

DODGING A BULLET, BUT OPENING OLD WOUNDS IN FOURTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

Professor Anthony Amsterdam once predicted that judicial recognition of a sliding scale of probable cause would produce much more slide than scale.¹ Until the decision in *Winston v. Lee*,² that prediction proved accurate because the United States Supreme Court had consistently "scaled down" the level of probable cause required for a constitutional search.³ This scaled approach to the fourth amendment assumed that a hierarchy of privacy interests existed, which were to be balanced against a hierarchy of governmental interests.⁴ In theory, this balancing process would remain neutral because some privacy interests would outweigh certain governmental interests, just as other governmental interests would prevail over specific rights of privacy. In practice, however, the Court regularly accorded greater weight to

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¹ Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974).

² 105 S. Ct. 1611 (1985).

³ The investigative-stop cases, from *Terry v. Ohio*, 392 U.S. 1 (1968) to *United States v. Sharpe*, 105 S. Ct. 1568 (1985), best illustrate the consistent watering down of the probable cause requirements necessary to authorize intrusions by government officials. In *Sharpe*, the Court permitted an extended investigatory detention when the delay resulted in part from the evasive actions of the defendant's accomplice. *Sharpe*, 105 S. Ct. at 1576. The arresting officer in that case had "decided to make an 'investigative stop' " because the pickup truck driven by Sharpe's accomplice "was riding low in the rear" and appeared to be "heavily loaded." *See id.* at 1571. The Court approved this stop, noting that the officer possessed "clear justification to stop the vehicles and pursue a limited investigation." *Id.* at 1574 n.3. Justice Brennan disagreed with this conclusion and observed that the stop may have been made because the officer who had been following the defendants in an unmarked car "was about to run out of gas." *See id.* at 1588 & n.9 (Brennan, J., dissenting); *see also id.* at 1583-84 (Marshall, J., concurring) (criticizing Court's approval of the stop).

⁴ *See* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 766. *See generally* 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, 1016-35 (1973) (discussing the magnitude of various governmental and privacy interests); McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55, 67-91 (1978) (advocating a hierarchy of privacy interests).

the alleged governmental interest,⁵ and the theoretically neutral balancing process uniformly produced cases that diluted fourth amendment protections. As a result, several critics suggested that the Court was manipulating the balancing process in order to achieve the desired result of aiding law enforcement agencies.⁶

The *Winston* Court appeared to answer this criticism by demonstrating that a sliding scale of probable cause or reasonableness⁷ was not "a one way street,"⁸ which always favored law enforcement interests.⁹ The result in *Winston* revealed that in an appropriate situation, a scaled approach to the constitutionality of searches and seizures could produce a decision favoring a heightened protection of privacy.¹⁰ *Winston* might thus be considered an indication of the Supreme Court's evenhanded application of a balancing-of-interests *process* without regard to whether the substantive result favored the prosecution or the defense. Such a view is superficial, however, because the case more accurately represents a continuation of the Court's drift away from an emphasis on process and toward the previously discarded practice of reading substantive value judgments into the reasonableness clause of the fourth amendment.

The *Winston* case involved a defendant who had been

⁵ Justice Brennan has characterized the balancing process as one "in which the judicial thumb apparently will be planted firmly on the law-enforcement side of the scales." *United States v. Sharpe*, 105 S. Ct. 1568, 1593 (1985) (Brennan, J., dissenting).

⁶ Courts often "misconstrue the fourth amendment and fudge the standards of probable cause" to avoid application of the exclusionary rule. Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 JUDICATURE 351, 356 (1979); see also Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 982-83 (1977) (criticizing the Court's treatment of the exclusionary rule and the unpredictable nature of the balancing process).

⁷ A "sliding scale of probable cause" and a "flexible concept of reasonableness" are merely alternative expressions of a single methodology—the balancing of conflicting governmental and individual interests. See *infra* notes 162-168 and accompanying text.

⁸ *Gooding v. United States*, 416 U.S. 430, 465 (1974) (Marshall, J., dissenting).

⁹ See *Winston*, 105 S. Ct. at 1620; see also *Berger v. New York*, 388 U.S. 41 (1967). In *Berger*, the Court struck down a New York statute permitting wiretaps. *Id.* at 44. In a concurring opinion, Justice Stewart indicated that he would permit some electronic eavesdropping. *Id.* at 69 (Stewart, J., concurring). Nevertheless, he stated that severe intrusions upon privacy, such as wiretaps, should require "the most precise and rigorous standard of probable cause." *Id.*

¹⁰ In addition to the *Winston* decision, the Court recently held that the use of deadly force to seize a fleeing, unarmed felon constitutes an unreasonable seizure notwithstanding the existence of probable cause to make an arrest. See *Tennessee v. Garner*, 105 S. Ct. 1694, 1700-01 (1985). But see *United States v. Sharpe*, 105 S. Ct. 1568 (1985). *Sharpe*, which was decided a week before *Garner*, approved a questionable investigative stop. See *supra* note 3 (discussing *Sharpe*).

wounded during an attempted robbery.¹¹ The suspect, brandishing a firearm, had approached a storekeeper who was closing his shop.¹² The storekeeper then drew his own gun and fired at his assailant.¹³ After an exchange of gunfire,¹⁴ the would-be robber fled the scene.¹⁵ The police soon arrived and found Rudolph Lee approximately eight blocks from the location of the shooting.¹⁶ He had apparently suffered a gunshot wound to the chest.¹⁷ The officers arrested Lee, and he was subsequently identified by the shopkeeper, who had also been shot during the gun battle.¹⁸ Lee was charged with attempted robbery, use of a firearm during a felony, and malicious wounding.¹⁹

The prosecution then sought an order requiring Lee to undergo surgery for the removal of what appeared to be a bullet lodged in his left shoulder.²⁰ After several evidentiary hearings,²¹ the trial judge ordered surgical removal of the object, and the state supreme court affirmed.²² The Federal courts subsequently refused to enjoin the surgery.²³ Immediately prior to the operation, however, an X ray revealed that the suspected bullet would be more difficult to remove than previously thought.²⁴ Nonetheless, the state courts denied Lee's petition for a rehearing.²⁵ This time, however, a Federal district court enjoined the

¹¹ See *Winston*, 105 S. Ct. at 1614.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* During the gun battle, the shopkeeper, Ralph Watkinson, was shot in the legs. *Id.* He also noticed that the defendant had been hit in the left side. See *id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* The police took Lee to the hospital where the shopkeeper was being treated. See *id.* The shopkeeper identified Lee in the emergency room. See *id.*

¹⁹ *Id.*

²⁰ *Id.* The prosecution hoped to match the markings on the bullet in Lee's shoulder with the markings on a test bullet fired from the shopkeeper's gun. See *id.*

²¹ See *id.* At the initial hearing, the prosecution's expert stated "that the surgical procedure would take 45 minutes and would involve a three to four percent chance of temporary nerve damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death." *Id.* Subsequently, the same doctor testified that the projectile was closer to Lee's skin than he had originally thought. *Id.* Consequently, the doctor believed the operation "could be performed under local anesthesia, and would result in 'no danger.'" *Id.* (citation omitted).

²² *Id.* at 1615.

²³ *Id.*

²⁴ *Id.* The X ray showed that the bullet was located "deep in muscular tissue in [Lee's] chest, substantially deeper than had been thought when the state court granted the motion to compel surgery." *Id.* As a result, a general anesthetic would be required. *Id.*

²⁵ *Id.*

operation,²⁶ and the Fourth Circuit upheld the injunction.²⁷ The United States Supreme Court then granted the state's petition for certiorari.²⁸

The Court began its opinion in *Winston* by "[p]utting to one side the procedural protections of the warrant requirement."²⁹ The parties agreed that the defendant had received "a full measure of procedural protections"³⁰ and that the state had met the "ordinary" standard of probable cause for a search.³¹ "Notwithstanding the existence of probable cause"³² and the state's full compliance with the procedures required by the warrant clause, the Court found that the reasonableness clause of the fourth amendment demands "a more substantial justification" than probable cause.³³ The Court viewed this higher level of justification as a substantive requirement of the reasonableness clause—a requirement unrelated to the procedural standards of the warrant clause.³⁴ Thus, the Court refused to permit the state to invade a suspect's body in a quest for incriminating evidence.³⁵

This recognition of the substantive values contained within the reasonableness clause will focus new attention upon the long-standing controversy over the relationship of the fourth amend-

²⁶ *Lee v. Winston*, 551 F. Supp. 247, 253-61 (E.D. Va. 1982), *aff'd*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985).

²⁷ *Lee v. Winston*, 717 F.2d 888 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985).

²⁸ *Winston v. Lee*, 466 U.S. 935 (1984).

²⁹ *Winston*, 105 S. Ct. at 1616.

³⁰ *Id.* at 1618. The defendant had been afforded "a full adversary presentation and appellate review." *Id.* at 1618 n.6. The Supreme Court refused to decide whether "such special procedural protections" are constitutionally required when a state seeks to compel a surgical search. *Id.*

³¹ *Id.* at 1618.

³² *Id.* at 1617. The Court observed that "[a] compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Id.* at 1616.

³³ *Id.* at 1620. Justice Brennan, writing for the Court, characterized the intrusion on Lee's privacy interests as "severe." *Id.* He stated that the proposed "surgery involve[d] a virtually total divestment of [Lee's] ordinary control over surgical probing beneath his skin." *Id.* at 1619. Such an intrusion, Justice Brennan concluded, "would be 'unreasonable' under the Fourth Amendment." *Id.* at 1620.

³⁴ *See id.* at 1616.

³⁵ *See id.* at 1620. Although Chief Justice Burger concurred in the Court's judgment, he stated that he would uphold a "detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." *Id.* at 1620 (Burger, C.J., concurring). Approximately three months later, a majority of the Court explicitly approved this type of seizure. *See United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3312 (1985).

ment's two conjunctive clauses.³⁶ Is the reasonableness clause a "blank check," which the Court may fill in with the substantive values it considers appropriate, or is constitutional reasonableness defined by the "bright-line" procedural requirements of the warrant clause?

