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The Jury as a Source of Reasonable Search and Seizure Law

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> 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.[1]

I. INTRODUCTION

The definition of a reasonable search has bedeviled the United States Supreme Court for some ninety years.[2] Formal logic or legal reasoning assists the Court in tracing premise to conclusion, but does not alone suggest the initial premise. The Court's difficulty in fourth amendment cases, in general, lies in identifying the premise—the fundamental value which is embodied in this constitutional guarantee.[3] The Court has recognized that this fundamental value, whatever it is, has an origin outside the language of the amendment,[4] and the Court has considered sources such as history,[5] popular consensus,[6] natural

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1. U.S. CONST. amend. IV.

2. The Court did not consider an important fourth amendment question until Boyd v. United States, 116 U.S. 616 (1886). A sizeable body of fourth amendment precedent did not develop until the advent of prohibition in the 1920's.

3. The Supreme Court has devoted a great deal of attention to the procedural requirements of the fourth amendment. *See, e.g.*, the Court's examination of when a warrant must be obtained, Coolidge v. New Hampshire, 403 U.S. 433 (1971), and the two prongs of Aquilar v. Texas, 378 U.S. 108 (1964). Although these *procedural* considerations are an important part of the fourth amendment jurisprudence, this Article focuses on what I regard as the *substantive* aspect of the amendment — the substantive justification, whether it be analyzed in terms of probable cause or reasonableness, which must be established in order to render the search constitutional. *See* text accompanying note 39 *infra*.

4. *See* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

5. *See* United States v. Watson, 423 U.S. 411 (1976); Warden v. Hayden, 387 U.S. 294, 312-18 (1959).

law,[7] and utilitarian balancing[8] to find this origin. None of these, however, provides an adequate basis for answering the variety and complexity of fourth amendment issues that confront the Court.

A. History

History reveals little more than that the drafters of the fourth amendment's reasonable search requirement were primarily concerned with remedying two then-existing abuses: writs of assistance and general warrants.[9] History neither clearly defines a reasonable search nor fully reveals the fundamental values underlying that requirement. Therefore, in using historical analysis to apply the fourth amendment's reasonable search test to modern police practices, the Court encounters the classic problem of defining both the historical core and the modern penumbral coverage of the amendment:[10] Should the Court adopt the view that the fundamental core of the amendment is the prohibition of writs of assistance and general warrants, and that only those modern practices that are sufficiently similar to these historically prohibited processes fall within the penumbra of the amendment's coverage, or should the Court regard writs of assistance and general warrants merely as examples of the fundamental evil that the amendment sought to prohibit,[11] recognizing that modern police practice may, after all, possess few of the characteristics of a general warrant but still violate the spirit of

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6. *See* Rakas v. Illinois, 439 U.S. at 143 n.12.

7. *See* Warden v. Hayden, 387 U.S. 294, 312 (1967)(Douglas, J., dissenting). *See generally* Doss & Doss, *On Morals, Privacy, and the Constitution*, 25 U. MIAMI L. REV. 395 (1971).

8. *See* Terry v. Ohio, 392 U.S. 1 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

9. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969); Lasson, *The History and Development of the Fourth Amendment to the U.S. Constitution*, 55 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. (1937).

10. *See generally* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

11. Compare the approach suggested by Justice Stewart's majority opinion in Katz v. United States, 389 U.S. 347 (1967)(extending fourth amendment protections to intangibles under the premise that the amendment is intended to benefit people, not things or places) with that offered by Justice Black in the same case (suggesting that the fourth amendment protects privacy only to the extent it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects" but does not extend to intangibles). *Id.* at 364 (Black, J., dissenting).

the fourth amendment?

Regardless of whether emphasis is placed on the amendment's core meaning or on its penumbral coverage, the Court is still left with the task of defining the amendment's fundamental purpose. It is true that inquiry into fundamental purpose could be avoided if the Court were to rigidly define the amendment as an attempt to specifically prohibit the issuance of a general warrant or a writ of assistance, but such a rigid approach would reduce the fourth amendment to an historical curiosity like the third amendment,[12] or like a statute prohibiting the tying of a horse to a street sign. Although the fourth amendment, if so construed, would be handy to have around in the event writs of assistance reappear in our society, it would have no other practical significance. Fortunately, the present Court displays no readiness to adopt such an unrealistically rigid view of the amendment.[13]

Because it is a constitution and not a statute with which the Court is concerned, the language of the amendment must be given some breadth beyond those particular forms of evil that the drafters suffered at the hands of English customs inspectors.[14] Besides giving due deference to the historical core of the amendment, the Court must extend the amendment's coverage to those modern practices that are "sufficiently similar" to general warrants and writs of assistance. Yet determining what is sufficiently similar raises a question about the fundamental purpose of the amendment: Does the modern practice under scrutiny seek to accomplish the same basic evil that a general warrant accomplishes and thus fall within the prohibition of the fourth amendment?

Unfortunately, the framers' prohibition of writs of assistance and general warrants does not clearly indicate what that fundamental purpose was. Important questions remain unanswered: Did the framers condemn general warrants in an effort to preserve individual privacy, or did they simply seek to eliminate the arbitrary exercise of power by the police? If both pur-

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12. "No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

13. Such a rigid view taken by an earlier Court, however, provided a foundation for Olmstead v. United States, 277 U.S. 438 (1928), which was overruled in Katz v. United States, 389 U.S. 347, 353 (1967).

14. Writs of Assistance were utilized by customs inspectors attempting to enforce the Navigation Acts. *See* authorities cited in note 9 *supra*.

poses were involved in the prohibition, how is the Court to deal with cases where the separate purposes lead to opposite results?[15] Even if the Court could clearly ascertain the framers' general purpose, there would not be clear answers for many of the modern predicaments faced by today's society. The constitutional framers could not have foreseen the threat to privacy posed by technological advances such as miniature microphone-transmitters and other modern methods of electronic surveillance.[16] Nor could the drafters have foreseen the increased dangers of modern crime such as the perils of explosives in airplanes and widespread drug use in urban societies.[17] The Court simply will not find clear answers to the fourth amendment problems arising in a modern context by searching history for the framers' general purpose.

B. Popular Consensus

One way the Court can avoid a static historical view of the fourth amendment is to interpret it to reflect the current "shared understandings" of society.[18] In fact the Court often speaks of the "reasonableness" of a search as a matter of common sense for prudent laymen, rather than a technical question for lawyers.[19] There are empirical problems with such an approach, however, principle among which is that in our pluralistic society, the ideal "shared understandings" may not exist. Since most police investigations focus on a subculture of criminals, suspected criminals, and those who lead an unconventional or deviant life style, the average, prudent layman, who is to represent the standard of reasonableness, has no experience with

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15. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 368-69 (1974).

