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# THE FOURTH AMENDMENT IN FLUX: THE RISE AND FALL OF PROBABLE CAUSE

*Ronald J. Bacigal\**

“When *I* use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean,—neither more nor less.”

Through the Looking Glass

## I. INTRODUCTION

PERHAPS MORE SO than most areas of the law, attempting to comprehend the fourth amendment cases is rather like stepping through the Looking Glass with Alice. Precedents and analytical approaches appear and disappear like the Cheshire Cat. Words and phrases acquire new meanings in the context of these analytical progressions. In particular, the word “reasonable” takes on two distinct meanings in fourth amendment analysis. Students of the fourth amendment quickly learn that for courts and commentators “reasonableness” is both a term of art synonymous with constitutionality and a convenient shorthand denoting a process of rational analysis. Failure to distinguish reasonableness as a process of rational thought from “reasonableness” as a standard of constitutionally permissible behavior, however, is fatal to an attempt to delimit the scope of fourth amendment protection. The final determination of the constitutionality of a particular search does not depend solely on a decision by the government or by an individual police officer that the search is a reasonable intrusion under the prevailing circumstances. The history of the fourth amendment teaches that constitutionality hinges on more than individual ad hoc decisions. Unfortunately, an analysis of relevant Supreme Court cases reveals that the Court has failed to establish an objective methodology which would facilitate the identification of constitutionally permissible searches from among those considered reasonable in behavioral terms. As a result, the fourth amendment currently provides no clear standard of constitutional reasonableness.

The Supreme Court’s attempts to delineate the parameters of fourth amendment protection have spawned a longstanding contro-

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versy over the relationship between the amendment's two conjunctive clauses: the reasonableness clause and the warrant clause.<sup>1</sup> The controversy has provoked such "strong and fluctuating differences of view on the court"<sup>2</sup> that one commentator referred to it as an "embarrassing chapter of supreme judicial schizophrenia."<sup>3</sup> Originally, the Supreme Court's fourth amendment analysis focused primarily on interpretation of the warrant clause, relegating the reasonableness clause to a position of minor importance. This "traditional probable cause" approach limited fourth amendment requirements to a showing of a valid search warrant based on probable cause.<sup>4</sup> The reasonableness clause did not serve to excuse the absence of probable cause nor did it require any justification beyond probable cause for a constitutional search or seizure.<sup>5</sup> The Supreme Court, however, subsequently placed increased emphasis on the reasonableness clause in defining fourth amendment requirements for a constitutional intrusion.

Dissatisfied with the inflexibility of traditional probable cause, the Court adopted the theory that the reasonableness clause supercedes the warrant clause.<sup>6</sup> This view has several variations, the most extreme being that reasonableness is the sole standard for determining the consti-

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

2. *Abel v. United States*, 362 U.S. 217, 235 (1960).

3. Moylan, *The Plain View Doctrine*, 26 *MERCER L. REV.* 1047, 1052 (1975).

4. *E.g.*, *Carroll v. United States*, 267 U.S. 132 (1925).

5. Prior to *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court used the reasonableness clause primarily to authorize warrantless searches. The reasonableness clause was said to excuse the absence of a warrant but not the nonexistence of probable cause. *E.g.*, *Carroll v. United States*, 267 U.S. 132, 156 (1925) (when only warrantless seizure is possible due to exigent circumstances, search is unlawful unless officer can establish probable cause).

6. Some members of the Court supported the theory that the reasonableness clause imposes limitations on the government's power to search in addition to the requirements of the warrant clause. *See, e.g.*, *Andressen v. Maryland*, 427 U.S. 463, 493 (1976) (Brennan, J., dissenting); *Warden v. Hayden*, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting). In that view, the warrant clause places limitations on the government's power to search, primarily in the form of procedural requirements, while the reasonableness clause is a substantive limitation. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 *U. CHI. L. REV.* 47 (1974); Note, *Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 *HARV. L. REV.* 945, 954 (1977). In particular, when the government has satisfied the warrant clause requirements of probable cause, particularity, and issuance of a warrant, the nature of the place to be searched or the items to be seized may preclude a constitutionally reasonable search. Inherent in this view is a hierarchy of fourth amendment protections recognizing that certain places and things require more constitutional protection against government searches and seizures than others. *See, e.g.*, McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 *IND. L.J.* 55 (1978); Note, *Legal Realism and Constitutionally Protected Privacy Under the Fourth Amendment*, *supra*.

This greater protection may take the form of a stricter standard of probable cause, or it may result in an absolute bar immunizing certain places and things from intrusions by government officials. However, no Supreme Court case to date has invalidated a search or seizure when the authorities have met the warrant clause and traditional probable cause requirements. *See* text accompanying notes 174-94 *infra*.

tutionality of a search. Under this approach, reasonableness becomes a free-floating standard that supercedes the warrant clause requirements of probable cause, particularity, and the proper issuance of a warrant.<sup>7</sup> Thus, in *South Dakota v. Opperman*,<sup>8</sup> and *Wyman v. James*,<sup>9</sup> the Supreme Court upheld the constitutionality of government intrusions even in the absence of a warrant or a prior determination of probable cause.<sup>10</sup> Presumably, this formless standard of reasonableness is determined primarily, if not exclusively, by applying common sense or rational analysis to the circumstances of each case.<sup>11</sup>

A less extreme variation on the reasonableness approach regards the warrant clause as a touchstone outlining the nature of a constitutional search.<sup>12</sup> Accordingly, as a fourth amendment standard, the required degree of probable cause is a "sliding scale" that fluctuates with the peculiar facts of each case. Two variants of case-by-case analysis emerge under this theory. First, the court may analyze the totality of the circumstances, considering compliance with the specific requirements of the warrant clause as one of many relevant factors.<sup>13</sup> Alternatively, the court may employ a doctrine of equivalent protections, in which case constitutionality depends on whether the challenged procedures provided adequate substitute safeguards which compensate for noncompliance with the warrant clause.<sup>14</sup>

Regardless of the terminology employed, under these approaches

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7. See Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 458 (1976).

8. 428 U.S. 364 (1976).

9. 400 U.S. 309 (1971). In *Wyman*, the Court held that "visits" by welfare officials were not intrusions within the purview of the fourth amendment, and in the alternative that if such "visits" were intrusions, they did not "descend to the level of unreasonableness." *Id.* at 318.

10. See Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011, 1028 (1973).

11. Dissenting in *Coolidge v. New Hampshire*, 403 U.S. 433, 527 (1971), Mr. Justice White referred to "the commonsense standard of reasonableness governing search and seizure cases." See also *Draper v. United States*, 358 U.S. 307, 313 (1959), in which the Court stated that reasonableness turns on the "factual and practical considerations of everyday life . . ." and *Vale v. Louisiana*, 399 U.S. 30, 36 (1970) (Black, J., dissenting).

12. This approach involves a certain amount of tail chasing, because to define reasonableness the Court looks to the warrant clause, and in defining the probable cause requirement of the warrant clause, the Court looks back to the reasonableness clause. In the words of Justice White, "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967).

13. See generally Lewis, *Justice Stewart and Fourth Amendment Probable Cause: "Swing Voter" or Participant in a "New Majority,"* 22 LOY. L. REV. 713 (1976).

14. The concept of equivalent protections may have originated in Chief Justice Vinson's dissent in *Trupiano v. United States*, 334 U.S. 699 (1948), when he objected to an insistence "upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect. . . ." *Id.* at 714-15. Perhaps the most forthright consideration of a doctrine of equivalent protections is Mr. Justice Powell's concurring opinion in *South Dakota v. Opperman*, 428 U.S. 364, 381-84 (1976). See also *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977).

the warrant clause is subsumed by the overriding primacy of the reasonableness clause. Probable cause becomes a factor to balance along with other circumstances to determine the constitutionality of a particular search or seizure. Inherent in these balancing approaches is the recognition of a hierarchy of fourth amendment interests. That is, certain private places or items are deemed to require more constitutional protection against government intrusion than others. Conversely, the Court also recognizes that certain searches and seizures, if compelled by strong government interests, may withstand constitutional attack by applying a justifiably less rigorous standard.

Finding the concept of a hierarchy of fourth amendment interests unwieldy, a number of recent articles have urged the Court to abandon value-laden interest balancing and to return to the objective standard of "traditional probable cause."<sup>15</sup> In fact, the Court's recent holding in *Dunaway v. New York*<sup>16</sup> may indicate the Court's dissatisfaction with the balancing approach. In *Dunaway*, a majority of the Court held that warrant clause probable cause analysis is the "general rule" for determining the constitutionality of government intrusions, while "balancing" to determine reasonableness is the exception.<sup>17</sup> Although the Court studiously avoided all references to the objectivity of a fixed probable cause standard,<sup>18</sup> it rejected the general applicability of a balancing test in favor of the "relative simplicity and clarity" of traditional probable cause.<sup>19</sup> Accordingly, *Dunaway* is consistent with the theory that traditional probable cause is the standard for searches and arrests incident to criminal investigations while the constitutionality of lesser government intrusions, such as administrative inspections and regulatory searches, is determined by a reasonableness standard.<sup>20</sup>

15. See, e.g., Leslie, *The Gradation of Fourth Amendment Doctrine in the Context of Street Detentions*, 38 OHIO ST. L.J. 409, 436 (1977). The author stated:

Divergence from traditional fourth amendment principles and doctrines unreasonably endangers privacy-security rights historically valued as essential to the very existence of a free society. In light of these dangers, it is time for the judiciary to reverse this process and to return to the protection of fourth amendment rights through the use of objective standards.

See also Ahrens, *Privacy and Property: Can They Remain After Juridical Personality is Lost?*, 11 CREIGHTON L. REV. 1077, 1086 (1978); Note, *United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable*, 58 B.U.L. REV. 436, 459 (1978); Note, *Automobile Spot Checks and the Fourth Amendment*, 6 RUT.-CAM. L. REV. 85-90 (1974).

16. — U.S. —, 99 S. Ct. 2248 (1979).

17. *Id.* at 2257.

18. The Court noted that while the probable cause standard may be a product of the balancing process, "the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York*, — U.S. at —, 99 S. Ct. at 2257. Three weeks before *Dunaway*, the Court had stated that "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*, — U.S. —, 99 S. Ct. 1861, 1884 (1979) (emphasis added).

19. — U.S. at —, 99 S. Ct. at 2257.

20. See W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* chs. 3, 9, 10 (1978) [hereinafter cited as LAFAYE TREATISE].

This article will demonstrate the Supreme Court's inability to develop an objective methodology to derive and apply fourth amendment principles under either the traditional probable cause approach or the balancing approach. A detailed analysis of traditional probable cause will reveal that its premises are ultimately subjectively derived.<sup>21</sup> This examination will also show that returning to traditional probable cause would necessitate resurrecting the unrealistic premise that an individual's privacy interest is always outweighed by the government's interest in searching if the authorities meet a static standard of probable cause. The article will then discuss the advent of the balancing approach and the new set of fourth amendment premises adopted by the Court. In addition, a consideration of these new assumptions about the nature of fourth amendment protection and how they have affected the traditional probable cause requirements will highlight the differences between the two approaches. Finally, the article will focus on the inadequacies of the "sliding scale" methodology the Court has used under the balancing approach and suggest several different theories of the fourth amendment's substance.

## II. TRADITIONAL PROBABLE CAUSE

Because of the short and spotty history of the fourth amendment, to refer to the probable cause doctrine as "traditional" creates the unwarranted impression that it is an inveterate practice, deeply rooted in American law.<sup>22</sup> In fact, the term "traditional probable cause" is rather arbitrarily applied to the Supreme Court's decisions from circa 1920 to 1967; it is a convenient label for what has always been an oversimplified view of the Court's interpretation of the warrant clause.<sup>23</sup> The simplistic formula of traditional probable cause states that government

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21. The Court conceded as much in *Dunaway* when Mr. Justice Brennan, writing for the majority, stated: "The requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." — U.S. at —, 99 S. Ct. at 2257.

22. See generally Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39 (1978). The Court did not consider an important fourth amendment question until *Boyd v. United States*, 116 U.S. 616 (1886) and *Boyd* is probably the antithesis of what is referred to as a traditional view of the fourth amendment. See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). A sizeable body of fourth amendment precedent did not develop until the advent of prohibition in 1920, and so-called traditional probable cause suffered an early demise in 1967 with the decisions in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *Terry v. Ohio*, 392 U.S. 1 (1967). To recognize the historical dearth of cases does not diminish an appreciation of the number and importance of modern fourth amendment cases: "The fourth amendment is by far the most important provision of the Bill of Rights in terms of the volume of litigation to which it gives rise in the nation's courts." J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 454 (1966). Accord, Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1169 (1966).

23. The Court contributed to this simplistic view by frequently expressing probable cause in terms of a reasonably prudent man standard. See text accompanying notes 40-46 *infra*. At other times the Court eschewed simplistic formulations of probable cause and recognized that: "The Fourth Amendment is to be construed . . . in a manner which will conserve public interests as

officers must not initiate a search unless they have a *reasonable belief* that *seizable items* are located in the place to be searched.<sup>24</sup> For purposes of analysis, this definition can be expressed in the form of three questions which a magistrate or policeman must answer correctly before conducting a search.<sup>25</sup> First, *what* are you sure of: that seizable items are located in the place to be searched. Second, *how* sure are you: a reasonable belief by a reasonably prudent man. Finally, *why* are you sure: sufficiently reliable information gave rise to the reasonable belief.

*A. The What of Traditional Probable Cause: The Nature of Items that the Government Can Seize*

Traditional probable cause pictured the fourth amendment as a monolith concerned with a single government interest: seizure of items in furtherance of law enforcement.<sup>26</sup> Conversely, only a single individual right or interest was within the scope of fourth amendment protection: freedom from unreasonable government intrusions.<sup>27</sup> The traditional view did not contemplate a hierarchy of fourth amendment values, nor did it engage in an open balancing of various governmental and individual interests. The court did not admit that the government's interest may depend on the type of crime under investigation or that an individual's interest could vary according to the intrusiveness of the search. Other types of government activities, such as health and safety inspections, were beyond the amendment's coverage or at most on the

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well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149 (1925).

24. Simplistic formulations of probable cause are most defensible when one remembers that an important consideration of fourth amendment law is the need to provide magistrates and police with clear standards for conducting a proper search. Complex and ultra-sophisticated formulations of probable cause may better serve academicians but generally frustrate those who must apply the formulations in the harsh realities of day to day law enforcement. See generally Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973) [hereinafter cited as Dworkin, *Fact Style Adjudication*]; LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures," 1974 SUP. CT. REV. 127. But see also Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L.C. & P.S. 198 (1977), in which the author noted: "A thoughtful effort to present fourth amendment law in a practical way demands serious attention to theory." *Id.* at 225.