I. OF BRIGHT LINES AND BLANK CHECKS

The Supreme Court has often acknowledged that it faces a dilemma when interpreting the fourth amendment. While the police sometimes need bright-line rules for guidance and certainty,³⁷ they must also be accorded the flexibility necessary to respond appropriately to the variety of factual situations confronting them.³⁸ The recent case of *Pennsylvania v. Mimms*³⁹ best illustrates that the Court is hopelessly caught between the need for clear-cut principles and the desire for on-the-job flexibility.

In *Mimms*, the Supreme Court considered a police practice of "order[ing] all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation."⁴⁰ The

³⁶ The fourth amendment provides as follows:

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.

³⁷ See, e.g., *United States v. Ross*, 456 U.S. 798, 822, 825 (1982). The Court has observed, "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (footnote omitted). Similarly, Professor LaFave states: "[T]he rules governing search and seizure are more in need of greater clarity than greater sophistication. . . . [A]n ounce of application is worth a ton of abstraction." LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 321 (1982) [hereinafter cited as LaFave, *Imperfect World*]; see also Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 333 (1973) (search-and-seizure doctrine must be "easily understandable by the persons sought to be deterred"); LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 [hereinafter cited as LaFave, "Case-by-Case Adjudication"] (fourth amendment rules should be "expressed in terms that are readily applicable by the police").

³⁸ See *United States v. Sharpe*, 105 S. Ct. 1568, 1576 (1985); *Illinois v. Gates*, 462 U.S. 213, 231-32, 239 (1983). In *Sharpe*, Chief Justice Burger stated, "A court . . . should . . . consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." *Sharpe*, 105 S. Ct. at 1576.

³⁹ 434 U.S. 106 (1977).

⁴⁰ *Id.* at 110.

Court addressed only this general practice and refused to inquire whether the police officer had any suspicion that this particular motorist was likely to be armed and dangerous.⁴¹ In upholding the practice, the Court relied upon statistical evidence showing " 'that a significant percentage of murders of police officers occurs when the officers are making traffic stops.' " ⁴²

Thus, the *Mimms* Court balanced the generalized governmental interest in protecting the police from attack by armed motorists against the generalized privacy interests of motorists as a class.⁴³ In holding that *all* motorists must obey an order to exit their automobiles after a lawful stop,⁴⁴ the Court attempted to treat all similarly situated defendants alike and to give "bright-line" guidance to police officers in the field. As Justice Stevens noted in dissent, however, this uniformity was achieved by sacrificing all flexibility:

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.⁴⁵

Justice Stevens's preference for an "individualized inquiry into

⁴¹ See *id.* at 109. Indeed, 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.*

⁴² *Id.* at 110 (quoting *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)).

⁴³ See *id.* at 110-11.

⁴⁴ See *id.* at 111 n.6.

⁴⁵ *Id.* at 120-21 (Stevens, J., dissenting).

the particular facts justifying every police intrusion”⁴⁶ represents the ultimate in flexibility and reflects the traditional judicial preference for adjudicative facts, rather than legislative facts such as the statistical evidence cited by the majority.⁴⁷ Such an approach, however, fails to consider fully the institutional role of the Supreme Court. The Court controls its own docket and is free to choose the particular factual situations in which to interpret the law. The Court’s prime institutional task is to deal with issues of significant public interest, not merely to do justice to the particular parties in the relatively rare case in which certiorari is granted.⁴⁸ 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.⁴⁹ Nevertheless, the Court’s role in protecting the rights of individual citizens necessarily conflicts with its role in formulating broad policies and bright-line rules designed to provide clear guidance to law enforcement agencies.⁵⁰

The competing goals of certainty and flexibility, so important in regulating the police power, are also legitimate concerns when addressing the exercise of judicial power.⁵¹ Is the warrant clause a bright line, which limits and structures the Court’s authority to interpret the fourth amendment, or does the reasonableness clause

⁴⁶ *Id.* at 116 (Stevens, J., dissenting).

⁴⁷ See Bacigal, *supra* note 4, at 784.

⁴⁸ See *Bounds v. Smith*, 430 U.S. 817, 827 (1977). In *Bounds*, the Court stated: “[A] court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below. Rather, review is generally granted only if a case raises an issue of significant public interest or jurisprudential importance or conflicts with controlling precedent.” *Id.*; see also *Ross v. Moffitt*, 417 U.S. 600, 615 (1974) (public impact of case is important factor in discretionary review).

⁴⁹ One author has noted: “Without individuality, there is no function for privacy. When we become fungible goods to be manipulated by government, there can be no recognition of idiosyncracies, no private realms to husband against intrusion.” Kurkland, *The Private I*, U. CHI. MAG., Autumn 1976, at 7, 36.

⁵⁰ See Amsterdam, *supra* note 1, at 377. Professor Amsterdam states:

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. The question must be answered with a due regard for the practical workings of the institutions that administer, and are governed by, any particular set of rules.

Id.

⁵¹ See, e.g., *New Jersey v. T.L.O.*, 105 S. Ct. 733, 758-59 (Brennan, J., concurring in part and dissenting in part). Justice Brennan criticized the Court’s consistent application of “balancing tests” as “an unanalyzed exercise of judicial will.” *Id.* at 758 (Brennan, J., concurring in part and dissenting in part). He stated that “the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good.” *Id.* at 759 (Brennan, J., concurring in part and dissenting in part). Furthermore, Justice Brennan maintained, “this Court has an obligation to provide

provide an ambiguous bequest of power (a blank check), which the Court may exercise as it deems appropriate? The language of the amendment itself is not dispositive because it seems to afford both a bright line and a blank check. The first clause of the amendment sets forth the blank check, acknowledging that some searches are reasonable and others are not.⁵² No definition of reasonableness is offered in this clause, however, and the Court must look to history and contemporary values in order to define the substantive content of the term. In contrast, the second clause of the amendment reads like a bright-line rule, setting forth specific requirements: the issuance of a warrant, probable cause, oath or affirmation, and specificity in describing the place to be searched and the items to be seized.⁵³ Thus, because the amendment provides both a bright line and a blank check, the Court must deal with the problem of reconciling the two clauses. Consideration of this issue has produced varying results during the long history of the fourth amendment.

The Intent of the Framers

If anything is clear about the history of the fourth amendment, it is that the amendment did not spring forth from a purely abstract consideration of fundamental rights.⁵⁴ The amend-

some coherent framework to resolve such questions on the basis of more than a conclusory recitation of the results of a 'balancing test.' " *Id.*

In addition, a distinction must be drawn between bright-line rules imposed by the Court to facilitate efficient administration of the law and bright-line rules derived from the Constitution. *See Tennessee v. Garner*, 105 S. Ct. 1694, 1709 (1985) (O'Connor, J., dissenting) (noting difference between constitutional and "purely judicial . . . limits on governmental action"). Indeed, the history of the fourth amendment exclusionary rule exemplifies the need for such a distinction. In 1961, the Court recognized the exclusionary rule as constitutionally derived. *See Mapp v. Ohio*, 367 U.S. 643, 648-49 (1961). Nevertheless, the current Supreme Court characterizes the rule as a judicially created device, which is not constitutionally mandated. *See United States v. Leon*, 468 U.S. 897, 906 (1984).

⁵² *See supra* note 36 (setting forth language of fourth amendment). The Supreme Court recently explained its view of the amendment's first clause: "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 105 S. Ct. 1568, 1573 (1985).

⁵³ *See supra* note 36. Some flexibility exists in defining the requirements of the warrant clause. *See Bacigal, supra* note 4, at 768-76. Probable cause is at times a rigid standard and at other times a flexible concept. *See id.* Nevertheless, there is a difference, at least in degree, between the flexibility inherent in a judicial determination of probable cause and the flexibility of a free-floating standard of reasonableness. *Cf. infra* notes 157-170 and accompanying text (discussing blurring of distinction between determinations of probable cause and reasonableness).

⁵⁴ *See N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 79-105 (1937). More so than the other amendments, "the fourth amendment was the product of particular events that

ment's roots lie in the colonists' actual experience with general warrants and writs of assistance, which were used to enforce British restrictions on free trade.⁵⁵ In an effort to extract increased revenues from the American Colonies, the British government enacted various measures to regulate colonial trade.⁵⁶ These regulations were enforced by royal customs officers,⁵⁷ who regularly entered and searched buildings with no formal authority other than the claim that their commissions as crown officers gave them the general power to search and seize.⁵⁸ When the colonists resisted these practices, writs of assistance were issued, empowering the customs officers to enlist the aid of constables and the militia.⁵⁹ The general warrants and writs of assistance relied upon by customs officers were alien in form to the modern search warrant. These early warrants required no probable cause; they did not specify a particular location to be searched; nor did they specify the items to be seized.⁶⁰ Furthermore, the general warrants were neither limited in time nor returnable to the judiciary. These warrants and the writs of assistance were valid for the life of the sovereign and in fact were negotiable from one officer to another.⁶¹

The colonists' hostility to these police tactics was based on two interrelated premises: first, the right of privacy was meaningless and a man's home was not his castle so long as there was a breath of life in a customs officer; second, the customs officers possessed the unchecked power to act arbitrarily and oppres-

closely preceded the Constitution and the Bill of Rights." T. TAYLOR, *Search, Seizure, and Surveillance*, in *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 19, 19 (1969). Professor Taylor asserts that researchers "can find specified in the pages of history the abuses against which the fourth amendment was particularly directed." *Id.* See generally J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19-48 (1966) (outlining the history of the fourth amendment).

⁵⁵ See J. LANDYNSKI, *supra* note 54, at 30-32.

⁵⁶ See Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791, 795 (1981).