16. *See generally* A. WESTIN, PRIVACY AND FREEDOM (1967).

17. "[C]rimes, unspeakable horrid 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 . . . ." Berger v. New York, 388 U.S. 41, 73 (1967)(Black, J., dissenting). If these be "hard times" in which we live, it may be wise to realize that the times often appear uniquely difficult to those who live them. Some 300 years ago Lord Hale authorized search warrants on the ground of "necessity especially in these times, where felonies and robberies are so frequent." J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 26-27 (1966).

18. *See* Rakas v. Illinois, 439 U.S. 128, 173 n.12 (1978); Kitch, Katz v. United States: *The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 137.

19. Draper v. United States, 358 U.S. 307, 313 (1959)(quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

searches and seizures.[20] Even those few searches that touch a large number of citizens (e.g., the weapons detection devices at airports) are not likely to evoke a clear consensus.[21] The Constitution, Justice Holmes observed, "is made for people of fundamentally differing views."[22]

In those instances where a popular consensus may exist, there remains the important question of whether Supreme Court Justices are the ones to identify and define it. Justices Brennan and Marshall once read popular consensus as prohibiting the death penalty,[23] yet popularly elected state legislatures countered by enacting new death penalty statutes.[24]

If the Court is not merely to read the popular consensus (and risk a misreading) but also to launder or filter consensus to free it of emotionalism or prejudice,[25] it must look beyond existing consensus to some independent standard that distinguishes emotional agreement from an enlightened, "true" consensus. The empirical difficulties involved are not only substantial but are arguably beyond the capabilities of any court.

Even if a true consensus could be found, it is not clear what weight it should be assigned in defining the reasonableness standard for searches and seizures. The most fundamental objection to interpreting the fourth amendment according to popular consensus is that such an approach conflicts with the role of the Constitution as a safeguard against the potential tyranny of the popular majority. When interpreting ambiguous language in a statute, a court may justifiably "stand in" for the legislature and apply the perceived will of the people. But when the Supreme Court interprets the Constitution to invalidate a statute authorizing unreasonable searches,[26] the Court sets itself *against* the

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20. *See* K. DAVIS, POLICE DISCRETION 18-19 (1975).

21. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967), where the Justices disagreed as to the likely response from citizens who are asked to authorize an "inspection" of their dwelling by health officials.

22. Lochner v. New York, 198 U.S. 45, 76 (1905)(Holmes, J., dissenting).

23. Furman v. Georgia, 408 U.S. 238, 299-300 (1972)(Brennan, J., concurring); *id.* at 332-33 (Marshall, J., concurring).

24. *See* Gregg v. Georgia, 428 U.S. 153, 179-81 (1976).

25. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 126 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 251 (1973).

26. *E.g.*, Berger v. New York, 388 U.S. 41 (1967)(striking down the New York wiretap law).

will of the people as expressed by the legislature.[27] The Court cannot employ the majority consensus as a vehicle for protecting individuals from the dictates of that same majority.[28]

I do not mean to totally discount the role of consensus in formulating law. The theme of this symposium is the relationship between the legal and moral orders in society. I agree that there is an important interaction between the legal order and existing customs, mores, and popular consensus in society, and I will later return to that theme. The point to be made here is that such interaction is properly subtle and long range; the Court cannot invoke clear consensus as a definitive resolution of particular cases.

C. Natural Law

The Court can justifiably disregard popular consensus by determining the reasonableness of a search according to a natural law standard of fundamental rights embodied in the fourth amendment. Such rights are seen as eternal and immutable;[29] thus, the reasonableness of a search can be seen as a discoverable absolute that is not contingent upon current consensus or historical data. Whatever appeal lies in the concept of an absolute or "right" answer, it involves an obvious problem of selecting a methodology for discovering that answer.[30] Legal philosophers, political philosophers, moral philosophers, and others all offer the Court theories pointing to numerous versions of the right answer.[31] Understandably, the Supreme Court has been wary of translating any of the various concepts of natural law into specific decisions.

At one point the Court appeared to move toward a concept of privacy—"the right most valued by civilized men"[32]—as *the* fundamental right embodied in the fourth amendment. Al-

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27. Legislatures are often criticized as unrepresentative bodies that merely react to various pressure groups. *See, e.g.*, T. LOWI, THE END OF LIBERALISM (1969). Whatever the deficiencies of legislative bodies, the courts cannot objectively claim to be *more* representative of popular consensus.

28. Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 52 (1978).

29. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928).

30. *See* Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1376 (1979).

31. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974); J. RAWLS, A THEORY OF JUSTICE (1971).

32. Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting).

though the origin[33] and definition[34] of the right of privacy were clouded, the Court seemed to recognize certain forms of privacy as absolute or nearly absolute rights.[35] However, at least within the context of the fourth amendment, the Court appears to have rejected the concept of the right of privacy as absolute.[36] The Court appears to have given up on discovering any absolutely protected zones of privacy and has confined its analysis of the fourth amendment to a balancing of a privacy *interest* (not a *right*) against the societal interest in law enforcement.

D. A Balancing Approach

The Court's utilitarian balancing of interests has come to dominate all aspects of fourth amendment jurisprudence. Traditionally, the major issues of fourth amendment litigation have been seen as falling into four distinct categories: (1) the scope of the amendment—the description of those circumstances meriting the amendment's protections, compared with those situations in which the amendment is totally inapplicable;[37] (2) the standards of the amendment—determination of what factors make a search constitutionally reasonable or unreasonable;[38] (3) the consequences of fourth amendment violations—the determination of when the exclusionary rule applies;[39] and (4) the existence of standing to raise fourth amendment questions—the identification of the class entitled to invoke the amendment's protections.[40]

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33. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965).

34. *See* Parker, *Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

35. *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, 483 (1965)(penumbral right to marital privacy).

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

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

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

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

40. *See, e.g.*, Rawlings v. Kentucky, 100 S. Ct. 2556 (1980); United States v. Salvucci, 100 S. Ct. 2547 (1980); Rakas v. Illinois, 439 U.S. 128 (1978). *See generally* Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1 (1975).