25. When police act pursuant to a warrant, the determination of probable cause is made by a magistrate. When police act without a warrant, they initially make the probable cause determination themselves. Of course either determination is subject to after-the-fact review by a court upon a motion to suppress evidence. See 1 LAFAVE TREATISE, *supra* note 20, at 446.

26. The function of probable cause "is to guarantee a substantial probability that the invasions involved in the search will be justified by discovery of offending items." Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961); Greenberg, *supra* note 10, at 1013.

27. Whether the fourth amendment is interpreted as a matter of the individual's *right* to privacy, or *interest* in privacy, may be significant. See text accompanying notes 174-88 *infra*. It is also interesting to consider Professor Dworkin's comment that "the Constitution nowhere gives the police a right of their own to make searches, reasonable or otherwise." Dworkin, *Fact Style Adjudication*, *supra* note 24, at 336.

periphery of fourth amendment jurisprudence.<sup>28</sup> Because this monolithic view of the amendment identified only two conflicting interests, the constitutional limitations on the government's power to search were determined by a resolution of that single conflict.

In *Warden v. Hayden*,<sup>29</sup> the Supreme Court resolved the conflict, holding that when the authorities have probable cause to believe that items are present which will further a criminal investigation, the government's interest in searching is always superior to an individual's interest in privacy.<sup>30</sup> Notably, the evolution of the *Warden* rule revealed that the reduced scope of the fundamental fourth amendment conflict did not obviate the need for a subjective, value-laden resolution of the conflict between the government and the individual interest.

In *Warden*, the Supreme Court overruled *Gouleb v. United States*,<sup>31</sup> which had set out the "mere evidence rule" forty-six years earlier.<sup>32</sup> As elaborated by subsequent cases, the rule stated that the government's interest in seizing contraband and fruits or instrumentalities of crimes outweighs an individual's interest in these items, but that the government's interest in "mere evidence" must yield to the individual's rights.<sup>33</sup> This conclusion rested on the premise that the fourth amendment protects possessory interests in private property.<sup>34</sup> Accordingly, the *Gouleb* Court concluded that the government's possessory interest in mere evidence is always inferior to a citizen's possessory rights.<sup>35</sup>

The *Warden* Court rejected the premise that property interests define and temper the government's power to search, stating: "[T]he principal object of the Fourth Amendment is the protection of privacy rather than property . . . ."<sup>36</sup> Discarding the property rights theory, the *Warden* Court asserted that the authorities' power to search derives from the government's interest "in obtaining evidence which would aid in apprehending and convicting criminals."<sup>37</sup> Given this new perception of the conflict between government and individual interests under the fourth amendment, the *Gouleb* conclusion that the government cannot seize mere evidence became "wholly irrational."<sup>38</sup>

To arrive at this new definition of the nature of conflicting fourth amendment interests, however, the *Warden* Court did not use terms of logic or speak of rationality. Rather, the Court stated that "this shift in

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28. See, e.g., *Frank v. Maryland*, 359 U.S. 360 (1959).

29. 387 U.S. 294 (1967).

30. *Id.* at 306.

31. 255 U.S. 298 (1921).

32. 387 U.S. at 302.

33. *Gouleb v. United States*, 255 U.S. at 309.

34. 387 U.S. at 302.

35. 255 U.S. at 309.

36. 387 U.S. at 304.

37. *Id.* at 306.

38. *Id.* at 302.



emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform;"<sup>39</sup> and also "through the interaction of the felt need to protect privacy from unreasonable invasions and the flexibility in rulemaking made possible by the remedy of exclusion."<sup>40</sup> Obviously, the shift from property rights to the right of privacy was not based exclusively on an objective reading of history or the language of the Constitution.<sup>41</sup> If the "correct" premise of traditional probable cause was determined by assessing the subtle interplay between conflicting interests and perceiving the felt need to protect privacy, such a methodology seems very similar to the subjective value judgments inherent in the balancing approach.

One important distinction remains, however, that renders traditional probable cause more objective than a balancing of hierarchical fourth amendment interests. Under the balancing approach, the Court subjectively resolves the conflict of different government and individual interests on a case-by-case basis. In contrast, traditional probable cause reduces the fourth amendment to a single conflict and decides that issue definitively. Thus, after initially engaging in subjective balancing, a rule capable of objective application in future cases appears to emerge. However, the traditional probable cause rule states that the government's interest in searching is superior only so long as the authorities have a reasonable belief that seizable items are present.<sup>42</sup> Accordingly, objective application of the Court's subjectively derived premise requires a fixed standard of certainty and reliability as the other two components of the traditional probable cause approach.

Obvious difficulties arise from defining the fourth amendment in terms of a single type of conflict between government and individual interests. To speak only of the government's interest in discovering incriminating evidence versus the individual's interest in freedom from unreasonably intrusive criminal investigations ignores the entire areas of administrative searches.<sup>43</sup> This approach homogenizes differing privacy interests such as freedom from intrusions into automobiles, homes, and body cavities. Moreover, traditional probable cause also generalizes varying law enforcement interests such as investigations of petty larceny, rape, and first degree murder. Accordingly, traditional probable cause achieves some measure of certainty at the high price of needed flexibility.

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39. *Id.* at 304.

40. *Id.* at 305.

41. See generally Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 REC. N.Y.B.A. 546 (1971).

42. *E.g.*, *Henry v. United States*, 361 U.S. 98, 99-102 (1959).

43. See text accompanying note 86 *infra*.

*B. The How of Traditional Probable Cause: The Required Degree of Certainty that Seizable Items are Present*

In a simplistic formulation of traditional probable cause, the factual inquiry is whether a person of reasonable caution would be justified in concluding that seizable items were present in the place to be searched. This standard encompasses two fourth amendment principles: (1) the government interest in searching for items in furtherance of a criminal investigation always outweighs individual privacy interests; and (2) the government has an interest in searching for seizable items only when it possesses the required degree of certainty that the items are present in the place to be searched. The possible range from which the required level of certainty emerges is a mathematical scale from zero to one hundred percent. The Supreme Court, however, has refrained from expressing the required level of certainty in mathematical terms, relying instead on a scale of less exact but more familiar legal terminology. In fact, there have been "an exceedingly small number of cases in the Supreme Court indicating what suffices for probable cause."<sup>44</sup> Perhaps the only certain assertion is that probable cause "lies somewhere between bare suspicion and proof of guilt beyond a reasonable doubt."<sup>45</sup> Although the Court's reluctance to rely on mathematical formulations of probable cause is understandable,<sup>46</sup> the less than forthright manner in which the Court has discussed the methodology used to identify "reasonable belief" is cause for objection. The Supreme Court has avoided clarifying the degree of certainty required to satisfy this admittedly vague constitutional standard by reducing its analysis to a factual inquiry focusing on the authorities' analysis that gave rise to the intrusion in the case before the Court.<sup>47</sup>

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44. *Sibron v. New York*, 392 U.S. 70, 74 (1968).

45. Armentano, *The Standards for Probable Cause Under the Fourth Amendment*, 44 CONN. B.J. 137, 144 (1970).

Professor LaFave once suggested that the level of probable cause is "more probable than not." LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 73 (1968) [hereinafter cited as LaFave, *Street Encounters*]. He noted, however, that "the issue is still open." 1 LAFAVE TREATISE, *supra* note 20, at 478 (1978). One student commentator maintained that a 65% degree of likelihood should not constitute sufficient probable cause to support a warrant for arrest, and that it is "inconceivable" that such a level of probability could support a warrantless arrest. Note, *Garbage In, Gospel Out: Establishing Probable Cause Through Computerized Information Transmittals*, 28 HASTINGS L.J. 509, 523 (1976).

It is generally assumed that both searches and arrests require the same quantum of evidence to establish probable cause. Thus courts cite interchangeably prior decisions regarding probable cause to search or arrest. For example, in determining probable cause to search, *Spinelli v. United States*, 393 U.S. 410, 416 (1969) referred to *Draper v. United States*, 358 U.S. 307 (1959) (an arrest case) as a "suitable benchmark." See generally Haddad, *supra* note 24. See also *Brinegar v. United States*, 338 U.S. 160 (1949).

46. See generally Broun & Kelly, *Playing the Percentages and the Law of Evidence*, 1970 U. ILL. L.F. 23; Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1978); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

47. *E.g.*, *Draper v. United States*, 358 U.S. 307, 313 (1959).

Obviously the degree of certainty to which the authorities can point in a given case is an inquiry vastly different than the constitutionally required degree of certainty. In examining the factual likelihood that a seizable item was present in the place searched, the Supreme Court is on strong ground in stating, "we deal with probabilities . . . they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."<sup>48</sup> Assessing the probabilities in a given factual situation involves the application of logic<sup>49</sup> and thus the reasonable man standard is appropriate.

The "reasonable" degree of certainty in a constitutional sense, however, has little or nothing to do with the judgment of a reasonably prudent man. That is, a reasonable man's conclusion that it is appropriate to search, based on a fifty-one percent likelihood of finding seizable items, does not guarantee that the search was constitutionally permissible under the reasonableness clause of the fourth amendment. Setting the constitutionally mandated level of certainty is a complex legal determination for a judge, not a factual question for reasonable men.<sup>50</sup> As a legal standard, it is independent of the method used to assess the factual likelihood that seizable items were present prior to the search. If the reasonable man's conclusion was the test for the constitutionality of an intrusion, fourth amendment issues could be taken from the courts and decided by juries or public opinion surveys.<sup>51</sup> Fourth amendment substance would vary according to the definition of a reasonable search embraced by a majority of the population. The Supreme Court, however, has shown little inclination to abandon the traditional view that the Bill of Rights is not subject to change based on the whims of society's current majority.<sup>52</sup> Thus, application of the traditional probable cause approach requires a distinction between the reasonable belief standard—determined by the Constitution—and the degree of certainty that the authorities actually had—determined by the reasonable man standard.

The Supreme Court has never articulated the proper methodology for deriving this constitutional standard. Apparently, the Court once again found no guidance in the language of the amendment itself and

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48. *Id.*

49. *But see* Tribe, *supra* note 46.

50. In *Steel v. United States*, 267 U.S. 505 (1924), the Court held that the existence of probable cause is "a question of fact and law for the court and not for the jury." *Id.* at 511.

51. Such an approach led one commentator to assert that "the determination of reasonableness of a search by the Court instead of by the jury is probably explicable by the fact that the question usually comes up in relation to admissibility of evidence, in which connection *questions of fact* are commonly decided by the court itself." (emphasis added) Waite, *Reasonable Search and Research*, 86 U. PA. L. REV. 623, 625 n.7 (1938). *See also* McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 194. The author pointed out that the fourth amendment "confines the dispute to the *factual aspects* of what is 'reasonable' . . ." (emphasis added).

52. *See* Amsterdam, *supra* note 22, at 358.

considered it necessary to resort to a subjective value judgment.<sup>53</sup> The more important inquiry, however, is whether the Court has applied the reasonable belief standard uniformly and objectively. To the extent that the reasonable belief standard varies according to the particular conflict of government and private interests, the Court has recognized a hierarchy of fourth amendment interests.

In theory, traditional probable cause and its monolithic view of government and individual fourth amendment interests mandates a fixed standard for the required degree of certainty.<sup>54</sup> It appears, however, that the Court has not always applied a uniform standard. In *Brinegar v. United States*<sup>55</sup> Justice Jackson suggested that the Court varied the standard of probable cause *sub silentio* according to the gravity of the offense.<sup>56</sup> Moreover, some have suggested that the Court lowered the standard of probable cause after *Mapp v. Ohio*<sup>57</sup> to temper the effect of the exclusionary rule on state law enforcement agencies.<sup>58</sup> In addition, the Court has indicated in dicta that the standard of probable cause may be lower for searches undertaken pursuant to a warrant,<sup>59</sup> to encourage the authorities to resort to magistrates before searching.<sup>60</sup> Given the vagueness of the reasonable belief standard, however, it is impossible to ascertain whether significant deviations from a fixed certainty requirement have occurred.

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53. Sometimes within a single sentence or two the Court will refer to probable cause as a practical matter for reasonably prudent men, and then also refer to probable cause as a complex compromise of competing societal interests. In *Brinegar v. United States*, 338 U.S. 160 (1949), for example, the Court stated that the actions of police officers "must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Id.* at 176. See text accompanying notes 39-40 *supra*.

54. The brief of the N.A.A.C.P. filed in *Terry*, referred to probable cause as "the objective, solid and efficacious method of reasoning. . . ." See *Amsterdam*, *supra* note 22, at 394. Probable cause "was interpreted to require a uniform quantum of pre-search information for every search and seizure. However great or slight the invasion, or however pressing the community interest at stake, the threshold level of information required was the same." Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 680 (1961).

55. 338 U.S. 160 (1949).

56. *Brinegar v. United States*, 338 U.S. 160, 183 (1949); *McDonald v. United States*, 335 U.S. 451, 460 (1948). The courts may also vary the emergency exception to the warrant clause according to whether the emergency involves criminal activity or "civil" emergencies. See Bacigal, *The Emergency Exception to the Fourth Amendment*, 9 U. RICHMOND L. REV. 249 (1975).

57. 367 U.S. 643 (1961).

58. Note, *Probable Cause: The Federal Standard*, 25 OHIO ST. L.J. 502, 515 (1964). An alternative to varying the level of probable cause would be to treat probable cause as the constant and vary the application of the exclusionary rule. See, e.g., *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (Burger, C.J., dissenting); and LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures," *supra* note 24, at 156.

59. For a thorough discussion of the circumstances in which a warrantless search is constitutional, see Haddad, *supra* note 24.

60. *United States v. Ventresca*, 380 U.S. 102 (1965).

C. *The Why of Traditional Probable Cause: The Informational Basis of the Government's Reasonable Belief*

Once the traditional approach defines the *what* and *how* of probable cause as a reasonable belief that seizable items are present, all that remains is the question of *why* the reasonably prudent man came to that reasonable belief. The line of cases from *Draper v. United States*<sup>61</sup> through *Spinelli v. United States*,<sup>62</sup> demonstrates the Court's insistence on "objective" facts to establish probable cause, as opposed to affidavits which merely set out subjective facts such as conclusions or a "bald and unilluminating assertion of suspicion. . . ."<sup>63</sup>

The Court has often stated that the *why* requirement of probable cause prevents the authorization of searches on the basis of suspicions, hunches, or "loose, vague or doubtful basis of fact."<sup>64</sup> Once the Court decided to assess the authorities' degree of certainty by applying the reasonable man standard, a record of the objective facts available to the intruding agents became obligatory. Affidavits containing only subjective conclusions preclude effective review based on an objective prudent man standard.<sup>65</sup> Accordingly, the need for an objective informational basis is logically deducible from the Court's definition of reasonable belief. Determining the type of facts that the authorities may consider is not, however, a simple matter of logical deduction.