⁵⁷ See C. UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 15 (1960). Officers of men-of-war stationed in America were also sworn in as customs officers with authority to seize and prosecute violators of the trade acts. *Id.* at 39. The British Admiralty stationed 44 ships, ranging from sloops to 50-gun vessels, along the east coast in an effort to enforce the King's trade decrees. *Id.*

⁵⁸ J. LANDYNSKI, *supra* note 54, at 31; see also N. LASSON, *supra* note 54, at 55 (describing the practices of royal customs officials).

⁵⁹ N. LASSON, *supra* note 54, at 53-54.

⁶⁰ *Id.* at 54.

⁶¹ See *id.* In addition, customs officials and naval officers were awarded a percentage of condemned seizures. C. UBBELOHDE, *supra* note 57, at 39. This incentive caused heated competition between land-based customs officials and naval officers, leading to a practice of "first come, first seize." *Id.* at 40.

sively.⁶² The blatant misuse of this power was demonstrated in one dramatic case in which a customs officer was called before a judge to answer for some minor offense.⁶³ At the conclusion of the case, the customs officer arrogantly announced: "I will [now] show you a little of *my* power. I command you to permit me to search your house for uncustomed goods."⁶⁴

At a minimum, therefore, the fourth amendment must be seen as an attempt to prohibit the historical abuses associated with general warrants and writs of assistance. The first precedent for the fourth amendment was the Virginia Bill of Rights of 1776, which specifically addressed the issuance of general warrants:

That general warrants whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.⁶⁵

The Virginia provision did not expound broad rights to reasonable security or privacy. It limited its coverage to general warrants and specifically provided only the following protections: (1) a definition of general warrants (lack of probable cause and particularity); (2) a characterization of such warrants as "grievous and oppressive"; and (3) a prohibition upon the issuance of such warrants.

The initial draft of the fourth amendment submitted to Congress was, like the Virginia approach, a limited prohibition of general warrants:

The right of the people to be secured in their persons,

⁶² See J. LANDYNSKI, *supra* note 54, at 34; N. LASSON, *supra* note 54, at 59-60. While popular lore emphasizes taxation without representation, "the means of enforcing the new taxes were as much an innovation in colonial policy and as much a threat to equality of treatment in the empire as the taxes themselves." Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, 16 WM. & MARY Q. 459, 460 (1959).

⁶³ See N. LASSON, *supra* note 54, at 60. James Otis described this case in his famous speech denouncing writs of assistance. See *id.* John Adams later observed: "[Otis's speech] was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free." *Id.* at 59 (citation omitted).

⁶⁴ *Id.* at 60 (emphasis added). Recent dissatisfaction with the exclusionary rule has caused the Supreme Court to denigrate the need to regulate police power. See *United States v. Leon*, 468 U.S. 897, 918, 926 (1984). Criticism of the modern exclusionary rule, however, should not confuse the procedural device of excluding evidence with the historically recognized goal of regulating the discretionary power of law enforcement officers.

⁶⁵ N. LASSON, *supra* note 54, at 79 n.3 (citation omitted).

houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.⁶⁶

This initial draft accomplished the same three purposes as the Virginia provision: (1) it defined general warrants (adding lack of an oath or affirmation to the elements of lack of probable cause and particularity); (2) it identified such warrants as grievous and oppressive *because* they violate the right of the people to be secure in their persons, houses, papers, and effects; and (3) it prohibited the issuance of such warrants. This prohibition of general warrants *because* they violate fundamental rights of the people may presuppose—but does not create—an independent right to privacy and security. In this context, the reference to the general right of the people to be secure in their persons, houses, papers, and effects merely explains why general warrants are improper. Thus, “the general principle was stated merely as a basis for the minor premise condemning general warrants and . . . the abuse attempted to be prevented was that of general warrants only.”⁶⁷

Had the fourth amendment been approved in its initial form it would have prohibited only the issuance of general warrants, and it would have had the same limited significance as the third amendment’s prohibition of the quartering of soldiers in private dwellings.⁶⁸ Both the third and fourth amendments would be handy to have around to prevent the recurrence of particular practices, but neither amendment would have any far-reaching effect. Consider, however, the ambiguities created if a reasonableness clause had been grafted onto the third amendment:

[The right of the people to be secure in their houses shall not be violated by the unreasonable quartering of soldiers, and] [n]o soldier shall . . . be quartered in any house . . . but in a manner prescribed by law.⁶⁹

How would a court interpret such a provision? Could the quartering of soldiers be unreasonable even if prescribed by law?

In fact, such a general statement was added to the fourth

⁶⁶ *Id.* at 101.

⁶⁷ *Id.* at 81 n.10. This was the interpretation given to the Pennsylvania provision on search and seizure. *See id.* at 81. The Pennsylvania and Virginia provisions served as models for the fourth amendment. *See infra* notes 78-79 and accompanying text.

⁶⁸ *See* U.S. CONST. amend. III. The third amendment provides, “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.” *Id.*

⁶⁹ *Id.*

amendment as a separate clause, and therein lies the origin of the reasonableness clause/warrant clause controversy. The process through which this general clause was added to the fourth amendment provides little meaningful insight into the intent of the framers.⁷⁰ The original draft⁷¹ was objected to because of an error in phraseology, and the amendment was reworded to read as follows:

The right of the people to be *secure* in their persons, houses, papers, and effects, *against unreasonable searches and seizures*, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.⁷²

Congressman Benson, the chairman of the committee to arrange the amendments, objected to the phrase "by warrants issuing."⁷³ He thought this provision too limited and proposed altering it to read, "and no warrant shall issue."⁷⁴ Although his proposal was initially defeated, it was ultimately incorporated into the final version of the amendment.⁷⁵

Benson's proposal effectively split the amendment into two clauses, and according to some historians, "[t]he general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope."⁷⁶ Whether this was truly the intent of all, some, or none of the drafters cannot be ascertained.⁷⁷ At the time of its adoption,

⁷⁰ See N. LASSON, *supra* note 54, at 101-03.

⁷¹ The original draft of the fourth amendment provided as follows: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." *Id.* at 101.

⁷² See *id.* (emphasis added).

⁷³ *Id.* (citation omitted).

⁷⁴ *Id.* (citation omitted).

⁷⁵ See *id.* The House of Representatives actually voted down a motion to phrase the amendment in its present form. See *id.* When Benson reported the version of the amendments agreed upon by the House, however, the clause appeared in the form the House had previously rejected. *Id.* The House failed to notice the alteration. *Id.* at 102. The Senate later adopted the amendment in its present form, and it was ratified by the states. *Id.* at 102-03; see also J. LANDYNSKI, *supra* note 54, at 41-42 (discussing Benson's part in the adoption of the fourth amendment). Thus, "[i]t cannot be maintained . . . that the Fourth Amendment as it is now worded is not properly a part of the Constitution." N. LASSON, *supra* note 54, at 102; see also *supra* note 36 (present language of the fourth amendment).

⁷⁶ N. LASSON, *supra* note 54, at 103.

⁷⁷ See Amsterdam, *supra* note 1, at 397-98. It is fallacious to consider the framers "a collection of bodies having but one head" and to assume that they reached but one true consensus. *Id.* at 398. Professor Amsterdam observes, "The agreement of

there were two influential precedents for the fourth amendment: the Virginia model, which merely prohibited general warrants, and the Pennsylvania provision,⁷⁸ which spoke of a broad right to be free of unreasonable searches and seizures.⁷⁹ The Pennsylvania Constitution, however, used the term "therefore" to connect the broad right to be free of unreasonable searches and seizures with the prohibition of general warrants.⁸⁰ Thus, in spite of its broadly worded premise, the Pennsylvania provision was still merely a prohibition of general warrants, as were the Virginia model and the original draft of the fourth amendment. As ultimately adopted, however, the fourth amendment connected the broad right to be free of unreasonable searches with the specifics of the warrant clause by substituting the word "and" in place of "therefore." This change from a single-barreled prohibition of general warrants to two arguably divisible clauses had no clear precedent in colonial practice.⁸¹

History has thus identified the question of the relationship of the amendment's clauses, but has not provided an answer. In one historical study, Professor Taylor endorses the blank-check approach and asserts that the amendment was intended as a condemnation of general warrants and an approval of special warrants.⁸² Beyond this preference for special warrants, Professor Taylor ob-

many minds upon the decision to disapprove particular practices does not signify the least agreement to approve other practices not upon the agenda." *Id.*

⁷⁸ See N. LASSON, *supra* note 54, at 80-81. In addition, the Declaration of Rights of the Massachusetts Constitution was the first to use the term "unreasonable searches and seizures." *Id.* at 82.

⁷⁹ See *id.* at 81 n.11. Section 10 of the Pennsylvania Declaration of Rights provided

[t]hat the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, are contrary to that right, and ought not to be granted.

Id. Lasson asserts that "[t]he word 'unreasonable' is imputed" into the first clause by virtue of the description of a permissible search contained in the second clause. *Id.*

⁸⁰ See T. TAYLOR, *supra* note 54, at 42; see also *supra* note 79 (text of Pennsylvania provision).

⁸¹ The Massachusetts provision, which split the right to be free from unreasonable searches and the specific warrant requirements into two separate sentences, came the closest to the configuration adopted by the framers of the fourth amendment. See J. LANDYNSKI, *supra* note 54, at 38-39; see also T. TAYLOR, *supra* note 54, at 42 (Massachusetts Constitution provides clearest antecedent to fourth amendment).

⁸² See T. TAYLOR, *supra* note 54, at 41-44.

serves, the framers had nothing to say about broad rights of privacy or security from governmental intrusion.⁸³ Thus, he maintains, the reasonableness clause authorizes the judiciary to find searches "reasonable" even when the warrant clause is not satisfied.⁸⁴ Another legal historian, Jacob Landynsky, characterizes Taylor's view as "clearly" unfaithful to the intended meaning of the fourth amendment.⁸⁵ Landynsky follows the bright-line approach and argues that the warrant clause defines and emphasizes the first clause by identifying "the kind of search that is *not* unreasonable"—namely, one carried out under the safeguards provided by a special warrant.⁸⁶

In over 100 years of interpreting the fourth amendment,⁸⁷ the Supreme Court has split along the same lines as the legal historians. The judicial split has been a shifting one;⁸⁸ the Court has moved through various stages, first emphasizing reasonableness, then advocating the primacy of the warrant clause. Ultimately, in *Winston*, the Court once again recognized the dominance of the reasonableness clause.