At least since the Court decided *Katz v. United States*[41] in 1967, the ongoing, distinct nature of those four categories has been in grave doubt. Prior to *Katz* the amendment's scope was defined to cover a physical trespass into a constitutionally protected area.[42] The *Katz* Court was clear in overturning this standard but offered in its stead only a nebulous new standard of protecting those "expectation[s of privacy] that society is prepared to recognize as 'reasonable.' "[43] Although the Court apparently assumes that it is the appropriate and exclusive decisionmaker in this area, it has never articulated the methodology it employs to determine reasonable expectations of privacy. Justice Harlan unabashedly proposed that the "impact on the individual's sense of security [be] balanced against the utility of the [government's] conduct as a technique of law enforcement."[44] The Court, however, has not openly adopted Justice Harlan's balancing approach. It has instead frequently avoided a determination of the amendment's scope by subsuming the scope inquiry within the question of fourth amendment standards where the balancing approach is more apparent.[45]

In determining the standards for a constitutional search, the Justices have engaged in a long-standing controversy over the relationship of the fourth amendment's two conjunctive clauses: the reasonableness clause and the warrant clause.[46] The Court's fourth amendment analysis originally focused on the warrant clause's requirement of probable cause as *the* substantive justification for a constitutional search. Probable cause was often referred to as an absolute standard that applied uniformly whenever the amendment applied.[47] However, the Court subsequently placed increased emphasis on reasonableness as the substantive requirement for a constitutional search.[48] Unlike the compara-

41. 389 U.S. 347 (1967).

42. *See* Olmstead v. United States, 277 U.S. 438, 464 (1928).

43. 389 U.S. at 361 (Douglas, J., concurring).

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

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

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

47. *See* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1980 ILL. L.F. 763.

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

tively rigid definition of probable cause, reasonableness was to be determined from "the total atmosphere of the case."[49] Although reasonableness as a flexible standard and probable cause as a comparatively rigid and uniform standard originally represented very distinct views of the fourth amendment, the distinctiveness was afterwards lost with the Court's de facto recognition of a sliding scale of probable cause, which served to infuse the warrant clause with the flexibility that had previously been unique to the reasonableness clause.

In *Camara v. Municipal Court*[50] and *Terry v. Ohio*,[51] the Court abandoned all pretense that probable cause was a fixed and uniform standard deduced from virtually absolute principles enshrined in the Constitution. It instead adopted the view that the probable cause standard is a compromise for accommodating the opposing interests of the government and individual citizens, and recognized that the same compromise is not required in all situations. The standard of the amendment, whether it be spoken of in terms of reasonableness or probable cause,[52] was thus to be determined by balancing conflicting individual and governmental interests. The flexibility of this balancing approach to fourth amendment standards has subsumed the threshold question of the amendment's scope. The Court eschews rigorous analysis of the amendment's scope in order to reach the question of fourth amendment standards where it may engage in its newfound freedom to weigh and balance any number of relevant factors.[53] In practice, the Court's references to the amendment's

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49. United States v. Rabinowitz, 339 U.S. 56 (1950).

50. 387 U.S. 523 (1967).

51. 392 U.S. 1 (1967).

52. In place of a rigid definition of probable cause as a "reasonable belief," the Court uses such terms as "reasonable suspicion," United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975), and "clear indication," Schmerber v. California, 384 U.S. 757, 770 (1966). Lower courts have referred to the required form of probable cause as "real suspicion," Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967); some knowledge, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); "mere possibility," People v. Sirhan, 7 Cal. 3d 710, 739, 102 Cal. Rptr. 385, 404, 497 P.2d 1121, 1140 (1972); reasonable, non-whimsical suspicion, People v. DeBaur, 40 N.Y.2d 210, 352 N.E.2d 562, 570, 386 N.Y.S.2d 375, 383 (1976). Of course the important constitutional consideration is the distinction between *mere* suspicion and *reasonable* suspicion, or between *mere* belief and *reasonable* belief. The concept of reasonableness is the significant legal determination; references to belief, suspicion and justification are surplusage.

53. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544 (1980), where only two members of the majority addressed the issue of whether a seizure had taken place. The three concurring Justices were willing to assume that a seizure had occurred and confined their analysis to whether the standard of reasonable suspicion had been met. *See*

scope and standards are merely alternative expressions of a single determination: The *standard* of the amendment is met because the government interest is deemed sufficient to set aside privacy; or, in the terminology of the *scope* inquiry, the privacy interest is deemed insufficient to trigger fourth amendment protection.

Adoption of this flexible balancing approach merges not only the questions of the scope and standards of the fourth amendment, but also the previously distinct categories of standing to invoke the amendment's protections and the application of the exclusionary rule. Prior to *Rakas v. Illinois*,[54] the Court had formulated rules of standing that were not necessarily tied to expectations of privacy and the balancing approach.[55] In *Rakas*, however, Justice Rehnquist indicated that the *Katz* expectation of privacy formulation should be the sole criterion for determining standing to invoke fourth amendment protections.[56] During its 1979 term, a majority of the Court adopted Justice Rehnquist's view that the traditional standing inquiry was to be subsumed within the scope question of whether the search infringed upon an interest of the defendant which the amendment was designed to protect.[57] Thus, the question of fourth amendment standing was subsumed within the question of the amendment's scope, which in turn has been subsumed within the question of reasonable standards.

Justice White, dissenting in *Rakas*, argued that the majority had undercut the substantive protection of the fourth amendment because of its desire to reduce the operation of the amendment's exclusionary rule.[58] In fact, the Court's approach to the exclusionary rule is but another aspect of the balancing approach which has come to dominate all fourth amendment considerations. Whatever the original basis of the amendment's exclusionary rule,[59] the present Court regards the rule as "a

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also Wyman v. James, 400 U.S. 309, 318 (1971).

54. 439 U.S. 128 (1978).

55. *See, e.g.*, Jones v. United States, 362 U.S. 257 (1960). *See generally The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 171-80 (1979).