Early Supreme Court cases contained dicta to the effect that the authorities could only consider evidence admissible at trial in establishing probable cause. In *Brinegar v. United States*,<sup>66</sup> however, the Court made it clear that affidavits relevant to probable cause are subject to a much lower standard and may be based on information that would, in fact, be inadmissible as evidence.<sup>67</sup> Moreover, in *Jones v. United States*,<sup>68</sup> the Supreme Court held that hearsay evidence could establish probable cause "so long as a substantial basis for crediting the hearsay is presented."<sup>69</sup> *Brinegar* and *Jones* freed probable cause from the constraints of admissibility standards and substituted substantial reliability as the new standard.<sup>70</sup> Again the Court was quick to supply a nebulous standard with which to measure the informational basis of the govern-

61. 358 U.S. 307 (1959).

62. 393 U.S. 410 (1969).

63. *Id.* at 414.

64. *Go-Bart Co. v. United States*, 282 U.S. 355, 357 (1931).

65. As Mr. Justice Stewart pointed out in *Beck v. Ohio*, 379 U.S. 89 (1964), "[i]f the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function." 379 U.S. at 96.

66. 338 U.S. 160 (1949).

67. *Id.* at 174-75.

68. 362 U.S. 257 (1960).

69. *Id.* at 269. See also *United States v. Matlock*, 415 U.S. 614 (1974).

70. With regard to hearsay, Professor LaFave suggests that substantial reliability means "it is more probable than not that the informant's information is correct." LaFave, "*Case-by-Case Adjudications*" Versus "*Standardized Procedures*," *supra* note 24, at 76.

ment's reasonable belief. As it had done in its formulation of the other components of traditional probable cause, the Court had little to say about the methodology from which the standard had evolved.

The two pronged test of *Aguilar v. Texas*<sup>71</sup> is often cited as providing the traditional probable cause standard of substantial reliability. The first part of the *Aguilar* test requires that the information be logically relevant to the conclusion that seizable items are present.<sup>72</sup> Second, the information must be credible and accurate in the judgment of the reasonably prudent man.<sup>73</sup> The first prong of *Aguilar* bears close attention.

The Federal Rules of Evidence define logically relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. . . ."<sup>74</sup> To say that an item of evidence has logical probativeness and is therefore logically relevant, however, does not mean that the evidence is automatically admissible at trial. The concept of *legal* relevance excludes *logically* relevant evidence when its probative value is outweighed by collateral considerations such as the evidence's prejudicial effect.<sup>75</sup> The essence of legal relevance is the need to assess the collateral consequences of admitting an item of evidence and to balance those consequences against the information's logical probativeness.<sup>76</sup>

Under the traditional probable cause approach, courts do not consider the collateral consequences of basing a search warrant on a particular piece of information. The substantial reliability standard is designed to engender total objectivity.

The Court, however, has yet to face a difficult case that tested this principle. Suppose, for example, that the police sought to justify roadblock searches by offering statistical information revealing that, at certain times of night, there is a fifty-seven percent chance that a black driver passing a checkpoint is armed with a deadly weapon. In terms of logical relevance it makes no difference that the rational inference that seizable items are present is drawn from statistics rather than from

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71. 378 U.S. 108 (1964). See *Spinelli v. United States*, 393 U.S. 410 (1969).

72. 378 U.S. at 113-14.

73. *Id.* at 114-15.

74. FED. R. EVID. 401.

75. "Of course the crime statistics show that the crime rate is higher among Negroes and among the poor, but that is just what worries me—that statistics and appearances will be held against individuals, and that the police in their contacts with the populace will treat some groups differently from others." Reich, *supra* note 22, at 1164. See generally, Comment, *Minority Groups And The Fourth Amendment Standard Of Certitude: United States v. Ortiz and United States v. Brignoni-Ponce*, 11 HARV. C.R.—C.L.L. REV. 733 (1976).

76. Rule 403 Federal Rules of Evidence provides "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

specific facts.<sup>77</sup> Moreover, it is not unlikely that the authorities could scientifically demonstrate that race is a probative factor bearing on probable cause in some types of cases. One cannot rationally argue that race is never logically probative on probable cause issues.<sup>78</sup> Accordingly, the Supreme Court will eventually have to decide the propriety of reducing the objectivity of the substantial reliability test in favor of a standard that allows some consideration of collateral consequences.<sup>79</sup>

### III. FOURTH AMENDMENT TRANSITION: THE SHIFT TO A BALANCING APPROACH

Traditional probable cause and its concept of a monolithic fourth amendment did not openly balance conflicting government and individual interests. Whatever balancing occurred took place in deciding the scope of the fourth amendment or *sub silentio*.<sup>80</sup> The courts spoke of the components of traditional probable cause—presence of seizable items, reasonable belief, and reliable information—not as products of balancing of interests, but rather as absolute requirements presumably found in the history or language of the amendment. As constitutional givens, the *what*, *how*, and *why* of probable cause were useful though simplistic inquiries with which the court could factually determine probable cause. Moreover, they were practical guides for the average policeman or magistrate requiring only a modicum of common sense and rational analysis.<sup>81</sup>

The simplicity of traditional probable cause, however, was purchased at a high price. Socially productive government activities that could not comport with the rigid requirements of traditional probable cause had to be found either unconstitutional or outside of the coverage of the fourth amendment. Notably, once the Court declared a particular activity beyond the scope of the fourth amendment, the underlying conflict between government and private interests was no longer subject to constitutional regulation. The Supreme Court faced this dilemma in *Frank v. Maryland*,<sup>82</sup> in which the validity of a govern-

77. "[A]ll factual evidence is ultimately 'statistical,' and all legal proof ultimately 'probabilistic' . . ." Tribe, *supra* note 46, at 1330 n.2. Statistical evidence differs from other forms of evidence in that it may be misused in ways that other forms of evidence might not. See, e.g., *People v. Collins*, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968). But this is no more than a recognition that all distinct forms of evidence are susceptible to distinct methods of misuse.

78. "[I]t would be foolish to contend that race alone could never provide a basis for a stopping. . . . A Negro in an exclusive white residential area, a white person in Chinatown, or an American Indian in a Negro area might all be stopped if a member of their race had just committed an offense in the immediate vicinity." LaFave, *Street Encounters*, *supra* note 45, at 81 n.210. See also Greenberg, *supra* note 10, at 1041-42.

79. See note 75 *supra*.

80. See text accompanying note 56 *supra*.

81. *Draper v. United States*, 358 U.S. 307, 313 (1959).

82. 359 U.S. 360 (1959).

ment health inspection program was tested. The health inspectors obviously could not satisfy the traditional probable cause requirements of specific facts establishing a reasonable belief as to the specific location of seizable items. Nevertheless, the Supreme Court upheld the inspection and maintained the integrity of the traditional probable cause standard by holding that health inspections are not searches within the meaning of the fourth amendment.<sup>83</sup>

The Court's overruling of *Frank* in *Camara v. Municipal Court*<sup>84</sup> is generally regarded as the beginning of the fall of the monolithic view of the fourth amendment.<sup>85</sup> To provide a constitutional framework for regulating a variety of government intrusions, the Court adopted the balancing approach.<sup>86</sup> Recognizing that diverse government interests engender different types of government intrusions, the Court articulated a sliding scale of probable cause to accommodate conflicts between particular government and individual interests. These government interests include, but are not limited to, deterring criminal behavior,<sup>87</sup> maintaining moral equilibrium (ranging from helping drunks to harassing prostitutes),<sup>88</sup> assisting innocent citizens in clearing themselves of suspicion,<sup>89</sup> curbing the "juvenile problem",<sup>90</sup> and acquiring information with which to lobby the legislature.<sup>91</sup> On the other side of the balancing process is the variety of individual interests in various forms of privacy, which include: privacy in various physical locales, such as homes,<sup>92</sup> autos,<sup>93</sup> and telephone booths;<sup>94</sup> privacy in personal papers;<sup>95</sup> privacy in erecting "an unbreachable wall of dignity

83. 359 U.S. at 372-73. See Greenberg, *supra* note 10, at 1011.

84. 387 U.S. 523 (1967).

85. Mr. Justice Clark referred to *Camara* in *See v. City of Seattle*, 387 U.S. 541, 547 (1967) as creating a "newfangled" warrant system. *Camara* creates "a system of warrant issuance which in reality leaves the probable cause standard behind it virtually nullified. . . ." Comment, *Constitutional Law—Administrative Searches and the Fourth Amendment: the Definition of Probable Cause in Camara v. Municipal Court of the City and County of San Francisco*, 36 U. MO. KANSAS CITY L. REV. 111, 131 (1968). See also Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 313 (1971); LaFave, *Street Encounters*, *supra* note 45. Greenberg, *supra* note 10, at 1012.

86. LaFave, *Street Encounters*, *supra* note 45, at 54. Dissenting in *Camara*, Mr. Justice Clark stated that the majority had accepted in the guise of probable cause what it purported to reject in overruling *Frank v. Maryland*: that administrative searches do not portend as much harm to individual privacy as do criminal investigatory searches, therefore these "less intrusive" searches can take place under lower standards. See *Camara v. Municipal Court*, 387 U.S. at 554.

87. *Terry v. Ohio*, 392 U.S. 1, 22 (1967). See Reich, *supra* note 22, at 1171.

88. *Terry v. Ohio*, 392 U.S. at 13-14. See also Cook, *supra* note 85, at 298.

89. *E.g.*, *People v. Morales*, 22 N.Y.2d 55, 238 N.E.2d 307, 290 N.Y.S.2d 898 (1968).

90. *People v. Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956).

91. See Reich, *supra* note 22, at 1166.

92. In upholding a warrantless arrest in public, *United States v. Watson*, 423 U.S. 411 (1976), reserved the question of whether a warrant is required before officers may enter a private dwelling to arrest an occupant. *Id.* at 418 n.16.

93. *E.g.*, *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

94. *Katz v. United States*, 389 U.S. 347 (1967).

95. *Andressen v. Maryland*, 427 U.S. 463 (1976).



and reserve against the entire world;"<sup>96</sup> privacy in "letting one's face go slack, or scratching wherever one itches."<sup>97</sup>

The recognition of a hierarchy of government and private interests has altered the basic inquiries that formerly resolved fourth amendment issues. The balancing approach entails new concepts concerning the nature of the government's interest, the required degree of certainty that an intrusion will further that purpose, and the integrity of the information upon which the government has based its belief that a search will accomplish its goal.

*A. Conflicting Government and Private Interests Under the Balancing Approach*

*Camara* and its progeny changed the *what* of probable cause from the limited and objective question of whether a search will produce seizable items to the determination of whether a search is productive in a broader sociological sense. That is, the test for a permissible search became whether "a valid public interest justifies the [particular] intrusion [contemplated by the authorities]."<sup>98</sup> Abandoning the principle that the presence of seizable items is the exclusive justification for a search, the *Camara* Court outlined a process of balancing diverse interests, on a case-by-case basis, to determine if an intrusion was constitutionally reasonable. In rejecting the traditional probable cause approach, the Court described the fourth amendment inquiry, asserting that, "there can be no ready test for determining [constitutional] reasonableness other than by balancing the need to search against the invasion which the search entails."<sup>99</sup>

While reformulating probable cause in this manner, the Supreme Court tried to maintain an appearance of objectivity by retaining the reasonably prudent man standard. In *Terry v. Ohio*, the Court described this approach, stating: "[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"<sup>100</sup>

The sleight of hand in that statement bears close attention. Under the traditional approach to probable cause, the Court had derived the constitutional principle that the government interest in conducting fourth amendment searches is always superior to private interests; it had then used the reasonable man standard to *apply* this concept to the

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96. Rossiter, *The Pattern of Liberty*, in ASPECTS OF LIBERTY 17 (M. Korvitz & C. Rossiter eds. 1958).

97. A. WESTIN, *PRIVACY AND FREEDOM* 35 (1968).

98. *Camara v. Municipal Court*, 387 U.S. at 539.

99. *Id.* at 536-37.

100. 392 U.S. at 21-22.

facts of each case. The reasonable man standard was suitable for deciding if the presence of seizable items was likely enough to engender a legitimate government interest in searching.<sup>101</sup> This methodology is, however, totally inappropriate for deciding if a search is constitutionally reasonable under the balancing approach. The *Terry* Court was misguided in its suggestion that a reasonably prudent police officer could objectively strike the constitutionally appropriate balance of conflicting government and privacy interests in each case.<sup>102</sup> Moreover, it is equally misguided to suggest that this standard of probable cause is objective and uniform on the assumption that all reasonably prudent men will inevitably strike the same balance given the same facts.<sup>103</sup> In fact, the reasonable man standard is useful only to discern whether a particular intrusion violates the principles or customs currently accepted by a majority of individuals in our society. Accordingly, to the extent that the fourth amendment embodies more than merely the current mores and existing practices approved by the majority, the reasonably prudent man is a defective standard for deriving constitutional concepts of appropriateness and reasonableness.<sup>104</sup>

Accordingly, the post-*Terry* balancing approach requires the Court to derive a premise of constitutional law in each case by resolving the specific conflict between government and individual interests before the Court.<sup>105</sup> For example, the Court would have to decide whether the fourth amendment decrees that the government interest in a health inspection is superior to the privacy interest in a dwelling. The Court's methodology in deriving these constitutional premises, however, has remained unarticulated. The Court's references to the reasonable man standard are misleading. Employing this methodology to *derive* the fundamental constitutional balance of competing interests is even more futile than the Court's prior attempt to use the reasonable man standard to *apply* the monolithic fourth amendment principles of traditional probable cause. Altering the *what* of probable cause by rec-

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101. See text accompanying note 44-51 *supra*.

102. *Terry's* statement regarding a belief "that the action taken was appropriate" is a meaningless generality to the police officer on the street. LaFave, *Street Encounters, supra* note 45, at 64.

103. A judge, like the rest of us, will not often find that the community's assessment of reasonableness differs from his own assessment. "The distinction between the subjective or individual and the objective or general conscience, in the field where the judge is not limited by established rules, is shadowy and evanescent, and tends to become one of words and little more." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 110 (1921). The Supreme Court has noted that an unstructured determination of reasonableness is often merely a statement of personal values. See *Chimel v. California*, 395 U.S. 752, 764-65 (1969).