II. THE INITIAL PRIMACY OF THE REASONABLENESS CLAUSE— THE BLANK CHECK IS ACCEPTED

In the first important search-and-seizure case, *Boyd v. United*

⁸³ *Id.* at 43.

⁸⁴ *Id.* at 39, 41.

⁸⁵ See J. LANDYNSKI, *supra* note 54, at 43.

⁸⁶ *Id.* Landynsky rejects the view that "the constitutionality of a search may . . . be determined by its 'reasonableness,' regardless of whether it was conducted under warrant." *Id.* He argues "that the Fourth Amendment made no provision for the warrantless search." *Id.* at 43-44. In addition, he asserts, "It would be strange . . . for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised 'reasonable' searches without warrant." *Id.* at 44. *But see infra* notes 113-126 and accompanying text (Supreme Court permits reasonable warrantless searches).

⁸⁷ *Boyd v. United States*, 116 U.S. 616 (1886) was the first significant fourth amendment case. See J. LANDYNSKI, *supra* note 54, at 49. The Supreme Court rarely considered the fourth amendment prior to *Boyd* because criminal cases were not made appealable to the Court until 1891. *Id.* Landynsky cites only four occasions on which the Court construed the search-and-seizure provisions of the Federal Constitution. See *id.* at 49 n.3 (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878); *Den v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 285-86 (1855); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 452 (1806)).

⁸⁸ The reasonableness clause/warrant clause controversy has "provoked strong and fluctuating differences of view on the Court." *Abel v. United States*, 362 U.S. 217, 235 (1960). Indeed, one commentator has referred to it as an "embarrassing chapter of supreme judicial schizophrenia." Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1052 (1975).

States,⁸⁹ the Supreme Court rendered one of the most expansive readings ever given the fourth amendment. The "search" construed in *Boyd* possessed none of the characteristics of a general warrant and in fact was not even a traditional search; it was an order issued for the production of a single, particularly described document.⁹⁰ The order fully complied with the procedural requirements of the warrant clause: it was issued by a judicial officer, it contained a particular description of the item to be seized, and there was no general rummaging through the appellant's private papers.⁹¹ In fact, no physical trespass occurred at all.⁹² Finding no procedural defects in the issuance of the order, the *Boyd* Court considered whether compelled production of a document constituted an unreasonable seizure within the meaning of the fourth amendment.⁹³ The Court found the order unreasonable, holding that the government's power to seize contraband did not extend to mere evidence of a crime.⁹⁴ The Court also declared that the fourth and fifth amendments together prohibited the forcible extortion of a man's private papers in order to incriminate him.⁹⁵

Boyd may well be "bad" law in a technical sense. The Supreme Court's reasoning was historically unsound and logically questionable, particularly the nebulous relationship drawn between the fourth and the fifth amendments.⁹⁶ In fact, during the century or so since the case was decided, the *Boyd* holding has been trimmed, modified, limited, and perhaps overruled sub silentio.⁹⁷ Nevertheless, *Boyd* remains historically important be-

⁸⁹ 116 U.S. 616 (1886).

⁹⁰ See *id.* at 618. *Boyd* was not even a criminal case; it was a civil forfeiture proceeding. See *id.* at 617.

⁹¹ See *id.* at 618-19.

⁹² See *id.* at 618. The defendant voluntarily complied with the order, which required the production of an invoice for a shipment of plate glass. *Id.*

⁹³ See *id.* at 622. The Court held forced compliance with the order equivalent to the issuance of a search warrant. *Id.*

⁹⁴ See *id.* at 622-23.

⁹⁵ See *id.* at 633-35. The Court noted "the intimate relation between the two amendments." *Id.* at 633. Writing for the majority, Justice Bradley declared that a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.

Id. at 634-35.

⁹⁶ See generally Note, *supra* note 6, at 946-48 (criticizing rationale of *Boyd*).

⁹⁷ The Federal Government has argued that *Boyd* was overruled by United States

cause it presented the Court with its first opportunity to choose between the blank-check and the bright-line approaches to the fourth amendment. The *Boyd* Court could easily have limited the fourth amendment's protection to the abuse it was designed to prevent—the general warrant—thus rendering the amendment “a dead letter.”⁹⁸ In rejecting that extremely limited construction, however, the Court perhaps took an overly expansive view of its power to interpret the amendment. The Court stated that the fundamental principles of the amendment “apply to all invasions, on the part of the government and its employes of the sanctity of a man's home and the privacies of life.”⁹⁹ Thus, the Court demonstrated that the fourth amendment contained more than a simple prescription for proper warrants. Although all of the *procedures* of the warrant clause might be satisfied, a search could still be invalidated because of the *substantive* right of privacy embodied in the reasonableness clause.

Thirty-five years later, the Court followed *Boyd's* substantive approach in *Gouled v. United States*.¹⁰⁰ In that case, the Court held that a search warrant could not be used to enter a man's dwelling “solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding.”¹⁰¹ The Court declared that such a search was unreasonable, although a similar warrant and search would be proper to seize contraband or the fruits or instrumentalities of crime.¹⁰² In practice, the authorities easily evaded this “mere evidence” rule, as it came to be called,¹⁰³ but it remained sound constitutional theory until 1967, when it was overturned by the case of *Warden, Maryland Penitentiary v. Hayden*.¹⁰⁴

The *Hayden* case exposed some of the logical flaws of the *Boyd* opinion and overturned the “mere evidence” rule, finding it

v. Doe, 465 U.S. 605 (1984). See *United States v. (Under Seal)*, 745 F.2d 834, 839 (4th Cir. 1984), *vacated sub nom.* *United States v. Doe*, 105 S. Ct. 1861 (1985). In *Doe*, the Court held that the prosecution could compel the production of the business documents of a sole proprietorship if it provided an accompanying grant of use immunity. See *Doe*, 465 U.S. at 617. Nonetheless, the Fourth Circuit stated that *Boyd* had limited but continuing vitality. See *(Under Seal)*, 745 F.2d at 839.

⁹⁸ *Abel v. United States*, 362 U.S. 217, 255 (1960) (Brennan, J., dissenting).

⁹⁹ *Boyd*, 116 U.S. at 630.

¹⁰⁰ 255 U.S. 298 (1921).

¹⁰¹ *Id.* at 309.

¹⁰² See *id.*

¹⁰³ See Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 70-71 (1974).

¹⁰⁴ 387 U.S. 294 (1967).

"wholly irrational."¹⁰⁵ The Court observed that the rule rested on the premise that the fourth amendment existed solely to protect the right to private property.¹⁰⁶ Thus, under the rule, the government could seize only that property in which it had a superior possessory interest.¹⁰⁷ The *Hayden* Court clearly rejected this property-rights premise, stating "that the principal object of the Fourth Amendment is the protection of privacy rather than property."¹⁰⁸ The Court declared that the government's power to seize items did not depend upon a superior possessory right; rather, it existed "for the purpose of obtaining evidence which would aid in apprehending and convicting criminals."¹⁰⁹

Hayden thus marked a dramatic shift from the concept of "substantive" reasonableness and the notion that the fourth amendment placed certain items beyond the search-and-seizure power of the government.¹¹⁰ By eliminating the "substantive" distinction between mere evidence and items such as contraband, the Court insulated governmental searches from attacks based on the nature of the items seized.¹¹¹ With this ruling, the Court turned away from reliance on the broad language of the reasonableness clause and began emphasizing the procedural requirements of the warrant clause.¹¹²

III. THE PRIMACY OF THE WARRANT CLAUSE—THE BLANK CHECK BOUNCES

The *Boyd* case rejected the simplistic view that the reasonableness of a search always depends upon the existence of a war-

¹⁰⁵ *Id.* at 302.

¹⁰⁶ *See id.* at 303.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 304.

¹⁰⁹ *Id.* at 306.

¹¹⁰ The Court recognized that there might be items "whose very nature precludes them from being the object of a reasonable search and seizure." *Id.* at 303. In addition, Justice Douglas maintained that the fourth amendment had created substantive zones of privacy, which could not be invaded no matter how valid the government's need to search and no matter how painstakingly the authorities complied with the procedures of the warrant clause. *See id.* at 321 (Douglas, J., dissenting). *But see infra* notes 147-152 and accompanying text (discussion of *Andresen v. Maryland*, 427 U.S. 463 (1976)).

¹¹¹ *See Hayden*, 387 U.S. at 306. Justice Brennan, writing for the majority, noted, "The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband." *Id.* at 306-07.

¹¹² *See id.* The Court noted, for example, that the state must still demonstrate probable cause "to believe that the evidence sought will aid in a particular apprehension or conviction." *Id.* at 307.

rant. In *Boyd*, the Court acknowledged that a procedurally proper warrant did not necessarily render a search constitutional. Shortly thereafter, the Court recognized the converse—certain searches may be reasonable even in the absence of a warrant. For example, in *Weeks v. United States*,¹¹³ the Court first stated that a warrant was unnecessary when a suspect was searched as an incident of a lawful arrest.¹¹⁴ Subsequently, in 1925, *Carroll v. United States*¹¹⁵ permitted police officers to search an automobile without a warrant.¹¹⁶

The *Weeks* Court maintained that the right to search incident to arrest had existed at common law to protect the lives of the arresting officers, to prevent the suspect's escape, and to prevent the prisoner from destroying evidence.¹¹⁷ Thirteen years after *Weeks*, the Supreme Court extended the right to search a prisoner and his immediate vicinity incident to a lawful arrest to include "all parts of the premises used for the unlawful purpose."¹¹⁸ Still later, the Court stretched the search-incident-to-arrest rationale to the breaking point in *Harris v. United States*.¹¹⁹ The *Harris* Court upheld a very extensive warrantless search¹²⁰ and also brought the warrant clause/reasonableness clause conflict into sharp focus,¹²¹ demonstrating that there was no clear historical answer to the controversy.¹²²

In *Harris*, several FBI agents arrested the defendant in his dwelling.¹²³ The agents possessed a valid arrest warrant, but

¹¹³ 232 U.S. 383 (1914).