56. Rakas v. Illinois, 439 U.S. at 134.

57. Rawlings v. Kentucky, 100 S. Ct. 2556 (1980); United States v. Salvucci, 100 S.Ct. 2547 (1980).

58. Rakas v. Illinois, 439 U.S. at 168-69 (White, J., dissenting).

59. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court referred to deterrence, judicial integrity, and the intimate relationship between the fourth and fifth amendments. *See generally* Schrock & Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitu-*

judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[60] Thus, when not clearly bound by precedent,[61] the Court views itself as free to apply or not to apply the exclusionary rule depending upon the results of balancing the benefits of deterrence against the costs of excluding relevant and trustworthy evidence.[62]

There is little sense in maintaining the traditionally distinct fourth amendment concepts of scope, standards, standing, and consequences when the Court resolves all of these issues by resort to the single method of flexible case by case balancing of individual and governmental interests.[63] Taken to its logical end, this balancing approach reduces all fourth amendment inquiries to two related fundamental questions: (1) How much and what type of privacy does a reasonably free society require? and (2) how much and what type of intrusion upon privacy is required to further a reasonably ordered society?[64] Although such questions may seem unduly abstract, they are appropriate considerations when determining the first premise—the fundamental value—embodied in the fourth amendment. I do not propose an answer to these questions, but merely suggest a process wherein

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tional Requirement, 59 MINN. L. REV. 251, 263-70 (1974); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendment*, 90 HARV. L. REV. 945 (1977).

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

61. The Chief Justice appears willing to overturn *Mapp* if certain conditions are met. *See* Stone v. Powell, 428 U.S. 465 (1976); Bivens v. Six Unknown Agents, 403 U.S. 388, 420-21 (1971)(Burger, C.J., dissenting).

62. *See, e.g.*, United States v. Havens, 446 U.S. 620, 633-34 (1980)(Brennan, J., dissenting); United States v. Janis, 428 U.S. 433 (1976). *Cf.* Mincy v. Arizona, 437 U.S. 385, 397-98 (1978)(in fifth amendment cases the Court distinguishes between the exclusion of unreliable evidence and the exclusion of trustworthy evidence for the extrinsic purpose of deterring police "misconduct").

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

64. The issues raised under the fourth amendment "bring into sharp focus the classic dilemma of order vs. liberty in the democratic state." J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 13 (1966). The fourth amendment is not unique in posing such fundamental questions. All public law issues are in a way reducible to a balancing of individual and governmental interests for the good of society. *See, e.g.*, Justice Jackson's description of the Bill of Rights as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." Watts v. Indiana, 338 U.S. 49, 61 (1949)(Jackson, J., concurring in part, dissenting in part).

the Court, the jury, and administrative officials all have a role in addressing the issues.

II. The Proposed Process

A. *The Court's Role*

Marbury v. Madison[65] and the concept of judicial review of legislative enactments is familiar to most laymen. Less familiar, however, is the establishment of the judiciary's supremacy over the jury in interpreting law. Determination of law by jury[66] was a widespread practice in this country until the 1850's[67] and was not eliminated in the federal courts until *Sparf v. United States*[68] in 1895. It is thus helpful to examine the holding of *Sparf* and the role the judiciary envisioned for itself.

The *Sparf* Court's recognition of judicial supremacy is based on the same premise as that described in *Marbury v. Madison*—"that it is emphatically the province and duty of the judicial department to say what the law is."[69] In rejecting a role for Maryland juries[70] in the resolution of search and seizure issues, Judge Charles E. Moylan, Jr., the noted fourth amendment scholar, asserted: "In a criminal case, the only issue for the jury is that of guilt or innocence. Anything that does not bear upon guilt or innocence is utterly foreign to the only task assigned to the jury."[71] In typically colorful fashion, Judge Moylan further

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65. 5 U.S. (1 Cranch) 137 (1803).

66. Jury *determination* of law is here used to refer to the practice of submitting questions of law to the jury. Authorizing the jury to determine law must be distinguished from the jury's extralegal power to *nullify* law. Jury nullification power exists because general verdicts of acquittal are not subject to review by the judiciary. *See generally* Scheflin, *Jury Nullification: The Right to Say No*, 48 S. Cal. L. Rev. 168 (1972).

67. *See* Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170 (1964).

68. 156 U.S. 51 (1895).

69. 5 U.S. (1 Cranch) at 177.

70. Maryland has retained the colonial practice of recognizing the jury as "the Judges of Law, as well as of fact." Md. Const., Declaration of Rights, art. 23 (formerly art. XV, § 5). *See generally* Dennis, *Maryland's Antique Constitutional Thorn*, 92 U. Pa. L. Rev. 34 (1943); Henderson, *The Jury as Judges of Law and Fact in Maryland*, 52 Md. St. B.A. 184 (1947); Markell, *Trial by Jury — A Two Horse Team or One Horse Team?*, 42 Md. St. B.A. 72 (1937); Prescott, *Juries as Judges of the Law: Should the Practice Be Continued?*, 60 Md. St. B.A. 246 (1955).

71. Ehrlich v. State, 42 Md. App. 730, 403 A.2d 371, 376 (1979). Without any discussion of the issue, the United States Supreme Court decreed that in the federal system the reasonableness of a search and seizure is "a question of fact and law for the court and not for the jury." Steele v. United States, 267 U.S. 505, 511 (1925).

stated that "[t]he jury is assigned the sole mission of determining 'Whodunnit?' "[72] From this premise Judge Moylan reasoned that because the fourth amendment's exclusionary rule serves the extrinsic purpose of deterring police misconduct and does not enhance the fact-finding process, "[i]t is not the function of the jury 'to police the police' by denying itself probative evidence."[73] The internal structure of such a syllogism cannot be faulted, but the premise is open to challenge.

The Constitution's framers did not perceive the sole mission of the jury as determining "whodunnit."[74] The prevailing view at the time of the adoption of the Constitution and throughout the first third of the nineteenth century saw the jury as a mainstay of liberty and an integral part of democratic government.[75] The common man in the jury box, just as the citizen in the voting booth, was seen as a central ingredient of a democratic theory that asserted the sovereignty of the people through self-government.[76] Throughout our country's history the jury's exercise of nullification power has been the most dramatic method of rejecting the limited role of determining "whodunnit." The acquittal rates for prosecutions under the Fugitive Slave Act[77] and Prohibition Laws[78] demonstrate juries' desire to expand their reach beyond factual questions and to address the law itself.[79] Even in the absence of dramatic political or moral issues the modern day jury occasionally "acquits the defendant in protest

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72. Erlich v. State, 42 Md. App. 730, 403 A.2d 371, 377 (1979). Judge Moylan's view of the jury's limited function as a factfinder is widely shared by the judiciary. *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 175 (3d Cir. 1973).

73. Erlich v. State, 42 Md. App. 730, 403 A.2d 371, 377 (1979).

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

75. *See* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170 (1964). The Articles of Impeachment of Justice Samuel Chase in 1895 include Justice Chase's denial of the jury's right to rule on the admissibility of evidence, and his refusal to allow counsel to argue to the jury that the Sedition Act was unconstitutional. REPORT OF THE TRIAL OF THE HON. SAMUEL CHASE (C. Evans, rptr., Baltimore 1805). *See generally* Lillich, *The Chase Impeachment*, 4 AM. J. OF LEGAL HIST. 49, 58 (1960).