104. According to Professor Ely, "It simply makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority." Ely, *supra* note 22, at 52.

105. In addition, the margin by which the government interest must outweigh the individual interest is a matter of constitutional interpretation, not a matter of pure mathematics. That is, a margin of 70 to 30 might be required by the Constitution, thus a mathematical margin of 55 to 45 would be constitutionally inadequate.

ognizing a hierarchy of government and private interests necessitates a subjective judgment to discover the constitutionally appropriate balance of these interests in each case.<sup>106</sup>

*B. The How of Probable Cause Under the Balancing Approach: The Required Degree of Certainty*

Under traditional probable cause, the required degree of certainty that seizable items would be found was denominated "reasonable belief." In the rhetoric of the fourth amendment cases, this level of probability lies somewhere between "mere suspicion" and "beyond a reasonable doubt."<sup>107</sup> While reasonable belief could not be defined with any precision, it was, at least in theory,<sup>108</sup> an unchanging standard. Ostensibly, reasonable belief was a fixed standard that courts could apply uniformly to determine if the government had an interest in searching for items related to a crime. Any failure to pin down reasonable belief with precision was due to failings of perception, and not due to a shifting standard of reasonable belief. Theoretically, the elusive creature that was reasonable belief stayed right where the Constitution put it. We simply did not know how to pin down and express its exact and unchanging position.

When the traditional monolithic view of the fourth amendment gives way to a hierarchy of various government and individual interests, the Constitution must resolve each unique conflict as it arises. The differing weights of the competing interests in each case necessitate a flexible standard for the required degree of certainty that the government intrusion will accomplish its purpose. Under this approach, the required level of certainty becomes much more elusive. It not only changes in degree according to the particular balance of government and private interest; it also changes its name.

At present it is difficult to list the various terms that courts have used to describe the degree of certainty required by the balancing approach. Expressions such as reasonable belief, reasonable suspicion,<sup>109</sup> reasonable certainty,<sup>110</sup> non-whimsical suspicion,<sup>111</sup> real suspicion,<sup>112</sup> clear indication,<sup>113</sup> some knowledge,<sup>114</sup> and mere possibility<sup>115</sup> have all been used, often without agreement as to their relative positions on a

106. *E.g.*, *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973).

107. *See* note 45 *supra*.

108. *See* note 54 *supra*.

109. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

110. *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966).

111. *People v. De Baur*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976).

112. *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1966).

113. *Schmerber v. California*, 384 U.S. 759 (1966).

114. *Blefare v. United States*, 362 F.2d 870, 875 (9th Cir. 1966).

115. *People v. Sirhan*, 7 Cal. 3d 710, 739, 497 P.2d 1121, 1140, 102 Cal. Rptr. 385, 404 (1972).

scale of probable cause.<sup>116</sup> Because of the complex valuational judgments involved, a court may find it nearly impossible to verbalize the balance of competing interests struck in any case.<sup>117</sup> Consistency of language and consistency within the framework of an existing scale, however, need not be sacrificed in that difficult process. The Supreme Court's recognition of a sliding scale of probable cause should be followed by a clear and universal understanding of the positions on that scale. With the parameters of the fourth amendment thus established, the judiciary should define the relative position<sup>118</sup> of each formulation of probable cause. If the courts felt compelled to place each verbalization of the required degree of certainty in its proper position on the scale, coining a new phrase to resolve each new or difficult factual situation would no longer be such an attractive solution.

Although clarification of the relative positions of "suspicion" and "belief," for example, contributes to linguistic uniformity and consistency, it does not define the degree of certainty required in each unique conflict between government and individual interests. For purposes of the fourth amendment, 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. In fact, careful scrutiny of the Supreme Court's usage of the relevant terms reveals that mere belief is no better than mere suspicion, while in some situations reasonable suspicion is every bit as good as reasonable belief.<sup>119</sup> Moreover, "reasonable" typically appears as a conclusory label after the Court has struck the fourth amendment balance in favor of the government. As such, the reasonableness of the belief or suspicion is the ultimate answer; it is not a methodology for assessing the sufficiency of probable cause.

Some courts have attempted to use reasonableness as a methodology for identifying sufficient probable cause; the approach has produced startling results. As a methodology, the reasonable man standard reduces the required degree of certainty to a showing of rational good faith on the part of the searcher. Thus, some lower courts have concluded that probable cause requires only "some basis from which the court can determine that the [intrusion] was not arbitrary or

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116. For example, while some commentators appear to agree that the Court's use of the term "clear indication" in *Schmerber v. California*, 384 U.S. 757 (1966), connoted a higher standard than reasonable belief, at least one court viewed it as a lower standard. See *Rivas v. United States*, 368 F.2d 703, 710 (1966).

117. Obviously the legal process places limits on the subtlety and sophistication of the language it uses. See Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

118. For a discussion of the question of the range of the sliding scale, see text accompanying notes 142-96 *infra*.

119. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

harassing."<sup>120</sup> To say that probable cause requires something more than whimsy or caprice serves one of the purposes of the fourth amendment: to protect individuals from arbitrary government intrusions upon privacy.<sup>121</sup> In terms of traditional probable cause, even a five percent likelihood that seizable items are present demonstrates that the basis for the search is rational and not wholly arbitrary. This standard, however, is clearly inconsistent with the constitutional premise of the balancing approach that certain privacy interests outweigh some legitimate government interests. Viewed in this light, the right to privacy cannot be set aside merely because the government offers a rational justification for the intrusion. Rather, in keeping with a sliding scale of probable cause, to deny an individual the right to a type or degree of privacy requires a specific degree of justification.

Accordingly, to determine which justifications are sufficient for a certain type of intrusion requires something other than objective rationality. The resolution of this issue depends on an assessment of the comparative social utility of allowing or prohibiting such intrusions. Moreover, the court's assessment of the government's interest in searching entails a consideration of the purpose of the search and the likelihood that the intrusion would accomplish its social objective. Thus, when probable cause is viewed as a multitude of compromises which resolves a multitude of conflicting government and individual interests, the required degree of certainty becomes a flexible standard that is part of the balance or compromise itself.

*C. Discerning the Integrity of the Government's Information: The Why of Probable Cause Under the Balancing Approach*

The *why* of traditional probable cause allowed the authorities to consider all "substantially reliable" information to establish a reasonable belief that seizable items were present at the site of the search. To meet this standard, the authorities' information had to be reasonably accurate and logically relevant.<sup>122</sup> After adopting the balancing approach, the Supreme Court frequently indicated that the implementation of a sliding scale of probable cause did not alter the nature of the information upon which the authorities may base their reasonable belief. In *Peters v. New York*,<sup>123</sup> for example, the Court stated that "specificity, reliability, and objectivity [remain] the touchstone of permissible governmental action under the fourth amendment."<sup>124</sup> That language,

120. *Wilson v. Porter*, 361 F.2d 412, 415 (9th Cir. 1966). See also *People v. DeBaur*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976). Cf. *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (good faith on arresting officer's part does not satisfy fourth amendment).

121. See Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 555 (1978) [hereinafter cited as Bacigal, *Observations*].

122. *Aguilar v. Texas*, 378 U.S. 108 (1964). See *Spinelli v. United States*, 393 U.S. 410 (1969).

123. 392 U.S. 40 (1968).

124. *Id.* at 61 n.20. See also *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) ("spe-

however, does not mirror reality. The Court's actual application of the sliding scale of probable cause has changed the type of information considered, particularly with regard to the touchstones of reliability and specificity.

To the extent that the objectivity touchstone allows the authorities to consider all logically relevant information, that standard has remained unaltered under the balancing approach. The Court continues to reject a *legal* relevance standard and, accordingly, will not disallow consideration of particular types of information because of collateral considerations such as prejudice. Thus, in *United States v. Martinez-Fuertes*<sup>125</sup> the Court unhesitatingly approved the individual agent's consideration of the logical probativeness of racial characteristics and refused to consider the potentially inflammatory aspects of condoning the use of this information.<sup>126</sup> Logical relevance, therefore, remains the *sine qua non* of objectivity. The touchstones of specificity and reliability have, however, been transformed by the sliding scale approach.

The balancing approach has imparted some flexibility to the courts' determination of what information is sufficiently reliable to merit consideration in establishing probable cause. In *Adams v. Williams*,<sup>127</sup> for example, the Supreme Court recognized that different types of information vary as to probativeness and reliability. The Court stated that, "[o]ne simple rule will not cover every situation."<sup>128</sup> On that basis, the *Adams* Court upheld a police officer's use of an informant's unverified tip to justify a stop and frisk. Recognizing that this information may not have satisfied the traditional reliability requirement of *Aguilar v. Texas*,<sup>129</sup> the Court nonetheless believed that, "the information carried *enough* indicia of reliability to justify the officer's forcible stop of [the suspect]."<sup>130</sup> Presumably, the *Aguilar* standard of reliability remains in effect for traditional full-scale arrests and searches, while *Adams*'s lesser indicia of reliability will suffice to justify a stop and frisk's lesser intrusion.

The Court's increased willingness to consider statistical information provides further evidence that the sliding scale analysis has produced a flexible reliability requirement. Under this new formulation of probable cause, intrusiveness of the search may determine the extent to

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cific articulable facts"); *Terry v. Ohio*, 392 U.S. 1, 15 (1968) ("objective evidentiary justification"). See generally Armentano, *supra* note 45, at 167-68; Greenberg, *supra* note 10, at 1015.

125. 428 U.S. 543 (1976).

126. Writing for the majority, Mr. Justice Powell stated: "even if it be assumed that [such] referrals [to the secondary inspection area] are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation." *Id.* at 563. See generally Comment, *Minority Groups and the Fourth Amendment Standard of Certitude: United States v. Ortiz and United States v. Brignoni-Ponce*, 11 HARV. C.R.-C.L.L. REV. 733, 748-62 (1976).

127. 407 U.S. 143 (1973).

128. *Id.* at 147.

129. 378 U.S. 108 (1964). See text accompanying note 71 *supra*.

130. 407 U.S. at 147.

which the authorities can rely on statistics as a basis for their reasonable belief.<sup>131</sup> To some extent, all information is based on probabilities. Even under the traditional, monolithic view of probable cause, the Court had approved the authorities' use of "soft" statistics such as the probabilities associated with high crime areas and the past criminal conduct of the suspect.<sup>132</sup> Whatever the relationship may be between the Court's consideration of statistical information and the reliability standard, however, the increased use of statistics has most directly affected the specificity touchstone of probable cause.

Courts and commentators have long recognized the problems involved in determining the proper role of statistical information in fourth amendment jurisprudence.<sup>133</sup> In the context of traditional probable cause analysis, the government's belief that seizable items were present could be established through "adjudicative facts" such as an officer's report that he saw contraband in the suspect's apartment. When the Supreme Court changed the formulation of the fourth amendment inquiry from the likelihood that seizable items were present to the appropriateness of the intrusion,<sup>134</sup> the type of information needed to establish probable cause also changed.<sup>135</sup> Under the balancing approach the Court addresses broad policy questions, assigning weights to conflicting government and individual interests. This inquiry necessitates reliance on broad factual generalizations or "legislative facts." Thus, the traditional requirement of specific facts establishing a specific likelihood as to the presence of specific seizable items has given way to increased use of statistics in relation to general

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131. Compare *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) ("Officers on roving patrol may stop vehicles only if they are aware of specific articulable facts. . . .") with *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) ("the intrusion here is sufficiently minimal that no particularized reason need exist to justify it. . . ."). See also *Berger v. New York*, 388 U.S. 41 (1967); *Stanford v. Texas*, 379 U.S. 476 (1965) which suggest that greater specificity will be required for more intrusive searches. Although *Berger* and *Stanford* refer to the specificity of the warrant, the warrant's specificity is contingent upon the specificity of the facts establishing probable cause. See text accompanying notes 122-30 *supra*, and 132-39 *infra*.

132. As to the relevance of: (1) geographic locale, see *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925); *The Appollon*, 22 U.S. (9 Wheat.) 159 (1824); (2) previous criminal activity, see *Brinegar v. United States*, 338 U.S. 160 (1949); *Husty v. United States*, 282 U.S. 694 (1931); *Carroll v. United States*, 267 U.S. 132 (1925); and (3) time of day, see *People v. Cruppi*, 265 Cal. App. 2d 9, 71 Cal. Rptr. 42 (1968); *White v. United States*, 271 F.2d 823 (D.C. Cir. 1959).

133. In *See v. City of Seattle*, 387 U.S. 523, 552 (1967) (Clark, J., dissenting), Mr. Justice Clark chided the majority for its failure to cite "empirical statistics on attitudes where consent must be obtained." It is interesting to note that Mr. Justice Clark felt justified in citing "human nature being what it is . . ." for the proposition that most citizens will refuse to consent. *Id.* at 552.

134. See text accompanying note 98 *supra*.

135. See, e.g., *Palmer v. State*, 14 Md. App. 159, 169, 286 A.2d 572, 578 (1972) ("No valuable social purpose could conceivably be served by extending the protection of the Fourth Amendment to a thief in the enjoyment of the stolen automobile.") (emphasis in original). See generally LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1, 23-25 [hereinafter cited as LaFave, *Administrative Searches*].

types of intrusions.<sup>136</sup> In *United States v. Robinson*,<sup>137</sup> and *Pennsylvania v. Mimms*,<sup>138</sup> for example, the government asserted a broad interest in the protection of police officers from attacks by armed motorists. In both cases, the Supreme Court upheld police intrusions designed to further that interest despite the absence of evidence that the motorists in question were armed. In its resolution of this broad policy question, the Court was required to make factual generalizations about the dangers faced by the police as a group and about the intrusion upon the privacy of all motorists. To resolve the conflict between these broad interests, the Court relied on general statistics to justify intrusions upon motorists as a class.<sup>139</sup>

In its emphasis on balancing broad, conflicting interests, the sliding scale analysis greatly diminishes the certainty that had been associated with traditional probable cause's factual determination of whether seizable items were present. Having no choice but to act "in the presence of empirical uncertainty"<sup>140</sup> the Court has altered the standard of substantial reliability to consider that imperfect generalized information. Thus, the *why* of probable cause has changed dramatically under the balancing approach. The degree of intrusion involved in a particular search will in fact vary the standard of accuracy which the Court will impose on the government's information. In addition, the Court has lessened the required specificity of the information to permit consideration of broad factual generalizations. Accordingly, substantial reliability is no longer a fixed standard; rather, it fluctuates as one part of the fourth amendment balance.