¹¹⁴ *See id.* at 392.

¹¹⁵ 267 U.S. 132 (1925).

¹¹⁶ *See id.* at 149.

¹¹⁷ *See Weeks*, 232 U.S. at 392.

¹¹⁸ *Marron v. United States*, 275 U.S. 192, 199 (1927).

¹¹⁹ 331 U.S. 145 (1947).

¹²⁰ *See id.* at 149-50.

¹²¹ *See id.* at 165-67 (Frankfurter, J., dissenting).

¹²² *See id.* at 157-63 (Frankfurter, J., dissenting). Justice White has recognized the problem inherent in a historical analysis of search-and-seizure questions:

[T]his Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity. . . . On the other hand, it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." . . . Because of sweeping change in the legal and technological context, reliance on the common-law rule in [some] case[s] would be a mistaken literalism that ignores the purposes of a historical inquiry.

Tennessee v. Garner, 105 S. Ct. 1694, 1702 (1985) (citations omitted).

¹²³ *Harris*, 331 U.S. at 148.

they lacked a search warrant.¹²⁴ Harris was handcuffed, and the Federal agents then spent five hours searching the entire apartment for stolen checks.¹²⁵ The majority upheld the search as an extension of the common law right to search a suspect incident to a lawful arrest.¹²⁶ The dissenters, however, cited the more immediate history leading to the adoption of the fourth amendment:

The Court today has resurrected and approved, in effect, the use of the odious general warrant or writ of assistance, presumably outlawed forever from our society by the Fourth Amendment. A warrant of arrest, without more, is now sufficient to justify an unlimited search of a man's home from cellar to garret for evidence of any crime, provided only that he is arrested in his home. Probable cause for the search need not be shown; an oath or affirmation is unnecessary; no description of the place to be searched or the things to be seized need be given; and the magistrate's judgment that these requirements have been satisfied is now dispensed with. In short, all the restrictions put upon the issuance and execution of search warrants by the Fourth Amendment are now dead letters as to those who are arrested in their homes.¹²⁷

Having sanctioned an extensive ransacking without a warrant in the *Harris* decision, the Court then veered in the opposite direction when the case of *Trupiano v. United States*¹²⁸ prohibited the seizure of objects in plain view at the time of an arrest.¹²⁹ The Court rejected reasonableness as the appropriate test and announced that

[i]t is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. . . . To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible.¹³⁰

Despite this statement, *Trupiano* recognized that the police could undertake very limited warrantless searches.¹³¹ These searches, how-

¹²⁴ See *id.* at 148-49.

¹²⁵ See *id.* A total of five FBI agents participated in the search. *Id.* Although they were looking for stolen checks, they discovered a sealed envelope containing forged selective-service documents. *Id.* The defendant was subsequently convicted of unlawful possession and alteration of draft-registration certificates and classification cards. *Id.* at 146 n.1.

¹²⁶ See *id.* at 151-52.

¹²⁷ *Id.* at 183 (Murphy, J., dissenting).

¹²⁸ 334 U.S. 699 (1948).

¹²⁹ See *id.* at 703-04, 710.

¹³⁰ *Id.* at 705.

¹³¹ See *id.* at 708.

ever, could not be justified by a nebulous standard of reasonableness, but only by a necessary and practical exception to the requirements of the warrant clause.¹³² Thus, *Trupiano* represented one of the Court's strongest endorsements of the primacy of the warrant clause. Unfortunately, the Court's holding survived for only two years.

In *United States v. Rabinowitz*,¹³³ the Court overruled *Trupiano* and rejected the standards of the warrant clause in favor of a reasonableness test.¹³⁴ The Court conceded that the warrant clause provided bright-line guidance.¹³⁵ Indeed, the Court observed, "requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration."¹³⁶ The majority preferred the blank-check approach, however, so that "[s]ome flexibility [would] be accorded law officers engaged in daily battle with criminals."¹³⁷ Thus, the Court embraced the inherently flexible and nebulous reasonableness test as the ultimate standard, holding that reasonableness "depends upon the facts and circumstances—the total atmosphere of the case."¹³⁸

This totality-of-the-circumstances test precluded any attempt at formulating bright lines and amounted to an "I know it when I see it" school of jurisprudence.¹³⁹ In a bitter dissent in *Rabinowitz*, Justice Frankfurter charged that the majority had disregarded the historical context of the fourth amendment and employed its own shifting notions of reasonableness.¹⁴⁰ The Court subsequently

¹³² See *id.* For example, the Court stated that the right to search a suspect as an incident of a lawful arrest "grows out of the inherent necessities of the situation." *Id.*

¹³³ 339 U.S. 56 (1950).

¹³⁴ See *id.* at 66.

¹³⁵ See *id.* at 65.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 66.

¹³⁹ See Bacigal, *supra* note 4, at 793; see also Weinreb, *supra* note 103, at 57 (describing this approach as a cataloging of facts followed by an unconnected conclusion regarding the search's reasonableness); White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 171 ("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. . . .").

¹⁴⁰ See *Rabinowitz*, 339 U.S. at 86 (Frankfurter, J., dissenting). Justice Frankfurter stated:

One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." . . . When the Fourth Amendment outlawed "unreasona-

shifted to Justice Frankfurter's view and conceded that reasonableness based on the totality of the circumstances was little more than a statement of personal values.¹⁴¹ Indeed, the Court recognized the need for "more precise analysis"¹⁴² and decided a series of cases emphasizing the benefits of clear rules and procedures.¹⁴³ Nonetheless, the Court has periodically returned to and embraced the unstructured reasonableness standard.¹⁴⁴ The history of the search-incident-to-arrest exception thus contains conflicting support for both the bright-line (warrant clause) and blank-check (reasonableness clause) approaches to the fourth amendment.

Outside the search-incident-to-arrest area, the Court has moved strongly toward the primacy of the warrant clause and has come very close to overruling *Boyd* sub silentio. The Court seriously weakened *Boyd* by overturning the "mere evidence" rule in *Hayden*,¹⁴⁵ but studiously preserved 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."¹⁴⁶ In *Andresen v. Maryland*,¹⁴⁷ the Court answered this question with a fairly definitive "no."

In *Andresen*, the government obtained a warrant to search for and seize a number of private papers stored in files in the defend-

ble searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

Id. at 70 (Frankfurter, J., dissenting).

¹⁴¹ See *Chimel v. California*, 395 U.S. 752, 764-65 (1969).

¹⁴² *Spinelli v. United States*, 393 U.S. 410, 415 (1969).

¹⁴³ See, e.g., *Aguilar v. Texas*, 378 U.S. 108 (1964). *Aguilar's* two-pronged test provided a bright-line approach to the assessment of the sufficiency of an informant's tip. See *id.* at 114-15; see also *Spinelli v. United States*, 393 U.S. 410, 415-17 (1969) (applying *Aguilar's* dual requirements of reliability and a statement of underlying circumstances). The Court abandoned this bright line in favor of the totality-of-the-circumstances approach in *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

¹⁴⁴ See, e.g., *New Jersey v. T.L.O.*, 105 S. Ct. 733, 741-42, 743-44 (1985); *Camara v. Municipal Court*, 387 U.S. 523, 535-38 (1967). Chief Justice Rehnquist has explained the Court's preference for the flexible reasonableness standard as follows: "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." *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973). On another occasion, Chief Justice Rehnquist observed that "[o]ur entire profession is trained to attack 'bright lines' the way hounds attack foxes." *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting).

¹⁴⁵ See *supra* note 105 and accompanying text.

¹⁴⁶ *Hayden*, 387 U.S. at 303.

¹⁴⁷ 427 U.S. 463 (1976).

ant's law office.¹⁴⁸ The Supreme Court upheld the search,¹⁴⁹ analyzing the issue in sharp contrast to the rationale of *Boyd*.¹⁵⁰ The Court indicated that however private and incriminating the contents of the documents might be, only the warrant clause's requirements affected the government's ability to obtain such evidence.¹⁵¹ The Court thus viewed the fourth amendment as a relative guarantee that the government would not seize items without justification or in a procedurally improper manner. No material or communication of any kind was absolutely protected from *procedurally proper* searches and seizures; the procedural safeguards of the warrant clause had become the exclusive means of shielding personal privacy.¹⁵²

Andresen took the warrant clause to the height of its dominance, while the substantive aspects of the reasonableness clause were confined to footnotes promising a higher level of protection for diaries.¹⁵³ The lower courts have not taken these footnotes seriously, and even personal diaries have been seized pursuant to a procedurally correct warrant.¹⁵⁴ The *Andresen* Court thus approved the very type of search condemned in *Boyd* and indeed rejected most of that decision's rationale. *Boyd* had disregarded the procedural aspects of the warrant clause and had focused on the substantive content of the reasonableness clause.¹⁵⁵ In contrast, *Andresen* denied the existence of any substantive content to the reasonableness clause and focused solely on the procedural requirements of the warrant clause.¹⁵⁶ The pendulum would swing one more time, however, and erode the primacy of the warrant clause. The Court's recognition of a balancing-of-interests approach to the fourth amendment would

¹⁴⁸ *Id.* at 466.

¹⁴⁹ *See id.* at 477, 484.

¹⁵⁰ *See id.* at 471-74.

¹⁵¹ *See id.* at 473-74. The Court stated,

"There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant."