76. "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them." 3 WORKS OF THOMAS JEFFERSON 81, 82 (Wash. ed. 1854).

77. Fugitive Slave Act, ch. 40, 12 Stat. 354 (1862).

78. National Prohibition Act, ch. 85, 41 Stat. 305 (1919)(repealed 1935).

79. *See* L. FRIEDMAN, THE WISE MINORITY 28-50 (1971); H. KALVEN & H. ZEISEL, THE AMERICAN JURY 291-92 (1966).

against a police or prosecution practice that it considers improper."[80]

The continued use of general verdicts indicates that the judiciary itself is not totally committed to the premise that the jury exists only to determine "whodunnit." If the jury's only function is to resolve factual disputes, it should be instructed to return only special findings of fact, and the trial judge should direct verdicts of guilty whenever reasonable jurors could not disagree on the facts.[81] The judiciary's refusal to review general verdicts of acquittal evidences acceptance of a function for the jury beyond resolution of factual disputes. In *Duncan v. Louisiana*[82] the Supreme Court recognized that the framers of the Constitution regarded the jury as "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[83] The concept of the jury as a check upon government power is more consistent with democratic theory[84] and the intent of the framers than is the view that the jury exists only to determine "whodunnit." The jury's ability to check government power is obviously enhanced when the jury is invested with the authority to determine law as well as to resolve factual questions.

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80. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 319 (1966).

81. *See* United States v. Garaway, 425 F.2d 185 (9th Cir. 1970)(directed verdict of guilty improper even where no issues of fact are in dispute). *See also* United States v. Davis, 413 F.2d 148, 153 (4th Cir. 1969); Sparf v. United States, 156 U.S. 51, 105-06 (1895).

82. 391 U.S. 145 (1968).

83. *Id.* at 156.

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

SPOONER, AN ESSAY ON TRIAL BY JURY 11-12 (republished 1st ed. 1971)(1st ed. 1852). That the determination of a reasonable search is a matter of constitutional law, not legislative law, does not definitively prohibit jury participation in the determination.

The troublesome aspect of the jury's determination of law is not the role of the jury vis-á-vis the judge, but the potential conflict of such a role with the individual defendant's constitutional rights. The view underlying the *Sparf* decision is that jury determination of law cannot be a one-way proposition. If the jury can overrule the judge and determine law adversely to the government, the jury must also be allowed to overrule the judge and determine law adversely to the defendant.[85] Thus, although allowing the jury to determine law might be seen as an acceptable device for checking government power in a conflict between the judiciary and the jury, the same device may become unacceptable when the rights of the individual defendant are considered.

Justice Story once stated that the individual defendant had the right "to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it."[86] Of course this statement begs the question by presuming that the judge and not the jury decides what is the law of the land. The question of judicial supremacy cannot be resolved merely by invoking the maxim that we are a government of laws, not a government of men.[87] It is not a self-evident truth that we are a government of laws when judges determine law but become a government of men when juries determine law. If jury decisions constitute the rule of men because juries decide cases on the mere basis of "random value judgments,"[88] then the judiciary, to provide rule of law, must lay claim to a superior basis of decision.

There are those who look to the judiciary for "The Right

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85. Sparf v. United States, 156 U.S. 51, 101-03 (1895). The jury serves as a safeguard against oppressive prosecutions only so long as the jury sides with the defendant against the government. If the community is hostile toward the defendant or his cause, the jury is more likely to side with the prosecution. *See* Broeder, *The Functions of the Jury: Facts of Fictions?*, 21 U. CHI. L. REV. 386 (1954). When the community is hostile toward the defendant, he looks to the judge for protection against the jury. Although the judiciary sometimes performs no better than the jury in times of panic or emergency (*see* Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945)) it is important to preserve the judiciary's role as a safeguard against arbitrary jury power.

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

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

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

Answer,"[89] but without an agreed upon methodology for discovering *the* answer, it is more realistic to look to the judiciary for answers that are simply consistent and principles. Judicial consistency in determining and defining law is presented as a means of avoiding the randomness of juries and the potentially different treatment of similarly situated defendants. In *Sparf* the judiciary promised consistency and uniformity by determining law according to settled, fixed legal principles. Stripped of superficial references to the law as the conclusion in a formal syllogism, the *Sparf* opinion identified two basic conflicts: (1) The defendant's right to uniformity and consistency in the law weighed against the utility of the jury's determination of law as a device for checking judicial power, and (2) the jury's uneven and unequal administration of justice versus "the orderly supervision of public affairs by judges."[90] The latter conflict is in part the age-old conflict of law and equity, and law again emerged victorious in *Sparf*.

In light of the judiciary's apparent inability to formulate settled, fixed legal principles of fourth amendment law, it appears that the benefits of judicial consistency were overvalued in *Sparf*. The Supreme Court's present case by case balancing approach to fourth amendment questions more closely resembles the flexibility expected from a jury rather than a formal, principled consistency of law.[91] A realistic look at the apparent consistency of current fourth amendment decisions could, in fact, again tip the scales in favor of jury determination of search and seizure law and lead to a reversal of *Sparf*. This Article, however, does not advocate a total shift of fourth amendment questions from the exclusive domain of judges to the exclusive domain of juries. It proposes, instead, in an attempt to accommodate the desirable aspects of uniformity and flexibility,

89. *See* Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361 (1979).

90. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 615 (1939). *See generally* M. WEBER, LAW IN ECONOMY AND SOCIETY (1954), suggesting that the judiciary and other personnel associated with the courts tend to develop a subculture of their own. The legal norms that emerge from this subculture derive more from the need for predictability and administrative convenience than from a concern for equity.

91. The Court's balancing efforts do not conform to "the disciplines analytical method described as 'legal reasoning,' through which judges endeavor to formulate or derive principles of decision that can be applied consistently and predictably." United States v. Havens, 446 U.S. 620, 633 (1980)(Brennan, J., dissenting). *See generally* Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

that both judge and jury be given a role in determining search and seizure law.