Thus, under the balancing approach, the *what*, *how*, and *why* standards of traditional probable cause have been reduced to mere considerations that serve as inputs in a court's attempt to strike the proper

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136. Dissenting in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), Justice Stevens attacked this generalized approach, stating: "the millions of traffic stops that occur every year are not fungible." *Id.* at 121 (Stevens, J., dissenting). See Kurland, *The Private I*, *The U. CHI. MAGAZINE* 7, 36 (Autumn 1976), in which the author states: "[w]ithout individuality, there is no function for privacy. When we become fungibles to be manipulated by government, there can be no recognition of idiosyncracies, no private realms to husband against intrusion."

Of course all individuals are somewhat unique, and all individuals share certain common characteristics. The relevant issue is to decide when the law will focus on similarities and when it will focus on differences. As Professor Amsterdam succinctly put it:

any number of categories, however shaped, is too few to encompass life and too many to organize it manageably. The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves.

Amsterdam, *supra* note 22, at 377.

137. 414 U.S. 218 (1973).

138. 434 U.S. 106 (1977) (per curiam).

139. See also *South Dakota v. Opperman*, 428 U.S. 364 (1976); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). But see *Chambers v. Maroney*, 399 U.S. 42 (1970) where the Court noted that what is required is "probable cause to search a particular auto for particular articles." *Id.* at 51.

140. Ely, *supra* note 22, at 31.



fourth amendment balance. By implicitly recognizing a hierarchy of fourth amendment interests, the Supreme Court altered the *what* of probable cause from the adjudicative fact that seizable items were present to the policy determination that the government's purpose outweighed the individual's interest in privacy. When the judiciary views the justification for an intrusion as a matter of balancing conflicting interests, the balancing process becomes the all-encompassing standard. In addition, the *what*, *how*, and *why* of probable cause lose their value as a particularized methodology for resolving fourth amendment issues.<sup>141</sup> Under this approach, once the Court determines that the constitutional balance favors the government interest, the level of certainty is automatically denominated "reasonable," and the information that the authorities considered is labeled "reliable."

#### IV. EXTERNAL LIMITATIONS ON THE OPERATION OF THE SLIDING SCALE OF PROBABLE CAUSE: THE EXISTENCE OF FOURTH AMENDMENT ABSOLUTES?

Professor Amsterdam once wryly observed that recognition of a sliding scale of probable cause would produce more slide than scale.<sup>142</sup> As a matter of case law, the observation has proved accurate because the courts have focused on the lower end of the scale of probable cause. Only in commentaries<sup>143</sup> and judicial dicta<sup>144</sup> can one find discussion of the possibility that, in a particular case, the balancing approach could yield a standard stricter than traditional probable cause.

Dissenting in *Gooding v. United States*,<sup>145</sup> Justice Marshall confidently stated: "It is by now established fourth amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches."<sup>146</sup> In support of this statement he cited *Camara, Terry, and Couch v. United States*,<sup>147</sup> all of which in fact applied a less stringent standard than traditional probable cause. The Supreme Court has never held that a particular type of intrusion requires more than traditional probable cause to satisfy the fourth amendment.<sup>148</sup> Thus, Justice Marshall could not cite to precedent

141. The balancing of conflicting interests becomes "a sort of universal solvent . . . for resolving all constitutional questions. . . ." White, *The Fourth Amendment as a Way of Talking About People*, 1974 SUP. CT. REV. 165, 167.

142. Amsterdam, *supra* note 22, at 394.

143. See, e.g., McKenna, *supra* note 6.

144. See *Gooding v. United States*, 416 U.S. 430 (1974); *Berger v. New York*, 388 U.S. 41 (1967).

145. 416 U.S. 430, 461-69 (1974) (Marshall, J., dissenting).

146. *Id.* at 464.

147. 409 U.S. 322 (1973) (Marshall, J., dissenting).

148. Some lower courts have required more than traditional probable cause for intrusions into the body. See generally Note, *Search and Seizure: Compelled Surgical Intrusions?*, 27 BAYLOR L. REV. 305 (1975); Note, *Fourth Amendment Balancing and Searches Into the Body*, 31 U. MIAMI L. REV. 1504 (1977).

when stating:

[the sliding scale] is not a one-way street to be used only to water down the requirement of probable cause when necessary to authorize government intrusions. In some situations . . . this principle requires a showing of additional justification for a search over and above the ordinary showing of probable cause.<sup>149</sup>

Although no Supreme Court case has required more than traditional probable cause, the process of balancing conflicting interests does not inherently preclude probable cause from "rising" above the traditional requirement. The same balancing process that identifies lesser intrusions justified by lesser probable cause presumably may identify greater intrusions which must be satisfied by greater probable cause. Any limitations on the level of probable cause produced by a balancing of interests must come from an external source, and not from the internal operation of the balancing process itself.

Accordingly, there remains for consideration the possibility that external limitations restrict the scope of the sliding scale of probable cause. In particular, the balancing model may be inapplicable to certain types of searches that are either absolutely reasonable because of a compelling government interest, or, alternatively, absolutely unreasonable because of an extraordinary interest in privacy.

In defining the scope of the fourth amendment, the Supreme Court has often indicated that probable cause has an absolute lower limit; that is, certain government activities require no form of probable cause or justification because they occur beyond the coverage of the amendment.<sup>150</sup> The Court initially established the methodology for determining the scope of the fourth amendment in *Olmstead v. United States*.<sup>151</sup> *Olmstead* held that fourth amendment protection covered only physical intrusions into constitutionally protected areas that result in the seizure of a tangible item. In keeping with the traditional approach to fourth amendment jurisprudence, the Court set out a firm standard,<sup>152</sup> leaving for case-by-case determination only the question of whether the facts rationally and objectively met this test.<sup>153</sup>

When *Katz v. United States*<sup>154</sup> overruled *Olmstead* and cut the fourth amendment free from the fixed requirement of physical intrusion, the Court was left without an established categorization of what interests came within the scope of fourth amendment protection.

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149. *Gooding v. United States*, 416 U.S. 430, 465 (1974) (Marshall, J., dissenting).

150. See Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 So. ILL. U.L.J. 75.

151. 277 U.S. 438 (1928).

152. The standard was firm in the sense that a trespass was required; the definition of a trespass for purposes of the fourth amendment, however, was ambiguous. See White, *supra* note 147, at 173.

153. *E.g.*, *Silverman v. United States*, 365 U.S. 505 (1961).

154. 389 U.S. 347 (1967).

*Katz's* dramatic language that the amendment "protects people, not places"<sup>155</sup> eliminated the old standard of physical trespass into constitutionally protected areas; in its stead, however, *Katz* offered only a nebulous new standard of protecting "those expectations of privacy which society recognizes as reasonable."<sup>156</sup> That word again—reasonable—led many lower courts into confusing reasonableness as a factual matter with reasonableness as a constitutional determination.<sup>157</sup> Thus, many courts misread the language of *Katz* as establishing the reasonably prudent man standard as the test of fourth amendment coverage. It has elsewhere been shown at great length that the judiciary cannot determine the coverage of the fourth amendment by recourse to the simplistic methodology of identifying the current expectations of reasonably prudent members of our society.<sup>158</sup> A determination of whether a particular privacy expectation can claim fourth amendment protection requires not a factual determination by the reasonably prudent man, but rather a constitutional determination by the Court.<sup>159</sup> Thus, "the heart of the controversy opened by *Katz* is the question of what constitutes a justifiable expectation of privacy."<sup>160</sup>

By resorting to some rather strained reasoning,<sup>161</sup> the Court has frequently avoided discussion of the methodology used to determine "what expectations of privacy are constitutionally 'justifiable.'"<sup>162</sup> When the Court openly refers to methodology, it generally limits its discussion to the balancing of conflicting government and individual interests.<sup>163</sup> In an unabashed recognition of the Court's approach, Justice Harlan, dissenting in *United States v. White*,<sup>164</sup> discussed the scope of the fourth amendment. Justice Harlan stated that, in determining

155. *Id.* at 351.

156. *Id.*

157. *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973); *People v. Superior Court*, 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1974); *People v. Suerra*, 21 Cal. App. 3d 534, 98 Cal. Rptr. 627 (1971).

158. See *Amsterdam*, *supra* note 22, at 384; Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977).

159. Mr. Justice Douglas correctly noted that: "Obviously citizens must bear only those threats to privacy which we decide to impose." *United States v. Williamson*, 405 U.S. 1026, 1029 (1972) (Douglas, J., dissenting). See also *United States v. White*, 401 U.S. 745, 751-52 (1971) in which the Court stated: "Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a Warrant."

160. Dworkin, *Fact Style Adjudication*, *supra* note 24, at 335.

161. Bacigal, *Observations*, *supra* note 121, at 537.

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

163. In place of a balancing of interests, commentators have suggested that the fourth amendment be interpreted to protect those claims of privacy which (1) are "natural or essential," Weinreb, *supra* note 6, at 83; (2) are "relatively serious," Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUNDATION RESEARCH J. 1193, 1212 (1976); (3) reflect "society's generally shared expectations," Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 137; or (4) recognize "our shared intuitions of when privacy is or is not gained or lost," Parker, *supra* note 113, at 276.

164. 401 U.S. 745 (1971).

whether the fourth amendment applies to a particular government activity, the court must assess the "impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."<sup>165</sup> If Justice Harlan correctly perceived the Court's approach to fourth amendment issues, a balancing of conflicting interests may determine both the scope of the amendment and the required level of probable cause under the amendment.<sup>166</sup> If it is true that a single methodology determines the coverage of the amendment and the required level of probable cause, it is meaningless to speak of "The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied."<sup>167</sup>

The Supreme Court's holding in *Wyman v. James*<sup>168</sup> illustrates that the Court no longer pays serious attention to the difference between satisfying the fourth amendment and finding it inapplicable. *Wyman*'s primary holding that no fourth amendment intrusion had occurred is set out in a single paragraph which contains no citation of authority.<sup>169</sup> The majority opinion then devoted nine pages to establish the reasonableness of the intrusion, assuming *arguendo* "that a caseworker's homevisit, . . . somehow . . . and despite its interview nature, does possess some of the characteristics of a search in the traditional sense. . . ."<sup>170</sup>

Following *Wyman*'s lead, many lower courts seem more comfortable with an approach that assumes that a search has occurred and then proceeds to balance conflicting state and individual interests to determine whether the search was reasonable.<sup>171</sup> Thus, with the recognition of a sliding scale of probable cause, the significance of a threshold determination of the amendment's coverage has greatly diminished.<sup>172</sup> The courts need not scrutinize government's activity to make an initial assessment of whether the asserted privacy interest is protected by traditional probable cause requirements or, alternatively, totally beyond the scope of fourth amendment protection. By adopting the *Wyman* approach, the Court has allowed itself the option of announcing the results of the balancing process by holding that the government interest was sufficient to set aside privacy or by holding that the privacy interest was insufficient to trigger fourth amendment protection. Regardless of the language used to express this determination, however,

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165. *Id.* at 786.

166. "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." Dworkin, *Fact Style Adjudication*, *supra* note 24, at 364. See Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs*, 11 GA. L. REV. 75, 78 (1976).

167. See Moylan, *supra* note 150.

168. 400 U.S. 309 (1971). See also *Cardwell v. Lewis*, 417 U.S. 583 (1974).

169. 400 U.S. at 317-18.

170. *Id.* at 318.

171. See, e.g., *United States v. Vilhotti*, 323 F. Supp. 425 (S.D.N.Y. 1971).

172. See *Amsterdam*, *supra* note 22, at 393; *Greenberg*, *supra* note 10, at 1047.

the decision is the product of a single methodology—assessment of the comparative weight of the government and individual interests in conflict. Thus, the sliding scale appears to have no lower limit; in addition, courts balance interests to determine the scope of the amendment as well as the required level of probable cause.<sup>173</sup>

Although much debate has focused on the possible existence of a lower limit to the sliding scale's application, scant attention has been devoted to an analysis of a similar upper limit. The broad jurisprudential question is the conflict between absolute privacy rights and utilitarian balancing;<sup>174</sup> specifically, the question is whether the fourth amendment recognizes some form of privacy which cannot be outweighed by any government interest.<sup>175</sup> One reading of *Boyd v. United States*<sup>176</sup> and the "mere evidence" cases<sup>177</sup> may support the concept of some absolute zone of privacy beyond the reach of the government's power to search and seize.<sup>178</sup> The origin of this absolutely protected zone of privacy has been attributed to a fourth amendment concept of reasonableness;<sup>179</sup> to the fourth amendment's intimate relationship with the fifth amendment;<sup>180</sup> to a relationship with other constitutional rights;<sup>181</sup> and to natural law and fundamental decency.<sup>182</sup> All of these

173. See Peebles, *supra* note 162, at 93, for the proposition that the sliding scale is widely used in the lower courts to deal with "a substratum of governmental investigative activity which for fourth amendment purposes falls short of a full search." The author further contends that "full" searches should be governed by the rule that warrantless searches are per se unreasonable. As noted earlier, the per se approach focuses on whether the magistrate or the police officer should determine probable cause, and does not deal with the required level of probable cause. See note 5 *supra*.

174. See generally Dworkin, *Taking Rights Seriously*, reprinted in OXFORD ESSAYS IN JURISPRUDENCE 202 (2d series, A. Simpson ed. 1973).

175. Certain forms of privacy may be absolute or almost absolute rights. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (mother's right to terminate pregnancy in certain situations); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (penumbra right to marital privacy).

176. 116 U.S. 616 (1885). The thrust of this broad reading of *Boyd* is explained in Amsterdam, *supra* note 22, and Note, *Legal Realism and Constitutionally Protected Privacy Under the Fourth Amendment*, *supra* note 6.

177. See generally Weinreb, *supra* note 6.

178. Dissenting in *Warden v. Hayden*, Mr. Justice Douglas saw the mere evidence rule as recognizing a zone of privacy "that no police can enter. . . ." 387 U.S. at 312.

179. This theory is predicated on the idea that the reasonableness clause places substantive restrictions on the power to search beyond the mandates of the warrant clause. See note 6 *supra*.

180. According to this view the close relationship between the fourth and fifth amendments means that in some situations there is no difference between seizing incriminating items and compelling an individual to be a witness against himself. See generally Note, *Legal Realism and Constitutionally Protected Privacy Under the Fourth Amendment*, *supra* note 6.

181. Even searches based on probable cause may be unreasonable because they infringe on other constitutional rights, such as the first amendment, according to this theory. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (penumbral right to privacy); *Stanley v. Georgia*, 394 U.S. 557 (1969) (first amendment protection).