Id. at 474 (quoting *Gouled v. United States*, 255 U.S. 298, 309 (1921)).

¹⁵² *See Note, supra* note 6, at 978, 979; *see also* *Fisher v. United States*, 425 U.S. 391, 400 (1976) (warrant clause, rather than fifth amendment, was framers' vehicle for protection of personal privacy).

¹⁵³ *See, e.g., Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976) ("Special problems of privacy which might be presented by subpoena of a personal diary . . . are not involved here.").

¹⁵⁴ *See, e.g., People v. Sirhan*, 7 Cal. 3d 710, 740-41, 497 P.2d 1121, 1141, 102 Cal. Rptr. 385, 405 (1972), *cert. denied*, 410 U.S. 947 (1973).

¹⁵⁵ *See supra* notes 93-95 and accompanying text (discussing *Boyd*).

¹⁵⁶ *See supra* notes 150-152 and accompanying text (discussing *Andresen*).

ultimately lead it to the *Winston* decision and a complete re-examination of the substantive content of the reasonableness clause.

IV. THE RETURN OF REASONABLENESS

The reasonableness clause as a flexible standard and the warrant clause as a comparatively rigid and uniform standard represent distinct views of the fourth amendment. The Court's recognition of a sliding scale of probable cause, however, has blurred the distinction between the two standards. This sliding scale has added to the warrant clause the flexibility that previously had been unique to the reasonableness standard. Prior to *Camara v. Municipal Court*¹⁵⁷ and *Terry v. Ohio*,¹⁵⁸ the reasonableness clause had been used to excuse the absence of a warrant, but not the lack of probable cause. The Court had stated, "In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court [he has] probable cause."¹⁵⁹ Regardless of whether the search was made pursuant to a warrant, probable cause remained the uniform connecting thread between the warrant and reasonableness clauses. "[S]eizures are 'reasonable' only if supported by probable cause,"¹⁶⁰ the Court maintained, and however great or slight the invasion, or however pressing the community interest at stake, probable cause "require[d] a *uniform* quantum of pre-search information for every search and seizure."¹⁶¹

In *Camara* and *Terry*, the Court rejected the notion that probable cause was a uniform, bright-line standard deduced from the language of the fourth amendment.¹⁶² Instead, the Court adopted the view that the probable cause standard is a method of accommodating the opposing interests of the government and individual citizens.¹⁶³ The Court recognized that different situations call for different accommodations.¹⁶⁴ Thus, varying levels of probable cause might sometimes be appropriate.¹⁶⁵ This concept of a variable standard of probable cause has become as flexi-

¹⁵⁷ 387 U.S. 523 (1967).

¹⁵⁸ 392 U.S. 1 (1968).

¹⁵⁹ *Carroll v. United States*, 267 U.S. 132, 156 (1925).

¹⁶⁰ *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

¹⁶¹ Note, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 680 (1961).

¹⁶² See *Terry*, 392 U.S. at 17-19; *Camara*, 387 U.S. at 535-36, 539.

¹⁶³ See *Terry*, 392 U.S. at 21, 22-27; *Camara*, 387 U.S. at 534.

¹⁶⁴ See *Terry*, 392 U.S. at 27; *Camara*, 387 U.S. at 539.

¹⁶⁵ See, e.g., *Camara*, 387 U.S. at 538-39.

ble and nebulous as the reasonableness standard;¹⁶⁶ in fact, the two standards are essentially the same.¹⁶⁷ The Court employs only one methodology—a balancing of conflicting governmental and individual interests—to determine whether a search is constitutional. It makes no difference “whether the balancing is done merely to determine what is reasonable or to determine what level of probable cause is required.”¹⁶⁸

This balancing-of-interests approach to probable cause necessitates the same type of substantive value judgments implicit in the reasonableness clause. Under the balancing approach, the Court determines whether probable cause exists by comparing the magnitude of the conflicting governmental and individual interests.¹⁶⁹ When these interests are at odds, the Court must identify the underlying societal values, attach relative weights to these

¹⁶⁶ In place of a rigid definition of probable cause as a “reasonable belief,” the Court has used a number of terms. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (“reasonable suspicion”); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (“clear indication”). *But see* *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3310-11 (1985) (Court denied that “clear indication” was a distinct standard of justification for intrusions upon privacy).

The lower courts have also used various terms to describe the required level of probable cause. *See, e.g.*, *Henderson v. United States*, 390 F.2d 805, 808 (9th Cir. 1967) (“real suspicion”); *Blefare v. United States*, 362 F.2d 870, 875 (9th Cir. 1966) (“[s]ome knowledge”); *People v. Sirhan*, 7 Cal. 3d 710, 739, 497 P.2d 1121, 1140, 102 Cal. Rptr. 385, 404 (1972) (“mere possibility”), *cert. denied*, 410 U.S. 947 (1973); *People v. De Bour*, 40 N.Y.2d 210, 219, 352 N.E.2d 562, 569-70, 386 N.Y.S.2d 375, 382-83 (1976) (nonwhimsical suspicion). 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 mere surplus.

¹⁶⁷ This approach involves a certain amount of tail chasing. To define reasonableness, the Court sometimes 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*, 387 U.S. at 534.

¹⁶⁸ LaFave, “*Street Encounters*” and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 56 n.86 (1968). In addition, Justice Brennan contends that there is no need for “the amorphous ‘reasonableness under all the circumstances’ standard” in light of the flexible probable cause test announced in *Illinois v. Gates*, 462 U.S. 213 (1983). *See New Jersey v. T.L.O.*, 105 S. Ct. 733, 756 (1985) (Brennan, J., concurring in part and dissenting in part).

¹⁶⁹ *See supra* notes 4-6 and accompanying text. Once the Court interprets the amendment as protecting values beyond the public’s 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 simply acknowledges that “we must consider the two objects of desire, both of which we cannot have, and make up our

values, and strike the constitutionally appropriate balance. In theory, the sliding scale of probable cause improves upon the nebulous reasonableness standard by providing three criteria for identifying constitutional searches: (1) the weight of the governmental interest justifying the intrusion, (2) the severity of the intrusion into an individual's privacy, and (3) the feasibility of alternative procedures.¹⁷⁰ A close analysis of the Court's application of these three factors, however, reveals little more than a series of ad hoc determinations of reasonableness based on the totality of the circumstances.

The first factor, determining the value of the government's interest, presents an almost infinite range of governmental justifications for intruding upon individual privacy.¹⁷¹ For example, in noncriminal situations, the justifications range from photographing political demonstrators¹⁷² to protecting underprivileged children.¹⁷³ Similarly, alleged governmental interests in the traditional criminal context vary from checking for violations of automobile registration laws¹⁷⁴ to apprehending vicious murderers.¹⁷⁵ In order to be effective, the fourth amendment's balancing process must somehow define the legitimate governmental inter-

minds which to choose." *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

¹⁷⁰ See, e.g., *Camara*, 387 U.S. at 534-39. The Court in *Camara* made only passing reference to the third factor, alternative procedures. See *id.* at 537. In addition, the Court noted a fourth factor: "a long history of judicial and public acceptance." *Id.* This final factor is of dubious validity and weight. See LaFave, *supra* note 168, at 42-43. But cf. *United States v. Watson*, 423 U.S. 411, 416-22 (1976) (emphasizing historical acceptance of practice of arresting suspected felons in public without a warrant).

¹⁷¹ See, e.g., *Terry*, 392 U.S. at 22 (government possesses interest in deterring criminal behavior); *People v. Gale*, 46 Cal. 2d 253, 255, 294 P.2d 13, 15 (1956) (interest in curbing "the juvenile problem"); *People v. Morales*, 22 N.Y.2d 55, 63, 238 N.E.2d 307, 313, 290 N.Y.S.2d 898, 906 (1968) (government may assist innocent citizens in clearing themselves of suspicion), *vacated sub nom. Morales v. New York*, 396 U.S. 102 (1969); Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 298 n.44 (1971) (police may maintain moral equilibrium—ranging from helping drunks to harassing prostitutes); Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1167 (1966) (acquiring information with which to lobby the legislature).

¹⁷² See *Donohoe v. Duling*, 330 F. Supp. 308 (E.D. Va. 1971), *aff'd*, 465 F.2d 196 (4th Cir. 1972). In that case, the court stated, "It has long been the policy in Richmond and other places throughout the nation to photograph persons participating in vigils, demonstrations, protests and other like activities, whether peaceful or otherwise." *Id.* at 309. The court noted that such a "practice serves as a deterrent to violence and vandalism." *Id.*

¹⁷³ See *Wyman v. James*, 400 U.S. 309, 318 (1971).

¹⁷⁴ See *Delaware v. Prouse*, 440 U.S. 648, 655 (1979).

¹⁷⁵ See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *People v. Sirhan*, 7 Cal. 3d

ests and assign a relative value to each one. To date, the Supreme Court has offered little meaningful guidance as to what considerations are relevant in assessing the government's purported interest. Although the Court has at times concluded that a governmental interest is "legitimate and weighty,"¹⁷⁶ "urgent,"¹⁷⁷ or "vital,"¹⁷⁸ it has failed to identify the standards it uses to reach these conclusions.

The second factor under the sliding-scale approach is an assessment of the severity of the government's intrusion into an individual's privacy. By requiring a higher level of probable cause, the law affirms the dignity of the individual and displays respect for a particular form of privacy. Unfortunately, the Court has never offered a satisfactory or workable definition of the constitutional right of privacy.¹⁷⁹ The Court has spoken of the severity of intrusions upon privacy only in conclusory terms,¹⁸⁰ and it is no wonder that the process of assigning weights to the various privacy interests has not yielded any bright-line rules. Furthermore, when the Court speaks of "privacy" primarily as a right to hide seizable evidence,¹⁸¹ the defendant's apparent guilt has obviously influenced the assessment of how much constitutional protection he should receive.¹⁸²

The third aspect of the balancing approach requires a determination of the feasibility of alternative procedures. Simply stated, this factor recognizes that a governmental infringement upon individual privacy may be deemed unreasonable because a

710, 738-39, 497 P.2d 1121, 1140, 102 Cal. Rptr. 385, 404 (1972), *cert. denied*, 410 U.S. 947 (1973).