B. The Jury's Role

The Supreme Court clearly reneges on *Sparf*'s promise of uniformity and consistency each time it determines the reasonableness of a search as if it were a jury, free to assess the unique aspects of an individual case and to decide "justice" in that particular case without regard to general rules or principles.[92] Yet at other times the Court seeks to inject uniformity into fourth amendment law by treating all similarly situated defendants alike.[93] That the Court is hopelessly caught between the pulls of uniformity and flexibility is illustrated in *Pennsylvania v. Mimms*.[94]

The Court in *Mimms* was confronted with a police practice of ordering "all drivers out of their vehicle as a matter of course whenever they had been stopped for a traffic violation."[95] The Court addressed the general practice without inquiring whether the individual police officer had any suspicion that the particular motorist was likely to be armed and dangerous.[96] The Court relied upon statistical evidence which showed " 'that a significant percentage of murders of police officers occurs when the officers are making traffic stops,' "[97] and upheld the challenged practice. The Court balanced this generalized governmental interest in protecting police from attack by armed motorists against the generalized privacy interests of motorists as a class.[98]

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

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

Id. at 448.

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

94. 434 U.S. 106 (1977).

95. *Id.* at 110.

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

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

98. In its haste to balance the de minimus privacy interest of motorists against the

In holding that *all* motorists must obey an order to exit their autos after a lawful stop, the Court attempted to treat all similarly situated defendants alike. This uniformity was achieved, however, by sacrificing all flexibility. As Justice Stevens noted in dissent:

> The Court cannot seriously believe that the risk to the arresting officer is so universal that his safety is *always* a reasonable justification for ordering a driver out of his car. The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible.[99]

Justice Stevens' preference for an "individualized inquiry into the particular facts justifying every police intrusion"[100] is the ultimate in flexibility and reflects a traditional concern for adjudicative facts instead of legislative facts such as the statistical evidence cited by the majority. But such an approach does not fully consider the institutional role of the Supreme Court.

The Court controls its own docket and therefore possesses some discretion to choose the particular factual situations through which the law will be interpreted. The Court's prime institutional task is to deal with issues of significant public interest, not merely to do justice to the particular parties.[101] The

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weighty interest in police safety, the Court did not pause to give serious consideration to the "scope" question of whether the order to exit the vehicle constituted a seizure under the amendment.

99. Pennsylvania v. Mimms, 434 U.S. 106, 120-21 (1977)(Stevens, J., dissenting).

100. *Id.* at 116.

101. A court addressing a petition for discretionary review is not primarily concerned with the correctness of the judgment below. Rather, "review is generally granted only if a case raised an issue of significant public interest or jurisprudential importance

fourth amendment cases in which certiorari is granted are best seen as vehicles for broad policy statements designed to guide lower courts, prosecutors, defense counsel, and, most importantly, the police.[102] When the Court abandons *Sparf*'s promise of determining law according to general principles in favor of unstructured, ad hoc balancing of the total circumstances of the particular case, the Court leaves us with murky law for this day and this case only.[103]

The Court's role in dealing with broad policies and general rules necessarily conflicts with its role of protecting the rights of individual citizens.[104] Justice Stevens is obviously correct in asserting that individual defendants do not regard themselves as fungible items to be manipulated for the general good of society.[105] But it is impossible for the Court to maintain its institutional concern for general principles while remaining totally responsive to the peculiarities of each case. All individuals and all fourth amendment cases are somewhat unique, just as they all share certain common characteristics. As Professor Amsterdam has succinctly observed,

> Any number of categories, however shaped, is too few to en-

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or conflicts with controlling precedent." Bounds v. Smith, 430 U.S. 817, 827 (1977).

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

103. "If the number of pertinent factors of decision is too large, and each of them is constantly shifting, then categories of classification or criteria of analogy will be hard to draw and even harder to maintain." R. UNGER, LAW IN MODERN SOCIETY 197 (1976).

104. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978), and R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974), discussing the role of the judiciary in protecting individual rights even when utilitarian balancing might require sacrificing those rights for the common good. On a less theoretical level, the actual experience in Maryland is relevant. *See* note 71 *supra*. Prior to amendment in 1950, the Maryland Constitution's recognition of the jury as the final judges of law precluded appellate review of the legal sufficiency of the evidence. A defendant who suffered disfavor with the jury could not look to the judiciary for protection even when there was an "absolute failure of legal evidence to justify a conviction." Markell, *Trial by Jury—A Two Horse Team or One Horse Team?*, 42 MD. ST. B.A. 72, 81 (1937). In 1950, Article XV, section 5, of the Maryland Constitution was amended to read: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, *except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.*" MD. CONST., Declaration of Rights, art. 23 (Emphasis added). The Maryland experience demonstrates the importance of the judiciary as a safeguard against irresponsible juries. In arguing for a supplemental jury determination of reasonable searches, this article does not seek to diminish the role of the judiciary in protecting individual rights.

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

> compass 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.[106]

The conflicting benefits of uniformity and flexibility can best be achieved if the Court shares with the jury the determination of the reasonableness of a particular search. It is proposed that the judge make a preliminary ruling on the constitutionality of a contested search. The preliminary ruling would be final and unreviewable by the jury only if the search is deemed unconstitutional.[107] If the judge finds the search lawful and admits the fruits in evidence, the jury would hear all relevant evidence relating to the circumstances of the search and would be instructed:

> Members of the Jury, you are the final judges of the lawfulness of the search in this case. Whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, is not binding upon you as members of the jury and you may determine the law as you apprehend it to be in the case. You may consider the evidence produced by the search only if you determine that the search was reasonable within the meaning of the fourth amendment. If you find the search to be unreasonable within the meaning of the fourth amendment you must disregard all evidence produced by the search.[108]

Such an instruction recognizes the jury's traditional concern for the "justice" of a particular case without undue regard for general rules.[109] In situations such as *Mimms*, the judiciary could continue to apply the general rule that it is reasonable for police to protect themselves by ordering motorists to exit their automobiles. But a jury would be free to consider whether it was reasonable to require a particular pajama-clad, elderly, invalid person to exit his or her auto on a cold, dark, rainy night after

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

107. Such an approach to the fourth amendment is analogous to the Massachusetts rule governing the admission of confessions. *See* Jackson v. Denno, 378 U.S. 368, 378 n.8 (1964). *See generally* Annot., 1 A.L.R.3d 1251, 1252-56 (1965).

108. This instruction is a modification of the Maryland instruction on the jury's prerogative to determine substantive criminal law. *See* note 71 *supra*.

109. "The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case." Wigmore, *A Program for the Trial of a Jury*, 12 J. AM. JUD. SOC., 166, 170 (1929).

committing the heinous offense of failing to signal a left turn. Should the jury find the police conduct unreasonable under such circumstances, no great harm is done to the general rule. The broad guidelines for police would be preserved without sacrificing the privacy of all motorists to the quest for uniformity. An acceptable compromise would be reached between a government of law and a law tempered by individual justice.