182. Under this view, no matter how strong the government's need for an intrusion upon privacy, natural law or the "social compact" theory of society places limits on the type of search which a government may conduct. E.g., J. UNGER, *LAW IN MODERN SOCIETY* 60 (1976) in which the author states that one characteristic of positive law is recognition of the "division between a sphere of social life that is sacred and untouchable and one that is subordinated to the sovereign's

concepts share an emphasis on the nature of the items seized by the government; none focus on the procedures utilized in making the seizure.

In *Andressen v. Maryland*,<sup>183</sup> however, the Court gave a fairly definite "no" to the question of "whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."<sup>184</sup> The Court, understandably reluctant to speak in terms of absolutes,<sup>185</sup> considered only the item actually seized—in this case, business records.<sup>186</sup> The broad language of *Andressen* implies, however, that no items, even personal diaries, are so "private" that they are beyond the search and seizure powers of the government.<sup>187</sup> The *Andressen* majority's analysis focused entirely on the procedural aspects of the fourth and fifth amendments. The Court did not attempt to define the nature of those items that are generally entitled to constitutional protection from government searches. The Court's failure to rule that *no* items are absolutely protected from a government seizure is probably due to a sense of judicial propriety in limiting its holding to the facts of the case; it does not indicate that the Court is keeping an open mind on the question.<sup>188</sup>

If the general language of *Andressen* accurately reflects the Court's view of the fourth amendment, there is no upper limit to the operation of a sliding scale of probable cause. Any form of privacy can be set aside by a sufficiently weighty government interest, lending credence to the phrase, "unique among the prohibitions and protected rights of the first eight amendments to the Constitution, the Fourth Amendment contains no absolutes. . . ."<sup>189</sup> Typically, though, absolute rules are tested and broken in hard cases which demonstrate the need for flex-

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interests." See also Doss & Doss, *On Morals, Privacy, and the Constitution*, 25 U. MIAMI L. REV. 395 (1971).

183. 427 U.S. 463 (1976).

184. This question was the question left open in *Warden v. Hayden*, 387 U.S. 294, 303 (1967).

185. See, e.g., *Franks v. Delaware*, 438 U.S. 154 (1978). But see *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *United States v. Robinson*, 414 U.S. 218 (1973).

186. In *Fisher v. United States*, 425 U.S. 391 (1976) the Court had noted that: "Special problems of privacy which might be presented by subpoena of a personal diary . . . are not involved here." *Id.* at 401 n.7.

187. See generally McKenna, *supra* note 6.

188. The Court may well regard the question of absolutely protected zones of privacy as a largely academic question and does not seem disposed to answer questions such as the following: Is there a difference between "absolute" absolutes and absolutes of the particular case? Does it matter if a particular Court opinion states that a certain form of privacy can never be intruded upon, or if the opinion states that a certain form of privacy can never be intruded upon based on the justification offered in the case? Does phrasing a case holding in terms of an "absolute" absolute preclude the Court from defining, confining and distinguishing the absolute in future cases? In defining an absolute right to privacy will not the Court have to balance the need for an absolute right to privacy against the need to search in each case?

189. Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287 (1971). See also White, *supra* note 141, at 231, where the author asserts: "No fourth amendment interest is absolute."

ibility in a dramatic fashion.<sup>190</sup> *People v. Sirhan*<sup>191</sup> may have presented one such hard case. The government action in *Sirhan*, a warrantless search of a private dwelling and seizure of a personal diary, intruded upon what society generally considers intimately private.<sup>192</sup> Balanced against these interests was the community interest in dispelling the potential panic that could follow a political assassination. The Supreme Court of California had no difficulty with this "hard" case and struck the balance in favor of the government, stating,

The crime was one of enormous gravity, and the "gravity of the offense" is an appropriate factor to take into consideration. The victim was a major presidential candidate, and a crime of violence had already been committed against him. The crime thus involved far more than idle threats. Although the officers did not have reasonable cause to believe that the house contained evidence of a conspiracy to assassinate prominent political leaders, we believe that the *mere possibility* that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy.<sup>193</sup>

If the "mere possibility" of furthering an important government interest outweighs important privacy rights in a dwelling and a diary, it is unlikely that any absolute right to privacy exists.

Assuming that the fourth amendment embodies no absolutes, it becomes relevant to ask if the sliding scale of probable cause is indeed a slipping slope that will allow shocking invasions of privacy to protect extraordinary government interests. If it is, the Court could strike a balance in favor of the government to allow some form of torture or bodily intrusion to force an individual to reveal the location of a pirated nuclear weapon. But if the amendment does contain absolutes, where and how are they to be found: natural law, tradition, consensus, or the judge's own values? Such questions cut to the heart of constitutional and jurisprudential principles.<sup>194</sup> If the Court is to find absolute principles outside the fourth amendment, so be it. A reading of the history and language of the amendment, however, does not suggest any

190. Cf. Dworkin, *Fact Style Adjudication*, *supra* note 24, in which the author states:

Everyone knows that absolute certainty is impossible and that a hard case can be put in which any rule will fail. What we too often forget, though, is that not all cases are hard ones. Most are readily classifiable instances of frequently recurring conduct. Sometimes, as in the fourth amendment cases, the peculiarity and unintelligibility of the law itself are largely responsible for making easy cases hard ones.

*Id.* at 367.

191. 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

192. The California Supreme Court did not consider whether the diary was absolutely protected by the fourth amendment, because the issue was deemed to be waived by trial counsel. *Id.* at 740, 497 P.2d at 1141, 102 Cal. Rptr. at 405.

193. *Id.* at 739, 497 P.2d at 1140, 102 Cal. Rptr. at 404 (citations omitted, emphasis added).

194. For a brief but excellent consideration of these questions, see Ely, *supra* note 22.

absolutely protected zone of privacy.<sup>195</sup> A more appropriate interpretation recognizes that the fourth amendment is a wholly relativistic means of regulating government intrusions upon privacy;<sup>196</sup> and, accordingly, that the sliding scale has no upper limits to its operation.

#### V. BALANCING FOURTH AMENDMENT INTERESTS: THE METHODOLOGY OF THE SLIDING SCALE

Under the balancing approach, a court makes its probable cause determination by comparing the magnitude of the conflicting government and individual interests.<sup>197</sup> When government and privacy interests are at odds, a court must adopt and apply some methodology to identify underlying societal values, attach relative weights to these values, and strike the constitutionally appropriate balance. Prior to its adoption of the balancing test, the Supreme Court had often determined the constitutional reasonableness of a search through a totality of the circumstances test.<sup>198</sup> This test, a non-methodology in reality, was accurately described by Professor Weinreb as a cataloguing of facts followed by an unconnected conclusion regarding the search's reasonableness.<sup>199</sup> In fact, the totality of circumstances test can be characterized as an "I know it when I see it" school of jurisprudence.<sup>200</sup> Similarly, though, pseudo-sophisticated balancing tests<sup>201</sup> often suffer

195. See note 197 *infra*.

196. Criticism of the relativistic view of the fourth amendment comes not only from those who advocate some absolute right to privacy, but also from those who advocate the merits of certainty in controlling police conduct. See Dworkin, *Fact Style Adjudication*, *supra* note 24, at 365.

197. The premise, while by no means historically or logically inescapable, is certainly defensible. Historically, the fourth amendment was primarily concerned with two recognized abuses; general warrants and writs of assistance. See Landynski, *SEARCH AND SEIZURE AND THE SUPREME COURT* (1966); N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION* (1937). However, if it is accepted that "the genius of the founding fathers lies in their development of an instrument capable of matching ingenious attempts by the government to outflank its protections," *United States v. Holmes*, 521 F.2d 859, 866 (5th Cir. 1975), then history gives little guidance on when and how the amendment protects individuals against the great variety of present government intrusions into their lives. If the Court interprets the amendment as protecting values beyond the interest in being free of general warrants and writs of assistance, some ordering of social values is essential; all cannot be given equal weight. Recognition of a hierarchy of fourth amendment values and the need to balance these values is simply a recognition that "we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose." *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

198. *E.g.*, *United States v. Rabinowitz*, 339 U.S. 56 (1950).

199. Weinreb, *supra* note 6, at 57.

200. One commentator has noted that:

We 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." No one can know what meaning will be given such a term, just as no one can know what "privacy" will be made to mean.

White, *supra* note 141, at 170.

201. Professor Amsterdam counseled that we must resist "the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity. . . ." Amsterdam, *supra* note 22, at 375. See also Unger, *supra* note 182, at 197. Professor



from the same type of nonstandardized decisionmaking. In the extreme, the balancing approach asks two related fundamental questions: (1) how much and what type of privacy does a reasonably free society require; and (2) how much and what type of an intrusion upon privacy is required to further a reasonably ordered society.<sup>202</sup> Faced with this type of question,<sup>203</sup> and told by countless commentators that it is making moral and political decisions based on its conception of a "good" society,<sup>204</sup> it is not surprising that on occasion the Court has thrown up its hands and made no attempt to explain its holding.<sup>205</sup>

On other occasions the Court has conceded that the totality of circumstances test is little more than a statement of personal values<sup>206</sup> and has recognized the need for a "more precise analysis."<sup>207</sup> In theory the sliding scale of probable cause improves upon the nebulous totality test by identifying three criteria for determining reasonableness: (1) the weight of the government interest justifying the intrusion; (2) the severity of the intrusion into individual privacy; and (3) the feasibility of alternative procedures.<sup>208</sup> In the final analysis, however, the sliding scale of probable cause does not provide a more standardized approach. In fact, an analysis of the Court's use of these three factors, in isolation and in relation to each other, reveals no meaningful progress beyond the ad hoc totality of the circumstances test.

Unger points out that, "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." *Id.* at 197.

202. *See, e.g.*, Justice Jackson's description of the Bill of Rights as "the maximum restrictions on the power of organized society over the individual that are compatible with the maintenance of organized society itself." *Watts v. Indiana*, 388 U.S. 49, 61 (1949) (Jackson, J., concurring). *See also* Landynski, *supra* note 197, who notes that the issues raised under the fourth amendment "bring into sharp focus the classic dilemma of order vs. liberty in the democratic state." *Id.* at 13.

203. "No answer is what the wrong question begets. . . ." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 55 (1962). One answer such a question might beget is that "a search which proves the person searched to be guilty of a crime is by that very fact shown to have been a search made in the public interest, and thereby becomes reasonable." Waite, *supra* note 51, at 632. *See also* *People v. Meyers*, 38 App. Div. 2d 484, 330 N.Y.S.2d 625 (1972).

204. *E.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Waite, *supra* note 51, at 623; Fuller, *Reason and Fiat*, 59 HARV. L. REV. 376 (1946).

205. *See* text accompanying notes 283-85 *infra*.

206. *Chimel v. California*, 395 U.S. 752, 764-65 (1969).

207. *Spinelli v. United States*, 393 U.S. 410, 414-15 (1969). *Cf.* Tribe, *supra* note 46, where the author discusses the desirability of "precise and rigorous techniques of analysis." *Id.* at 1331. Professor Tribe then compares, "the wisdom of being somewhat fuzzy and open-ended in one's statement of at least some kinds of standards and procedures. . . ." *Id.* at 1390. *See also* Fuller, *supra* note 204.

208. *See, e.g.*, *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967). The Court in *Camara* made only passing reference to the third factor, alternative procedures, *see* text accompanying notes 241-62 *infra*, and noted another factor: "a long history of judicial and public acceptance." 387 U.S. at 537. The historical acceptance factor is of dubious validity and weight. *See* LaFave, *Street Encounters*, *supra* note 45, at 14. *Cf.* *United States v. Watson*, 423 U.S. 411 (1976) (Court emphasized historical practice of arresting suspected felons in public without a warrant).

A. *The Operation of the Sliding Scale: Determining the Value of the Government's Purpose*

The possible justifications for intruding upon individual privacy are practically infinite.<sup>209</sup> In non-criminal situations, they range from photographing political demonstrators<sup>210</sup> to protecting underprivileged children.<sup>211</sup> Government interests in traditional criminal law searches range from checking for violations of automobile registration laws<sup>212</sup> to apprehending vicious murderers.<sup>213</sup> The sliding scale's difficulty begins with a recognition that it must define the ways in which and the extent to which the government's interests differ.

Consider only one small aspect of the problem—whether to assign weight to the government interest according to the severity of a particular crime.<sup>214</sup> The Court could begin its fourth amendment inquiry by attaching relative weights to each crime listed in a criminal code. Alternatively, the Court could assign weights to distinct categories of crime, such as violence against a person, crimes against property, crimes that are *malum in se*, and so on. Having undertaken this task, the Court would immediately have to decide whether it should defer to a state legislature's evaluation of the severity of a crime or formulate a national uniform scale identifying the government interest in preventing each type of offense. This attempt to highlight the problem may be criticized as a dare to the Court to draw a line, only to subsequently attack the wisdom of that decision. A criticism of the ultimate wisdom of where the line is drawn, however, is separable from an evaluation of the process used to arrive at the legal standard. Accordingly, the point to be made here is that, unfortunately, the courts and commentators suggesting that the severity of a crime is an appropriate factor in the balancing process have not proposed a viable methodology for ranking the various offenses.<sup>215</sup>

Moreover, those who suggest that the Court's balancing test include a reference to the severity of the crime appear to ignore that most searches occur at an early stage of the prosecutorial process, long

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209. See text accompanying notes 86-91 *supra*.

210. In *Donohue v. Duling*, 330 F. Supp. 308, 309 (E.D. Va. 1971), the court stated: "[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."

211. *Wyman v. James*, 400 U.S. 309 (1971).

212. *Delaware v. Prouse*, 440 U.S. 648 (1979).

213. *People v. Sirhan*, 7 Cal. 3d 710, 740, 497 P.2d 1121, 1141, 102 Cal. Rptr. 385, 405 (1972).

214. For suggestions that the severity of the crime is an appropriate factor, see, e.g., LaFave, *Street Encounters*, *supra* note 45, at 57-58; Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 63; Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 669 (1961). See also *Mincey v. Arizona*, 437 U.S. 385 (1978); *Brinegar v. United States*, 338 U.S. 160 (1949) (Jackson, J., dissenting); *People v. Sirhan*, 7 Cal. 3d 710, 740, 497 P.2d 1121, 1141, 102 Cal. Rptr. 385, 405 (1972); Greenberg, *supra* note 10, at 1040.