¹⁷⁶ *Mimms*, 434 U.S. at 110.

¹⁷⁷ *United States v. Biswell*, 406 U.S. 311, 317 (1972).

¹⁷⁸ *Delaware v. Prouse*, 440 U.S. 648, 658 (1979).

¹⁷⁹ See *Katz v. United States*, 389 U.S. 347, 350 (1967). The *Katz* Court warned that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" *Id.* Indeed, the Court noted that "protection of a person's *general* right to privacy . . . is . . . left largely to the law of the individual States." *Id.* at 350-51 (footnotes omitted); see also Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 275-76 (1974) ("no consensus in the legal and philosophical literature on a definition of privacy").

¹⁸⁰ See, e.g., *Mimms*, 434 U.S. at 111. The *Mimms* Court characterized a motorist's interest in remaining in his vehicle as *de minimis* because "[t]he driver is being asked to expose to view very little more of his person than is already exposed." *Id.*

¹⁸¹ See *Segura v. United States*, 468 U.S. 796, 815-16 (1984); *United States v. White*, 401 U.S. 745, 753 (1971) (White, J., plurality opinion).

¹⁸² In considering whether the defendant's obvious guilt should be 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, *supra* note 54, at 57 (emphasis added).

less intrusive alternative existed, which could have accomplished the same end at a lower cost to individual privacy. Most often, the Court has disposed of this factor in a conclusory, one-sentence reference to the lack of practical alternatives.¹⁸³

In *Winston*, however, the Court devoted considerable attention to this question.¹⁸⁴ More specifically, the Court examined the prosecution's case and determined whether there was a "compelling need" for the removal of a bullet from the defendant's body or whether the prosecution had access to sufficient alternative methods of meeting its burden of proof.¹⁸⁵ The Court's approach to this question hooked the prosecutor on the horns of a dilemma: If the evidence is sufficient to establish a high degree of likelihood that the item subject to seizure is present in the de-

¹⁸³ See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 537 (1967) (doubtful that techniques other than area inspections would detect building-code violations); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (blood test only effective method of obtaining evidence of blood-alcohol content); cf. *Delaware v. Prouse*, 440 U.S. 648, 659 (1979) (Court concluded that alternative mechanisms were available to detect unlicensed drivers).

¹⁸⁴ See *Winston*, 105 S. Ct. at 1619-20.

¹⁸⁵ See *id.* The Court derived the "compelling need" standard from *Schmerber v. California*, 384 U.S. 757 (1966). See *Winston*, 105 S. Ct. at 1616-18. In *Schmerber*, the Court permitted the forced taking of a blood sample from a motorist suspected of drunken driving. See *Schmerber*, 384 U.S. at 771. The Court relied on several factors, including the relative safety of the blood-test procedure and the "clear indication" that evidence of drunken driving was present in the defendant's body. See *id.* at 770-71. In addition, however, the Court noted that a blood test "is a highly effective means of determining the degree to which a person is under the influence of alcohol." *Id.* at 771. Furthermore, the Court observed that a person's blood-alcohol content diminishes rapidly as time passes. See *id.* at 770. Therefore, the Court reasoned, important evidence might be lost if the state were required to undertake the time-consuming task of obtaining a warrant. See *id.* at 770-71.

In *Winston*, Justice Brennan asserted that the *Schmerber* Court had relied on "the difficulty of proving drunkenness by other means" in concluding that the blood test was "of vital importance" to the prosecution's case. See *Winston*, 105 S. Ct. at 1618. He emphasized the lack of a similar urgency in the *Winston* case, pointing to the "substantial additional evidence" available to the state. *Id.* at 1619. Justice Brennan concluded his analysis of this issue by establishing the new "compelling need" standard:

[A]lthough the bullet may turn out to be useful to the Commonwealth in prosecuting [Lee], the Commonwealth has failed to demonstrate a compelling need for it. We believe that in these circumstances the Commonwealth has failed to demonstrate that it would be "reasonable" . . . to search for evidence of this crime by means of the contemplated surgery.

Id. at 1620. Clearly, Justice Brennan's language indicates that the state must meet a heavy burden in order to justify compelled conventional surgery. As the *Winston* opinion indicates, however, intrusions into the body require case-by-case analysis. See *id.* at 1616. Thus, the "compelling need" test may not apply to blood tests, X rays, or arthroscopic techniques.

fendant's body, then this same evidence, when presented to the fact-finder at trial, should circumstantially establish the location of the bullet; thus, there is no compelling need actually to remove the bullet.¹⁸⁶ Because the prosecution had a strong enough case without the bullet, the Court concluded that the state lacked the justification necessary for such an extreme intrusion into the privacy of the defendant's body.¹⁸⁷

Although the Court's estimate of the strength of the prosecution's case proved to be accurate,¹⁸⁸ such an assessment was possible only because of the unique posture of the *Winston* case. The defendant in *Winston* had been afforded a complete adversarial hearing prior to the search.¹⁸⁹ In normal situations, however, courts deal with *completed* searches, and they must assess only those facts known to the magistrate or the police officer at the time of the search.¹⁹⁰ Magistrates and police officers cannot possibly evaluate what contribution a particular piece of evidence will make to the likelihood of a conviction because they are privy to neither the prosecution's case nor the defendant's case.¹⁹¹

¹⁸⁶ See *Winston*, 105 S. Ct. at 1619. The Court also questioned whether the bullet would be useful for ballistic testing "because the bullet's markings may have been corroded in the time that the bullet has been in respondent's shoulder." *Id.* at 1619 n.10.

¹⁸⁷ See *id.* at 1620. Similarly, in another recent case, the Court stated that the killing of a nonviolent suspect was not a sufficiently productive means of accomplishing law enforcement goals. See *Tennessee v. Garner*, 105 S. Ct. 1694, 1705-06 (1985). In *Garner*, a police officer had observed that a fleeing burglary suspect was young, slightly built, and unarmed. *Id.* at 1697. In addition, the officer had viewed the suspect's face with the aid of a flashlight, and the suspect was attempting to escape on foot. See *id.* Nonetheless, the policeman shot and killed the youth when he persisted in his attempt to escape. *Id.* The Court held that such a use of deadly force to apprehend an unarmed suspect was unreasonable under the fourth amendment. *Id.* at 1701. Although the Court did not apply *Winston*, it could easily have concluded that the police possessed sufficient alternative means to effect the capture of the suspect, including the officer's description and the immediate use of a police radio to enlist a number of patrol cars in the search for the youth, who had no apparent access to a vehicle.

¹⁸⁸ The defendant was convicted based on other evidence. See *Richmond Times-Dispatch*, Apr. 24, 1985, at A1, col. 1.

¹⁸⁹ See *Winston*, 105 S. Ct. at 1618 & n.6. The Court refused to decide whether such a hearing was constitutionally required. See *supra* note 30 and accompanying text.

¹⁹⁰ See *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 564, 566-67 (1971); *Beck v. Ohio*, 379 U.S. 89, 96 (1964). In certain limited situations, however, a court may inquire into facts not contained in the affidavit supporting a request for a search warrant. See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

¹⁹¹ Hindsight judgment based on what occurs at trial should not be used to assess the necessity for evidence at the time the search occurs. For example, one commentator has fallen into the trap of arguing that the government's need to search in a particular case was *de minimis* because the seized evidence was merely used to

Thus, consideration of the government's compelling need for a particular piece of evidence is not feasible in the vast majority of search-and-seizure cases. Absent the unusual circumstances of *Winston*, this aspect of the balancing test is likely to play a minor part in fourth amendment jurisprudence.

The balancing approach to the fourth amendment requires the Court to weigh values within the three distinct categories of governmental interests, individual privacy, and alternative procedures.¹⁹² Beyond that initial task, however, lies the difficult problem of incorporating the three variables into a common formula that creates some basis for comparison. Since the adoption of the sliding-scale approach, the Court has analyzed governmental interests by referring to "legitimate" governmental power; it has evaluated the nature of an intrusion under the rubric of individual privacy; and it has 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 achieving flexibility through the balancing approach may be infinitely sensible in that it seeks to correlate the importance of the governmental interest with the severity of the intrusion upon privacy.¹⁹³ Until a precise methodology for interweaving all three factors is articulated, however, fourth amendment decisions will continue to appear unprincipled. At present, the selection and description of the factors to be weighed largely determine the outcome of any balancing process.¹⁹⁴ When the Court announces that an "important and weighty" governmental

corroborate what the defendant conceded at trial. See Note, *Fourth Amendment Balancing and Searches into the Body*, 31 U. MIAMI L. REV. 1504, 1515 (1977). 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.

¹⁹² See *supra* notes 169-191 and accompanying text (discussing the three categories). Our new Chief Justice has noted that these categories should remain distinct. See Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 KAN. L. REV. 1, 13-14 (1974). As his article states, "for purposes of evaluation it is both possible and necessary to arrange the privacy and the governmental interests on separate continuums." *Id.* at 14.

¹⁹³ See *People v. De Bour*, 40 N.Y.2d 210, 222-23, 352 N.E.2d 562, 571-72, 386 N.Y.S.2d 375, 384-85 (1976); see also *United States v. Lopez*, 328 F. Supp. 1077, 1094-97 (E.D.N.Y. 1971) (magnitude of governmental interest determines level of probable cause necessary for intrusion).