That the jury is interpreting constitutional law in determining the reasonableness of a search should not be prohibitive. The Court no longer purports to determine fourth amendment law by the mechanical and objective methodology of legal formalism.[110] The Court determines the reasonableness of a search by deciding what is a reasonable, justifiable, legitimate expectation of privacy in our society[111] and by determining what degree of protection should be afforded to such expectations. The Court does not possess a unique ability to make such determinations. "The governing principle is that [such determinations] should be entrusted to whoever can do the job better. Is it more appropriate for an expert trained in the law or for twelve representatives of the community?"[112]

To the extent that the term *reasonable* expectation of privacy connotes common sense and community consensus,[113] it is suggested that the jury is best able to make such determinations. The jury can be seen as fulfilling its traditional fact-find-

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

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

111. The Court has characterized the expectations of privacy protected by the fourth amendment as those expectations which are "reasonable," United States v. Dionisio, 410 U.S. 1, 13-15 (1973); "justifiable," United States v. White, 401 U.S. 745, 752 (1971); and "legitimate," Rakas v. Illinois, 439 U.S. 128, 149 (1978).

112. Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 503 (1967).

113. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas v. Illinois, 439 U.S. 128, 143 n.12. (1978). *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 560 n.14 (1976); Terry v. Ohio, 392 U.S. 1, 17 n.14 (1967).

ing function by determining what expectations of privacy are currently held by the reasonable member of society and by weighing those expectations against the community's desire or need for order. Thus, in defining reasonable expectations of privacy, the jury would merely *describe* the existing social compromise and not *prescribe* some ideal compromise.

The terms *justifiable* and *legitimate* expectations of privacy connote more than an empirical examination of what is usually done in the community. The terms suggest the setting of an ideal toward which society is to progress. Such determinations require value judgments, political choices, and ultimately a "social judgment" about the ideal compromise between privacy and order in society.[114] How such judgments are made under our republican form of government is one of the most difficult questions our society faces, and a major concern of this symposium. Recognizing the jury's prerogative to play some part in such judgments is troublesome, but perhaps less so than the current practice of investing the judiciary with exclusive authority to make such judgments.[115]

In addressing the subject of rational judgments, Professor Langer has 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."[116] By approaching the fourth amendment in terms of privacy versus order and security, the Court has reached an insoluble question that is capable of two or more equally good answers. The Court cannot resolve the issue by an intellectual discovery of the "correct" answer. That does not mean there is no value in the Court's effort. The Justices' continual debate over the conflict of privacy and order in a free society may help sharpen the definition of ill-defined social norms so that they can become more readily understood, absorbed, and agreed to by the members of society.[117] Through the subtle, long-range, and still dimly understood process whereby our soci-

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114. *See generally* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 399 (1974). For a broad perspective on defining and identifying societal values and the "Moral Order" in our society, see Schwartz, *Moral Order and Sociology of Law: Trends, Problems, and Prospects*, 4 ANN. REV. SOC. 577 (1978).

115. *See generally* Ely, *The Supreme Court 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

116. S. LANGER, PHILOSOPHY IN A NEW KEY 11 (3d ed. 1957).

117. *See generally* Bohannan, *The Differing Realms of the Law*, 67 AM. ANTHROPOLOGIST 33-42 (1965).

ety defines, agrees to, and absorbs social norms, society will ultimately accept or reject the Court's particular accommodations of privacy and order.[118] However, enthusiasm for the Court's long-run contribution to the evolution of social norms must be tempered by the obvious realization that the Court is not a debating society that merely exhorts and persuades. The Court is an entity of great immediate power, and, in the short run, numerous lives are affected[119] by judicial perceptions of privacy and order which may be totally out of touch with modern society.

Of course the Court cannot postpone all decisions until society's final judgment is in.[120] Scholars (and critics of the Court) can afford to take the long view, but the Court must *act* in the fact of empirical uncertainty. Even imperfect decisions enjoying a degree of consistency (foolish or otherwise) are preferable to endless discussions of the philosophical mysteries of privacy in an ordered society.[121] The Court must and certainly will continue to act in the face of present uncertainty, just as the Justices certainly will continue a dialogue on the proper accommodation of privacy and order in society. What is proposed in this Article is a process for formally involving other entities in that dialogue, thus providing a more immediate and direct interaction between the Court and other voices in society.

The proposed model of fourth amendment decision-making is a three-tier process which recognizes a role for juries, courts, and police administrators.[122] The model resembles an inverted pyramid with the court functioning at the highest level in

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118. *See* S. SCHEINGOLD, THE POLITICS OF RIGHTS (1974).

119. "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).

120. History may make a final judgment on the past, but there is no existing *final* judgment on the present.

121. *See* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 761 (1963), where the author states:

> The point is that authority cannot be conceded to persons because they are right—the authority must preexist their right or wrong judgment and must survive it too—and judges decide cases by virtue of their authority, and not because they are any more likely to be right than other people.

122. The general benefits of police administrative rulemaking are explored elsewhere in great detail. *See generally* K. DAVIS, POLICE DISCRETION (1975); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1975); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972). Here, I merely consider the possibility of interaction between police administrators, courts, and juries when determining the reasonableness of a search.

addressing broad categories of conflict between privacy and order in society. The Court's balancing approach to the fourth amendment is better suited to a high level of abstraction than to refined calculations in individual cases. In classifying police-citizen encounters, one could realistically expect the Court to recognize broad categories such as border stops, stop and frisk, search incident to arrest, and the like. On the other hand, one would not expect categories that distinguish between searches of purses, shopping bags, briefcases, or duffel bags. Obviously, there is no magic number of correct categories, and, therefore, the dividing line between categories will always remain somewhat fuzzy. However, the dividing lines between categories can be more easily maintained than the dividing lines between individual fact situations; thus, the Court can better achieve the goal of uniformity and consistency in law. Although the categories must be derived from the initial premise regarding the accommodation of privacy and order in society, each recognized category would constitute an intermediate premise from which principled analysis could distill more specific rules. For the lower courts and police administrators, intermediate premises cut short the debate of first principles and avoid turning every fourth amendment case into a battle over ultimate moral truths.[123]

Whatever choices the judiciary makes regarding the accommodation of privacy and order in society, it is another entity—law enforcement agencies—which must function at the intermediate level of fourth amendment decision-making. Police agencies possess the expertise and practical experience necessary to refine each judicially recognized category into meaningful guidance for patrolmen. The police agency's implementation of court decisions necessitates the formulation of law enforcement policy which must, to some extent, be based on the value judgments and political choices not addressed by the courts when recognizing broad categories of reasonable searches.[124] At present, most law enforcement policy does not emanate from the administrative level of the police hierarchy, but is made primarily by individual patrolmen who are "the least qualified."[125]

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123. *See generally* Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967).