215. See *Mincey v. Arizona*, 437 U.S. 385 (1978).

before the severity of the crime is known with certainty. In contrast, by the time an appellate court rules on the constitutionality of a search, the litigants typically have established the nature of the alleged crime with precision. To effectuate the purposes of the exclusionary rule, a court considering the severity of the crime would have to distinguish the agent's perception of the crime before the intrusion from the nature of the offense subsequently discovered. By way of illustration, consider the following two situations. First, upon hearing loud screams from an apartment, a police officer reasonably concludes that someone's life is in immediate danger. He enters the apartment and finds an uninhibited couple engaged in illegal fornication. Second, a police officer detects an odor from an apartment which he reasonably believes is the smell of burning marijuana. He enters the apartment and finds that the odor comes from a cauldron where neighborhood children are being boiled. In both situations the court faces almost unbearable pressure to evaluate the government's justification for initiating the search in light of the facts known at trial.<sup>216</sup> The danger of hindsight judgment is a familiar fourth amendment problem that inheres in the remedy of exclusion of evidence at trial. The typicality of this problem, however, does not reduce its stature or its impact on a methodology that would include an assessment of the severity of crimes.

Proponents of the sliding scale analysis have also suggested that the courts consider "the need for evidence in a particular case"<sup>217</sup> as another important factor in weighing the government's need to search. Again, the danger of hindsight judgment casts doubt on the wisdom of this suggestion. For example, one commentator fell into the trap of arguing that the government's need to search in a particular case was *de minimus* because the seized evidence was merely used to corroborate what the defendant conceded at trial.<sup>218</sup> This type of Monday morning quarterbacking ignores the fact that at the time of the search the government had no way of knowing what, if anything, the defendant would concede at trial. Moreover, this approach would require the magistrate or police officer to become familiar with the prosecution's entire case—and as much as is known about the case for the defense—to assess what contribution a particular piece of evidence would make to the likelihood of a conviction. Thus, even if judicial hindsight is avoided, consideration of the government's need for evidence in a case is not feasible or appropriate.

Perhaps the greatest difficulty in assessing the importance of the

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216. The Court has recognized the problem of hindsight judgments: "after-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 96 (1964).

217. Weinreb, *supra* note 6, at 70.

218. Note, *Fourth Amendment Balancing and Searches into the Body*, 31 *MIAMI L. REV.* 1504, 1515 (1977).

government's purpose in searching, however, lies in establishing what that purpose was. Must the Court accept at face value the government's characterization of its interest in searching? Or is the Court free to determine what the interest must have been?<sup>219</sup> In *Cady v. Dombrowski*,<sup>220</sup> the Court upheld a warrantless search on the ground that the police were performing "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."<sup>221</sup> In upholding the search, the Court apparently attached great significance to the "specific motivation" of the intruding officer, describing it as a "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle."<sup>222</sup>

Assuming that *Dombrowski* means that the Court will consider the specific motivation of the intruding officer, the government will be able to offer some broad societal interest beyond obtaining incriminating evidence in many cases.<sup>223</sup> For example, the government could argue that although the police seized heroin as evidence for a criminal prosecution, the officer in charge had reason to believe that this particular heroin would be distributed to school children at the local junior high school. The Court has little basis for rejecting such questionable contentions in view of the difficulty of discerning the officer's subjective intent. Thus, in those cases in which the government can plausibly articulate a special community interest, the *Dombrowski* approach seems to grant the prosecution a significant advantage.

To date, however, the Supreme Court has not offered much guidance as to what considerations are relevant in assessing the government's interest. Although the Court has provided conclusory labels that a government interest is "legitimate and weighty,"<sup>224</sup> "urgent,"<sup>225</sup> and "vital,"<sup>226</sup> it has not put forth the methodology used to reach such conclusions.

### *B. Assessing the Severity of the Intrusion into an Individual's Privacy*

The higher the required level of probable cause, the more the law affirms the dignity of the individual and displays respect for a particu-

219. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967). The Court refused to accept the police officer's statement that he was searching for the suspect or stolen money and concluded that the officer must have been searching for weapons. *Id.* at 299-300.

220. 413 U.S. 433 (1973).

221. *Id.* at 441.

222. *Id.* at 447.

223. Mr. Justice Jackson recognized this tendency stating: "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

224. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

225. *United States v. Biswell*, 406 U.S. 311, 317 (1972).

226. *Delaware v. Prouse*, 440 U.S. 648, 658 (1979).

lar form of privacy. When the Court falls prone to speaking of privacy as primarily a right to hide seizable evidence,<sup>227</sup> the defendant's obvious guilt may influence the assessment of how much constitutional protection he should receive.<sup>228</sup> Certainly an individual's privacy interest is not limited to the right to hide incriminating evidence.<sup>229</sup> Cataloguing those rights encompassed within an individual's privacy interest, however, is far more difficult than excluding those that lie beyond its protection.<sup>230</sup> Given the difficulty of that initial task, it is no wonder that the process of assigning weights to the different privacy interests that have emerged has not yielded a principled methodology.

Some have suggested that the language of the fourth amendment itself recognizes a rough scale of privacy values. That is, in speaking of persons, houses, and papers, the amendment arguably accords these forms of privacy special protection.<sup>231</sup> The Supreme Court's fourth amendment decisions do not support this reasoning, however. In *Andressen v. Maryland*,<sup>232</sup> for example, the Court did not appear to attach any special significance to the fact that the amendment refers to papers. Similarly, the Court did not openly distinguish the search and seizure of a person from other intrusions in *United States v. Watson*.<sup>233</sup>

The strongest argument based on the amendment's language is that dwellings are entitled to special fourth amendment protection. History reveals that the framers were concerned about this kind of intrusion.<sup>234</sup> Indeed, the Court's clearest recognition of a hierarchy of privacy interests has been expressed in its frequent observation that "there is a constitutional difference between houses and cars. . . ."<sup>235</sup>

In *Silverman v. United States*,<sup>236</sup> the Court expressed that principle more strongly:

A man can still control a small part of his environment, his

227. See generally Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 REC. N.Y.B.A. 546 (1971); Parker, *supra* note 117.

228. E.g., *United States v. White*, 401 U.S. 745, 752 (1971). In considering whether the defendant's obvious guilt is a factor in interpreting the amendment, it is important to remember that it was "the unrestrained search for smuggled goods that brought the fourth amendment into being." J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 57 (1966).

229. See text accompanying notes 92-97 *supra*.

230. The right to privacy "like a chameleon, has a different color for every turning." Berger v. New York, 388 U.S. 41, 77 (1967) (Black, J., dissenting). See generally A. WESTIN, *PRIVACY AND FREEDOM* (1967); Genely, *Redefining Privacy*, 12 HARV. C.R.-C.L.L. REV. 233 (1977); Parker, *supra* note 117.

231. Amsterdam, *supra* note 22, at 392.

232. 427 U.S. 463 (1976).

233. 423 U.S. 411 (1976). In *Watson* the Court "lowered" the protections of the fourth amendment by upholding the constitutionality of a warrantless arrest in a public area. The Court did not even discuss the possibility that a higher standard of probable cause was required because the seizure of a "person" is referred to in the language of the amendment. See *Ingram v. Wright*, 430 U.S. 651, 679 (1977).

234. See Lasson, *supra* note 197.

235. *Chambers v. Maroney*, 399 U.S. 42, 52 (1970).

236. 365 U.S. 505 (1961).

house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide *some such* oasis, *some* shelter from public scrutiny, *some* inculated enclosure, *some* enclave, *some* inviolate place which is a man's castle.<sup>237</sup>

Assuming that the fourth amendment does recognize that "the good society must have . . . [some] protected crannies for the soul,"<sup>238</sup> the Court has not yet articulated the basis for its conclusion that a dwelling is one of these specially protected areas.

Justice Douglas, perhaps the strongest advocate of a specially protected zone of privacy, rejected the notion that this zone could be defined in terms of places.<sup>239</sup> Perhaps the *Andressen* majority took the logical step of treating this specially protected zone of privacy, this "cranny for the soul," as being confined to the soul itself.<sup>240</sup> If the language and history of the fourth amendment do not establish specially protected forms of privacy, the Court must find another source of reference in scaling the individual's right to privacy under the balancing approach. If the Justices have found a source other than subjective ad hoc judgments, the Court has yet to reveal it. To date, the Court has only spoken of the severity of intrusions upon privacy in conclusory terms.

### C. *Determining the Feasibility of Alternative Procedures*

Simplistically stated, this third aspect of the balancing test recognizes that a government infringement upon individual privacy may be deemed unreasonable because a less intrusive alternative procedure existed which could have accomplished the same end at less cost to individual privacy. The Court flirted with the less restrictive alternative analysis in *Chambers v. Maroney*,<sup>241</sup> but with the possible exception of *Delaware v. Prouse*,<sup>242</sup> no fourth amendment case has given serious consideration to this factor. Most often courts have disposed of the

237. *Id.* at 511 n.4. (emphasis added) (quoting Frank, J., dissenting, *United States v. On Lee*, 193 F.2d 306, 315-16 (1951)). It is difficult to read such language literally in light of lower court opinions dealing with the inviolability of a dwelling. See Comment, *A Man's Home is His Fort*, 23 CLEV. ST. L. REV. 63 (1974).

238. Reich, *supra* note 22, at 1172.

239. *Warden v. Hayden*, 387 U.S. 294, 321 (1967).

240. Dissenting in *Andressen v. Maryland*, 427 U.S. 463 (1976), Mr. Justice Brennan implied that the majority had confined "the dominion of privacy to the mind. . . ." 427 U.S. 487 (Brennan, J., dissenting).

241. 399 U.S. 42 (1970). Mr. Justice White applied the doctrine to the facts of *Chambers* before rejecting it: "Arguably, only the 'lesser intrusion' [immobilizing a car] is permissible until the Magistrate authorizes [a search by issuing a warrant]." *Id.* at 51. See also *Berger v. New York*, 388 U.S. 41, 63 (1967), where the majority suggested that more scientific and less obtrusive procedures could be developed for apprehending criminals.

242. 440 U.S. 648 (1979).

feasibility of alternative procedures in a one-sentence conclusory reference to the lack of practical alternatives.<sup>243</sup>

At first blush it is surprising that the less restrictive alternative doctrine, long an accepted approach in applying other constitutional provisions,<sup>244</sup> has not received serious attention in fourth amendment cases. The doctrine appears well suited for fourth amendment analysis, particularly in light of the amendment's standard of reasonableness. When two possible methods of achieving the government's purpose exist, it is reasonable to require the use of the less intrusive practice.<sup>245</sup> The Court cannot easily define the required level of probable cause as a forty percent or sixty percent likelihood that the intrusion will further the government interest without considering what alternatives are necessary to achieve the sixty percent likelihood.

The Court's failure to give serious attention to the less restrictive alternative doctrine in fourth amendment cases is probably due, not to a belief that the doctrine is irrelevant, but rather to a realization that no existing methodology evaluates the relative restrictiveness and efficiency of various alternatives. The Court is obviously reluctant to speculate on proposed procedures which are theoretically more efficient and less restrictive than existing practices.<sup>246</sup> For example, the defendant in *United States v. Martinez-Fuerte*<sup>247</sup> argued that legislation prohibiting the knowing employment of illegal aliens would be a less restrictive and more efficient means of serving the government's interest in checking the flow of illegal aliens.<sup>248</sup> The Court gave short shrift to this argument by noting that "the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers."<sup>249</sup> The Court seems reluctant to speculate on the virtues of proposed alternatives; perhaps it would confine the less restrictive alternative analysis to an evaluation of ex-

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243. See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, where the Court stated, "It is doubtful that any other canvassing technique would achieve acceptable results." *Id.* at 537. The requirement for an arrest warrant "would constitute an intolerable handicap for legitimate law enforcement. . . ." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975). See also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

244. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (equal protection); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

245. Cf. *Berger v. New York*, 388 U.S. 41, 73 (1967) (Black, J., dissenting) ("Crimes, unspeakably horrible crimes, are with us in this country, and we cannot afford to dispense with any known method of detecting and correcting them unless it is forbidden by the Constitution. . . .") See also *Whalen v. Roe*, 429 U.S. 589 (1977). When considering the needs of law enforcement agencies to combat "rising crime rates," it is interesting to note that 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." J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 26-27 (1966).

246. "It is always easy to hint at mysterious means available just around the corner to catch outlaws." *Berger v. New York*, 388 U.S. 41, 73 (1967) (Black, J., dissenting).

247. 428 U.S. 543 (1976).

248. *Id.* at 556-57.

249. *Id.*

isting practices which presumably have an established track record of efficiency.<sup>250</sup>

*Delaware v. Prouse*<sup>251</sup> may be the first case in which the Supreme Court held a search unconstitutional because the authorities failed to use an established less restrictive alternative procedure. In that case, the state sought to establish the constitutionality of "random stops"<sup>252</sup> of automobiles to check motorists' drivers licenses and car registrations. A majority of the Supreme Court accepted the government's contention that random stops furthered a "vital" state interest in promoting highway safety.<sup>253</sup> Having recognized the utility of random stops, the Court admitted its willingness to uphold the searches if "in the service of these important ends, the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail."<sup>254</sup> The state, however, was unable to offer any statistics to prove its claim that random stops are more efficient than the less intrusive checkpoint stops formerly used by the authorities.<sup>255</sup> Assuming that the *Prouse* holding did turn on the availability of a less restrictive alternative,<sup>256</sup> it becomes apparent that the Court placed the burden of proving the superiority of the more intrusive procedure on the government.<sup>257</sup> In other words, *Prouse* found the state's practice unconstitutional on the basis of the state's inability to demonstrate that the method was "sufficiently productive"

250. But the lower court decision in *Martinez-Fuerte* was based on an assessment of the established track record of fixed checkpoints. Statistics showed that only five percent of the illegal aliens passing through the checkpoint were apprehended, and that operations at the border (utilizing less manpower) had apprehended three times the number of aliens located by all traffic-checking programs. Thus the lower court decision was seen as forcing "the Border Patrol into a more effective allocation of its manpower." Note, *Alien Checkpoints and the Troublesome Tetrology: United States v. Martinez-Fuerte*, 14 SAN DIEGO L. REV. 257, 267 (1976).

251. *Delaware v. Prouse*, 440 U.S. 648 (1979).

252. When asked "whether the officer here was following orders to make random stops or whether he 'just did!'", counsel for the state responded, "[h]e just did it." In response to Justice Powell's inquiry as to why the Delaware police weren't using designated checkpoints to stop all motorists, counsel explained: "[r]andom stops can be done by police when they really don't have anything else to do." 47 U.S.L.W. 3491 (1979).

253. 440 U.S. 648, 658-60 (1979).