¹⁹⁴ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 890 (1975) (Douglas, J., concurring). Justice Douglas stated that "by specifying factors to be considered without attempting to explain what combination is necessary to satisfy the test, the Court may actually induce the police to push its language beyond intended limits." *Id.*

interest will be balanced against a "de minimis" interest in privacy,¹⁹⁵ the result is preordained. So long as the Court continues to approach the fourth amendment "in a totally ad hoc fashion," considering "any number of subjective factors,"¹⁹⁶ no bright-line rules are likely to emerge.¹⁹⁷

CONCLUSION

Of course, no bright-line rule can be drafted to cover all possible factual situations. Courts reason by analogy, and any rule can be evaded or modified by a careful consideration of the different facts present in each case. In addition, a court may be tempted to argue that the procedures actually employed constituted the "functional equivalent" of the bright-line rule. Justice Powell's concurring opinion in *South Dakota v. Opperman*,¹⁹⁸ for example, demonstrates how the bright-line rules of the warrant clause can be eroded by a result-oriented court.¹⁹⁹ The majority in *Opperman* upheld the constitutionality of an intrusion into an automobile even in the absence of a warrant or a prior determination of probable cause.²⁰⁰ The police inventory of the impounded automobile satisfied none of the bright-line requirements of the warrant clause: there was no warrant, no probable cause to believe that the vehicle contained any seizable item, and no specificity regarding the area to be searched or the item to be seized.²⁰¹ Nonetheless, the majority ignored the warrant clause and upheld the search under the general heading of reasonableness.²⁰²

Justice Powell disdained this blank-check approach, but

¹⁹⁵ See *Mimms*, 434 U.S. at 110-11.

¹⁹⁶ *Wyman v. James*, 400 U.S. 309, 341 (1971) (Marshall, J., dissenting).

¹⁹⁷ For example, the bright-line rules of standing have been replaced with the nebulous totality-of-the-circumstances test for determining justifiable expectations of privacy. Compare *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980) (applying totality-of-circumstances test) and *United States v. Salvucci*, 448 U.S. 83, 92-93 (1980) (rejecting claim of standing because defendant lacked "legitimate expectation of privacy") and *Rakas v. Illinois*, 439 U.S. 128, 139-42 (1978) (establishing totality-of-circumstances test) with *Jones v. United States*, 362 U.S. 257, 263-64 (1960) (automatic standing in possessory-offense cases).

¹⁹⁸ 428 U.S. 364 (1976).

¹⁹⁹ See *id.* at 376-84 (Powell, J., concurring).

²⁰⁰ See *id.* at 366-67, 376.

²⁰¹ See *id.* at 365-66. The police department routinely conducted inventories of impounded vehicles in order to secure any valuables that might be in the car. *Id.* at 366. Indeed, in this case, a police officer had observed a watch lying on the dashboard. See *id.*

²⁰² See *id.* at 370, 373, 376.

reached the same result while supposedly applying the bright-line rules of the warrant clause.²⁰³ He identified three purposes served by the warrant clause and found that the procedures followed by the police officers constituted the "functional equivalent" of the warrant clause's requirements.²⁰⁴ Justice Powell asserted that the first function of a warrant is to ensure that the police officer does not make a discretionary and potentially discriminatory search for evidence of a crime, thereby substituting his judgment for that of a neutral magistrate.²⁰⁵ He noted, however, that inventories are conducted to secure valuables rather than to seize evidence of a crime.²⁰⁶ Justice Powell concluded, therefore, that inventory searches for valuables pursuant to uniform, standardized procedures eliminate the discretion of the searching officer, thus alleviating the need for a warrant.²⁰⁷

A second purpose of the warrant requirement, Justice Powell observed, is to prevent hindsight and police perjury²⁰⁸ from affecting the evaluation of the constitutionality of a search.²⁰⁹ He maintained that inventory searches conducted in accordance with pre-existing police department regulations precluded any opportunity for post-search perjury by the police.²¹⁰ Finally, Justice Powell stated that the third function of a warrant is to inform the citizen that the police are acting under lawful authority.²¹¹ Because the owner of the automobile is not present at the time of the inventory, Justice Powell reasoned, there is no need to communicate this assurance to him.²¹²

Justice Powell thus employed a doctrine of equivalent protections, under which the constitutionality of the search depended upon whether the challenged procedures provided adequate safeguards to compensate for noncompliance with the

²⁰³ See *id.* at 381-84 (Powell, J., concurring); see also *California v. Carney*, 105 S. Ct. 2066, 2075, 2078 (1985) (Stevens, J., dissenting) (motor home may be "the functional equivalent" of a temporary abode such as a motel room, a vacation home, or a hunting-and-fishing cabin; thus, they should not be subject to automobile exception to warrant requirement).

²⁰⁴ See *Opperman*, 428 U.S. at 381-84 (Powell, J., concurring).

²⁰⁵ *Id.* at 383 (Powell, J., concurring).

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *Beck v. Ohio*, 379 U.S. 89, 96 (1964). The *Beck* Court stated, "[A]fter-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Id.*

²⁰⁹ *Opperman*, 428 U.S. at 383 (Powell, J., concurring).

²¹⁰ See *id.*

²¹¹ See *id.* at 384 (Powell, J., concurring).

²¹² *Id.*

warrant clause.²¹³ He argued that the police department's standardized regulations in *Opperman* served the same purpose as a search warrant.²¹⁴ Thus, in his view, they were an acceptable replacement for the requirements of the warrant clause.²¹⁵

Once a bright-line rule is subject to modification on the basis of "functional equivalency," however, the door is open to total emasculation of the rule. As Justice (now Chief Justice) Rehnquist has noted, "Acceptance by the courts of arguments that one thing is the 'functional equivalent' of the other . . . soon breaks down what might have been a bright line into a blurry impressionistic pattern."²¹⁶ Of course, bright-line rules are often blurred in hard cases such as *Winston v. Lee*, which dramatically demonstrated the need for some flexibility. *Winston* tested the bright-line rule of *Andresen* that no substantive area of privacy is beyond the reach of a procedurally proper warrant.²¹⁷ The Supreme Court was understandably reluctant to hold that this crystal-clear general principle could be used to permit such a "shocking" invasion of privacy.²¹⁸

If it were the nature of the intrusion that shocked the Court's collective conscience, however, the Justices might better have turned to a due process precedent rather than resurrecting *Boyd's* substantive approach to the fourth amendment. Some thirty years prior to *Winston*, in *Rochin v. California*,²¹⁹ the Court applied

²¹³ Chief Justice Vinson may have originated the concept of equivalent protections in a dissenting opinion. See *Trupiano v. United States*, 334 U.S. 699, 714-15 (1948) (Vinson, C.J., dissenting). The Chief Justice 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.*

²¹⁴ See *supra* notes 203-212 and accompanying text (outlining Justice Powell's argument).

²¹⁵ There have been numerous suggestions that police department regulations are superior to the exclusionary rule in controlling police conduct. See K. DAVIS, *POLICE DISCRETION* 98-131 (1975); Amsterdam, *supra* note 1, at 417-28; McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 672-94 (1972).

²¹⁶ *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting).

²¹⁷ See *supra* notes 147-156 and accompanying text (discussing *Andresen*).

²¹⁸ See *Winston*, 105 S. Ct. at 1619, 1620. Justice Brennan's description of the state's proposed course of action vividly conveys his sense of outrage: "[T]he Commonwealth proposes to take control of respondent's body, to 'drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness,' . . . and then to search beneath his skin for evidence of a crime." *Id.* at 1619 (quoting *Lee v. Winston*, 717 F.2d 888, 901 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985)).

²¹⁹ 342 U.S. 165 (1952). In *Rochin*, the police saw the defendant place two capsules in his mouth. *Id.* at 166. In an attempt to secure what they believed were narcotics, three police officers jumped upon the defendant and unsuccessfully tried

the due process clause to deal with a shocking intrusion into a suspect's body.²²⁰ In *Rochin*, Justice Frankfurter formulated distinct roles for the due process clause and the fourth amendment. He had previously maintained that the fourth amendment was specifically defined by the bright-line rules of the warrant clause,²²¹ but he viewed the due process clause as beyond confining and defining.²²² Justice Frankfurter's view of the distinct roles of the fourth amendment and the due process clause presents an alternative approach to factual situations such as *Winston*. The due process clause can be seen as the ultimate blank check²²³—the safety valve the Court needs to deal with situations that cannot be encompassed within rigid rules.²²⁴

The fourth amendment, in contrast, should not be interpreted to provide the same degree of flexibility. If the fourth amendment is made "responsive to every relevant shading of every relevant variation of every relevant complexity,"²²⁵ it will fail to serve its primary purpose of "regulat[ing] the police in their day-to-day activities."²²⁶ In order to achieve this objective, "the rules governing search and seizure are more in need of greater clarity than greater sophistication."²²⁷ In the short run, *Winston* may be hailed as a "victory" for the substantive right to privacy. In the long run, however, the Court's resurrection of a substantive content to the reasonableness clause will erode the certainty and predictability needed for the bright-line rules of the warrant clause.

to extract the capsules. *Id.* The officers then handcuffed Rochin and took him to a hospital, where "a doctor forced an emetic solution through a tube into Rochin's stomach against his will." *Id.* This "stomach pumping" caused Rochin to vomit, and the police found two morphine capsules in the vomited matter. *Id.*

²²⁰ See *id.* at 169-74.

²²¹ See *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

²²² *Rochin*, 342 U.S. at 173. For Justice Frankfurter, the relevant yardstick under the due process clause was "the community's sense of fair play and decency." *Id.*

²²³ On another occasion, Justice Frankfurter characterized due process as "the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956) (Frankfurter, J., concurring).

²²⁴ Indeed, the Fourth Circuit in *Winston* concluded that the proposed surgery was "condemned by *Rochin*." *Lee v. Winston*, 717 F.2d 888, 900 (4th Cir. 1983), *aff'd*, 105 S. Ct. 1611 (1985).

²²⁵ Amsterdam, *supra* note 1, at 375; see also R. UNGER, *LAW IN MODERN SOCIETY* 197 (1976) ("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.").

²²⁶ LaFave, "Case-by-Case Adjudication," *supra* note 37, at 141.

²²⁷ LaFave, *Imperfect World*, *supra* note 37, at 321.