124. *See generally* K. DAVIS, POLICE DISCRETION (1975).

125. *Id.* at 165. *See also* A.B.A. SPECIAL COMMITTEE ON STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, THE URBAN POLICE FUNCTION 125 (1973); NATIONAL ADVI-

Such policy is an amalgamation of past practices, vague rules of thumb, racial and cultural stereotyping, and a great deal of off-hand guesswork about what the public really wants.[126] Police policy decisions are rarely accorded formal status as a legitimate part of fourth amendment decision-making,[127] and existing policies together with the underlying value choices are deliberately kept vague and secret to avoid scrutiny and criticism.[128] Formal recognition that administrative policy formulation is a proper part of fourth amendment decision-making would insure that the police hierarchy, the courts, and the public become involved in the process of formulating policy regarding reasonable searches.

At the lowest level of particularized fourth amendment decision-making, the jury would fulfill its traditional function of applying general principles and guidelines to the facts of the specific case. The jury would be free to consider the types of detailed factual situations that could never be included in broad judicial categories or general administrative rules. The process of classification necessarily focuses on certain common characteristics while ignoring the unique aspects of particular situations. The jury would put back into the decision-making process the particularized factual situations that were necessarily ignored in abstracting the common characteristics for a judicial category or administrative rule. In addition, by focusing on justice in individual cases, the jury would be reopening the dialogue over first principles regarding privacy and order in society,[129] a dialogue which the Court and administrative officials had to cut short in the interests of providing some uniformity and consistency in the administration of criminal justice.

This proposed model of fourth amendment decision-making recognizes a division of responsibility in that the court is primarily responsible for providing uniformity and consistency in the

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SORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, POLICE (1973).

126. K. DAVIS, POLICE DISCRETION 113 (1975).

127. *See generally* La Fave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

128. K. DAVIS, *supra* note 127, at 69-70.

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

law; police administrative officials are primarily responsible for developing clear rules readily understood by line officers; and the jury is primarily concerned with individual justice based on particular factual situations. Although there is this division of responsibility in the proposed model, there is also considerable overlap, since the decision-makers must all address the basic issues of privacy and order in society. I do not perceive such overlap as a drawback to the model, rather it is an important benefit because it affords an opportunity for formal interaction between the decision-makers.[130] For instance, the jury could be informed of the relevant administrative regulations and court decisions.[131] Such information would not limit the jury's authority but might help guide its discretion by acquainting the jury with the general principles and rules selected by other decision-makers who have considered fundamental questions of privacy and order in society. A second example of formal interaction might be in formulating regulations, where police administrators would benefit from court decisions that establish clearly defined categories identifying what is "settled" law, and what areas permit an exercise of discretion. The police would also benefit from an awareness that juries consistently approve or disapprove of certain types of searches. The police could then adjust their regulations and actual practices in order to gain jury approval.[132] A final example would be the benefit to the Court in rendering its decisions from the existence of specific administrative regulations. Such regulations free the Court from the highly criticized practice of writing detailed law enforcement manuals for police.[133]

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

131. In Maryland the courts have permitted liberal use of materials for the enlightenment of the jury. *E.g.*, Dillon v. State, 277 Md. 571, 357 A.2d 360 (1976)(from the legislative preamble to a criminal statute); Brown v. State, 222 Md. 290, 302, 159 A.2d 844, 850 (1960) (from opinions of the appellate court); Jackson v. State, 180 Md. 658, 667, 26 A.2d 815, 819 (1942)(reading from legal textbooks).

132. When juries consistently refuse to convict for certain substantive offenses, prosecutors and police often abandon efforts to enforce such laws. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 310 (1971)(legislative change in reaction to jury response).

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

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

As it has in the death penalty cases,[134] the Court would also benefit from some systematic accounting of juries' determinations of reasonable searches. Should juries in the aggregate decide uniformly regarding a type of search (e.g., suppression of all wiretap evidence), the juries would thereby indicate a prevailing moral consensus.

III. CONCLUSION

The division of responsibility and interaction in the proposed fourth amendment decision-making process will not produce the singular "right" answer regarding the balance of privacy and order in society. The process is for this reason subject to criticism from those who maintain that the process is largely irrelevant, and that the ultimate test of any decision is its "correctness," however one defines correctness.[135] The proposed model is based instead on the view that it is at times appropriate for the law to emphasize process rather than to focus on the perceived "correctness" of a substantive result.[136] One may hope, with Professor Fuller, that this emphasis on process as "The Inner Morality of Law" will produce a correct decision in terms of a greater morality. I believe, however, that it is adequate to rest on the realization that, with respect to the clash of privacy and order in society, there is "an instinctive apprehension among a political people that there is usually much to be said for both sides of a question, and that further knowledge may reconcile the seemingly incompatibles."[137] A fourth amendment decision-making process that recognizes a role for the judiciary, the executive, and the people ("represented" by the jury)[138] allows our

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

134. For a discussion of the role of the aggregate decisions of juries in death penalty cases, see Schwartz, *The Supreme Court and Capital Punishment: A Quest for Balance between Legal and Societal Morality*, 1 LAW AND POL'Y Q. 285 (1979).

135. *See, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977).

136. *See generally* A. BICKEL, THE MORALITY OF CONSENT (1975); L. FULLER, THE MORALITY OF LAW (1969).

137. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 391 (1946)(quoting DAMPIER-WHETHAM, A HISTORY OF SCIENCE 214 (1930)).

138. Juries are at best an imperfect means of representation. *See*, J. VAN DYKE, JURY SELECTION PROCEDURES 23-44 (1977). Regardless of however imperfectly selected, the jury is a means of involving citizens as active participants in the evolution of a

society to maintain a formal dialogue on the proper accommodation of privacy and order. By maintaining that dialogue, we accord respect to the views of all participants and preserve the hope that the dialogue will produce further knowledge and insights which may yet reveal a superior answer.

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proper balance between privacy and order in a democratic society. As such the jury stands as a safeguard against a potentially insensitive and insulated judiciary that currently exercises exclusive control over the determination of reasonable searches.