254. *Id.* at 659.

255. See 47 U.S.L.W. 3491 (1979). Several courts have asserted, however, that random road checks are the most efficient means available to enforce registration and license requirements. *E.g.*, *State v. Holmberg*, 194 Neb. 337, 339, 321 N.W.2d 672, 675 (1975); *State v. Kabayama*, 98 N.J. Super. 85, 85-87, 231 A.2d 164, 166 (1967).

256. *Prouse* can also be analyzed from the perspective which views the fourth amendment as prohibiting the unfettered discretion of police officers. See generally Bacigal, *Observations, supra* note 121. *Prouse* was given such a reading in *Brown v. Texas*, — U.S. —, 99 S. Ct. 2637, 2641 (1979), in which the Court cited *Prouse* for the proposition that "when such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."

257. The state's contention that random spot checks promoted highway safety was characterized as a "mere assertion" and the Court noted the absence of any supporting "empirical data." 440 U.S. at 659-60. Compare Mr. Justice Rehnquist's approach: "The burden is not upon the State to demonstrate that its procedures are consistent with the Fourth Amendment, but upon respondent to demonstrate that they are not." 440 U.S. at 667 (Rehnquist, J., dissenting).



in relation to less intrusive alternatives to justify the greater infringement on privacy rights.

The state's failure in *Prouse* raises the question of whether overworked and underfunded prosecutors will be able to gather the empirical data necessary to meet this burden with any frequency. In addition, Professor Gilmore has leveled severe criticism at judicial use of empirical evidence, pointing out that "the gathered facts have a disappointing way of turning out not to mean anything beyond themselves."<sup>258</sup> Moreover, ascertaining the degree of infringement on privacy and the procedure's deterrent value requires a determination of the search's long-term effect on an individual's state of mind. The deficiencies of judicial reliance on empirical data are particularly acute when the court is attempting to measure these essentially nonquantifiable factors. The court must then compare nebulous findings with concrete measures of the cost of the additional manpower or machinery necessary to implement an alternative procedure. One can easily foresee a tendency for these more "readily quantifiable variables to dwarf those that are harder to measure. . . ."<sup>259</sup> Accordingly, the proponent of broad privacy protection must often argue that the largely unmeasurable deterrent and educative effects of alternative procedures will outweigh the more apparent costs of restricting law enforcement methods.<sup>260</sup> Similarly, the proponent of state intrusions, in a case such as *Prouse*, must argue that the long run deterrence of unfit drivers outweighs the more immediate effects on privacy.

Of course no fact-finding process, judicial or otherwise, can wholly eliminate the decisionmaker's uncertainty about the consequences of any chosen strategy of conduct. The Court's application of the less restrictive alternative doctrine, however, has been superficial,<sup>261</sup> giving little attention to the problems of making the doctrine a meaningful part of the fourth amendment jurisprudence.<sup>262</sup> If *Prouse* indicates that

258. G. GILMORE, *THE AGES OF AMERICAN LAW* 88 (1977).

259. Tribe, *supra* note 46, at 1393.

260. As Professor Weinreb has pointed out:

It is a risky business to speculate how human beings will adapt to a changed environment. . . . There is no way to establish that our behavior now is better (more "natural," or more "human," or more pleasant) than it would be if we expected and had less privacy. In the end we must rely on an unproved vision of man in society.

Weinreb, *supra* note 6, at 83.

261. See text accompanying notes 244-50 *supra*. See generally Note, *Less Drastic Means and the First Amendment*, 78 *YALE L.J.* 464, 472 (1969).

262. Application of the less restrictive alternative doctrine to the fourth amendment raises a number of problems: (1) Should the Court consider whether prohibiting a certain procedure will encourage police to use procedures not covered by the fourth amendment which are illegal or even less desirable than the prohibited procedure? For example, if the danger of third party destruction does not justify a warrantless search, will the police illegally arrest all third parties, in effect, freezing the status quo until a warrant can be obtained. See 2 W. LAFAVE TREATISE, *supra* note 20, at 450; Waite, *supra* note 51, at 634. (2) Can the Court strike down a particular police procedure, because, regardless of the effect upon individual privacy, there are less dangerous or more economically efficient procedures? For example: "I have no reluctance in condemning as uncon-

the Court is willing to give the doctrine greater effect, it is time to formulate a proper judicial methodology for obtaining and evaluating the needed empirical evidence.

#### *D. Balancing the Factors*

As this article has shown, a balancing approach to the fourth amendment requires the Court to scale values within the three distinct categories of government interests, individual privacy, and alternative procedures.<sup>263</sup> Beyond that initial task, however, lies the difficult problem of translating the three variables into a common language. Since the adoption of the sliding scale, the Court has analyzed government interests in the language of legitimate government power, evaluated the nature of an intrusion in the language of privacy, and considered the feasibility of alternatives in terms of efficiency and economy. The mystery of how these distinct lines of analysis interrelate, however, remains unsolved.

The goal of balancing may be "infinitely sensible"<sup>264</sup> in that it seeks to "directly correlate"<sup>265</sup> the importance of the government interest with the severity of the intrusion upon privacy. But until the method of correlating these factors is articulated, fourth amendment decisions will continue to appear unprincipled. At present the selection and description of the factors to be weighed largely predetermines the outcome of any balancing process.<sup>266</sup> When the Court announces that an "important and weighty" government interest was balanced against a "de minimus" interest in privacy,<sup>267</sup> the result is preordained. Thus, the methodology used to balance such obviously loaded factors becomes irrelevant. So long as the Court continues to balance "in a totally ad hoc fashion, any number of subjective factors,"<sup>268</sup> no methodology for comparing government interests is likely to emerge.

#### *Conclusion*

The recognition of a hierarchy of fourth amendment values is a defensible approach; arguably, it raises fourth amendment jurispru-

stitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves." *MacDonald v. United States*, 335 U.S. 451, 461 (1948) (Jackson, J., concurring). (3) To what extent may the Court make largely political determinations regarding the amount of community resources that should be committed to various law enforcement procedures? *See Dorman v. United States*, 435 F.2d 385, 395 (D.C. Cir. 1970).

263. "[F]or purposes of evaluation it is both possible and necessary to arrange the privacy and the government interests on separate continuums." Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 KANSAS L. REV. 1, 14 (1974).

264. Amsterdam, *supra* note 22, at 376.

265. *People v. LaPene*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375. *See also United States v. Lopez*, 328 F. Supp. 1077 (E.D.N.Y. 1971).

266. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 890 (Douglas, J., concurring).

267. *E.g., Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

268. *Wyman v. James*, 400 U.S. 309, 341 (1971) (Marshall, J., dissenting).

dence from a simplistic monolithic concept to a more sophisticated appreciation of the complexity of various conflicting governmental and individual interests. As a methodology for resolving that conflict, however, the sliding scale of probable cause does not prove helpful. The sliding scale theory does not articulate the mechanics of the balancing process; in fact, the methodology used by the courts appears limited to a simplistic formula—an acknowledgment that a balancing of interests is appropriate and an announcement of the result in conclusory terms. The Supreme Court's application of the balancing approach and the resulting sliding scale of probable cause have not advanced our understanding of the parameters of fourth amendment protection. Rather, this approach has thrown the lower courts into the methodological abyss of determining the constitutional reasonableness of an intrusion by interpreting the subjective evaluations of the Supreme Court.<sup>269</sup>

The increased objectivity resulting from a resurrection of the traditional probable cause approach would be purchased at a high price, however. Simplistic notions of traditional probable cause ignore the reality of differing government and individual interests that conflict within the purview of the fourth amendment.<sup>270</sup> In addition, a return to traditional probable cause would contract the scope of fourth amendment protection to cases of government intrusions incident to criminal investigations.<sup>271</sup> Moreover, in part, traditional probable cause analysis merely hides a subjective balancing process behind the rhetoric of objective reasoning.<sup>272</sup>

If the Court cannot go backward to traditional probable cause, it must go forward. But forward to what? The inherent weaknesses of the sliding scale and traditional probable cause are obvious; superior concepts, however, are not so readily apparent. Perhaps the solution lies not in finding a new methodology to answer the old fourth amendment questions, but rather in redefining the questions.<sup>273</sup> In her classic work *Philosophy In a New Key*<sup>274</sup> Susanne K. Langer noted that the pursuit of any system of thought ultimately leads to "the unanswerable puzzles, the paradoxes that always mark the limit of what a generative idea, an intellectual vision, will do."<sup>275</sup> The limit is reached when all answerable questions have been addressed, leaving only those insoluble

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269. As Professor LaFave has pointed out, "If the balancing technique is used, it would seem to make no difference in terms of outcome whether the balancing is done merely to determine what is reasonable or to determine what level of probable cause is required." LaFave, *Street Encounters*, *supra* note 45, at 56 n.86.

270. See text accompanying notes 26-28 *supra*.

271. *Id.*

272. See text accompanying notes 54-60 *supra*.

273. See G. GILMORE, *supra* note 258, at 100, noting that it is all too easy to convince oneself "that the cause of past failure lay in inadequate methodology and that, with more refined techniques, the trick will finally be pulled off."

274. S. LANGER, *PHILOSOPHY IN A NEW KEY* (3d ed. 1978) [hereinafter cited as LANGER].

275. *Id.* at 11

metaphysical questions whose very statement harbors a paradox wherein the question is capable of two or more equally good answers.

In that respect, *Katz* and *Camara* generated important and fruitful thought on the concept of privacy and order in a free society. By approaching the fourth amendment inquiry in terms of privacy versus order and security, however, we have reached the metaphysical question which harbors a paradox. Certainly, the proper balance of liberty and order in a free society is an appropriate question.<sup>276</sup> At the same time its abstractness obscures the realities of everyday life.<sup>277</sup> The Court's answers are not intellectual discoveries of "good" answers to appropriate questions, however; they merely adhere to one doctrine and refute the opposing doctrine. Each answer to the paradox wins a certain number of adherents who prefer it to an equally good rival answer. If fourth amendment jurisprudence has reached this insoluble dilemma, it is time to follow Professor Langer's suggestion: "If we would have new knowledge, we must get . . . a whole world of new questions."<sup>278</sup>

To date there have been only preliminary efforts to formulate new fourth amendment questions. Professor Dworkin has raised the question of whether the Court should adopt "an inflexible search and seizure code" and rely on the due process clause for the flexibility needed to handle situations in which the actions shock the conscience of the Court.<sup>279</sup> In a more limited context, Professor LaFave has also examined the virtues of standardized fourth amendment procedures as opposed to case-by-case adjudication.<sup>280</sup> Professor LaFave's new question, however, asks whether modification of the "plain view" principle might eliminate some of the need for balancing privacy and law en-

276. See text accompanying notes 202-05 *supra*.

277. As Professor Ahrens has asserted,

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.

Ahrens, *supra* note 15, at 1082.

Of course, what is or is not reasonable under the particular circumstances still depends on broad underlying policy determinations. The Court, however, 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 presumably preferable to anarchy. See Fried, *Two Concepts of Interest: Some Reflections on the Supreme Court's Balancing Test*, 75 HARV. L. REV. 755, 761 (1963), where the author states, [t]he point is that authority cannot be conceded to persons because they are right—the authority must pre-exist their right or wrong judgment and must survive it too—and judges decide cases by virtue of their authority, and not because they are any more likely to be right than other people.

See also B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921).

278. LANGER, *supra* note 274.

279. See Dworkin, *Fact Style Adjudication and the Fourth Amendment*, *supra* note 23.

280. See LaFave, "Case by Case Adjudication" Versus "Standardized Procedures," *supra* note 23.

forcement needs. Professor White has questioned the extent to which the language of fourth amendment analysis must be seen as a means of communicating with and about people.<sup>281</sup> Professor Amsterdam has asked about the role of police administrative regulations in determining a reasonable search.<sup>282</sup> Following some of Professor Amsterdam's analysis, I have elsewhere raised the question of the extent to which the political process should assume responsibility for protecting fundamental privacy values.<sup>283</sup>

Of course, there is another alternative—to maintain the status quo. The Court may continue the present approach of mixing, in some nebulous fashion, rational analysis and unspoken assumptions about values.<sup>284</sup> This approach would continue to produce rather fuzzy and open-ended concepts and rules. Being fuzzy and open-ended has certain benefits,<sup>285</sup> but the Court is currently giving us too much of a good thing. In this light compare these statements:

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.

Justice Rehnquist<sup>286</sup>

A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.

Justice Holmes<sup>287</sup>

Depending on one's values, Justice Rehnquist may be lauded for his candor, and Justice Holmes for his aspirations. Only if taken to the

281. See White, *supra* note 141.

282. See Amsterdam, *supra* note 22.

283. See Bacigal, *Observations, supra* note 121.

284. Highlighting the lack of clarity in the fourth amendment area, then Solicitor General Griswold revealed that "[t]he average search and seizure case takes a little more than twice as many pages as the average of all the cases decided by the Court. Griswold, *Search and Seizure—A Dilemma of the Supreme Court* (Roscoe Pound Lectures, delivered at the University of Nebraska College of Law, 18-19 March 1974), cited in LaFave, *Street Encounters, supra* note 45. The lack of clarity in this area is further exemplified by the fact that, "[i]n 1977 alone, over 150 articles on search and seizure were published in various legal journals and periodicals." Note, *United States v. Chadwick and the Lesser Intrusion Concept: The Unreasonableness of Being Reasonable*, 58 B.U.L. REV. 436, 437 n.14 (1978).

285. Every balancing test involves some discretion, and no known methodology can totally eliminate all subjective judgments on the part of the decisionmaker. However, a methodology which requires a systematic and thorough analysis of the issues and interests involved may help limit this subjective discretion. See generally Wechsler, *supra* note 204.

286. *Cady v. Dombroski*, 413 U.S. 433, 448 (1973). See generally B. CARDOZO, *supra* note 103, at 117, where the author states, "[t]he ends to which courts have addressed themselves, the reasons and motives that have guided them, have often been vaguely felt, intuitively or almost intuitively apprehended, seldom explicitly avowed."

287. O. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 186 (1920).

extreme, however, will these statements become inconsistent.<sup>288</sup> If the Court accepted Justice Rehnquist's statement without reservation, it should have ceased to write fourth amendment opinions. Because opinions continue to be written, the Court must accept Justice Holmes's statement to some extent; the Court, therefore, must recognize its duty to improve upon its previous efforts at articulating the meaning of the fourth amendment.

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288. As Professor Fuller has pointed out, "[l]aw is by its limitations fiat, by its aspirations reason, the whole view involves recognition of both." Fuller, *supra* note 204, at 377.