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# ARTICLES

## WARRANTS WITHOUT PROBABLE CAUSE

*Barry Jeffrey Stern*\*

### INTRODUCTION

Interpreting the Fourth Amendment as permitting warrants to be issued without probable cause would strike many as its ultimate perversion.<sup>1</sup> Although the Constitution is not

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<sup>1</sup> See, e.g., Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 251 (1984) ("endorsing use of the warrant procedure when probable cause is lacking would be inconsistent" with the Warrant Clause); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1496 (1985) ("[S]earches that are not based on probable cause could not be subject to a warrant requirement unless the Constitution . . . were amended."); *id.* at 1496 n.122 (concluding that the Court in *Camara v. Municipal Court* "did, in effect, amend the Constitution" by authorizing "administrative warrants issued upon 'area probable cause'"). *But see* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.10(d), at 28 (2d ed. 1987) (Court's conclusion in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), that there is a constitutional bar against warrants unsupported by probable cause is "far from convincing"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 414-25, 426 & n.135 (1988) (proposing a "composite model" for Fourth Amendment analysis involving initiatory and responsive police intrusions; initiatory intrusions are investigations undertaken in the absence of suspicious behavior, which do not require probable cause and are analyzed under the unreasonable search and seizure clause; proposed model allows a court to "decide that the only valid way for an initiatory intrusion to proceed would be to obtain prior judicial approval"); H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsid-*

specific about most things, the Warrant Clause of the Fourth Amendment contains what appears to be a clear prohibition: "no Warrants shall issue, but upon probable cause."<sup>2</sup> Yet, in *Camara v. Municipal Court*,<sup>3</sup> the Supreme Court interpreted the Fourth Amendment to authorize administrative search warrants unsupported by the traditional definition of probable cause. Moreover, in both *Davis v. Mississippi*<sup>4</sup> and *Hayes v. Florida*,<sup>5</sup> the Court suggested that a warrant could authorize the seizure of a person without probable cause to arrest.<sup>6</sup> Similarly, in *Griffin v. Wisconsin*,<sup>7</sup> Justice Blackmun, joined in dissent by Justices Marshall and Brennan, argued that a warrant to search a probationer's house could issue upon reasonable suspicion rather than the more demanding standard of probable cause.<sup>8</sup>

In response to the *Griffin* dissent, Justice Scalia, writing for a five member majority of the Court, directly challenged the assumption that the Fourth Amendment can be interpreted to authorize warrants without the traditional definition of probable cause. Justice Scalia concluded that a judicial warrant<sup>9</sup>

*eration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1210 (1987) (proposing that a reasonable suspicion standard support surveillance orders for semi-secure behavior; Professor Uviller concludes that "[a]s the administrative search warrant illustrates, we need not be hidebound in devising judicial orders to satisfy . . . the Fourth Amendment; a little imagination is welcomed by the Constitution in the pursuit of its purposes, correctly understood").

<sup>2</sup> The Fourth Amendment provides:

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.

<sup>3</sup> 387 U.S. 523 (1967). For a comprehensive discussion of the issues raised by *Camara*, see Wayne R. LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1.

<sup>4</sup> 394 U.S. 721 (1969).

<sup>5</sup> 470 U.S. 811 (1985).

<sup>6</sup> See *infra* text accompanying notes 131-40 (discussing *Hayes* and *Davis*).

<sup>7</sup> 483 U.S. 868 (1987).

<sup>8</sup> *Id.* at 881-87 (Blackmun, J., dissenting).

<sup>9</sup> In *Griffin*, Justice Scalia distinguished between judicial warrants and administrative warrants. Administrative warrants can be issued by executive and judicial officers, while judicial warrants presumably can be issued only by judicial officers. See *infra* text accompanying notes 75-79. This Article uses the term warrant to refer to both judicial and administrative warrants. The terms "judicial warrant" and "administrative warrant" are used when necessary to highlight Justice Scalia's

requirement for a search that does not require traditional probable cause would violate the text of the Warrant Clause and be inconsistent with the Court's Fourth Amendment jurisprudence.<sup>10</sup>

Justice Scalia's reliance on the plain meaning of the Fourth Amendment in *Griffin* is not surprising since it is consistent with his general approach to statutory and constitutional interpretation.<sup>11</sup> What is initially surprising about *Griffin*, however, is that justices closely associated with expansively interpreting the Fourth Amendment to protect privacy interests argued in favor of a warrant unsupported by probable cause.<sup>12</sup> If a warrant issued without probable cause sanctions

distinction between the two types of warrants.

<sup>10</sup> Justice Scalia concludes that a judicial warrant unsupported by probable cause

is a combination that neither the text of the Constitution nor any of our prior decisions permits. While it is possible to say that Fourth Amendment reasonableness demands probable cause without a judicial warrant, the reverse runs up against the constitutional provision that "no Warrants shall issue, but upon probable cause."

*Griffin*, 483 U.S. at 877 (citation omitted). Justice Scalia was joined in his opinion by Chief Justice Rehnquist and Justices White, Powell and O'Connor. *Id.* at 869.

Although Justice Scalia argues that his interpretation is consistent with precedent, only one decision that he cited, *Frank v. Maryland*, 359 U.S. 360 (1959), concludes that it is unconstitutional to impose a warrant requirement on a search that does not require traditional probable cause. *Frank*, however, was overruled by *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), which allows warrants to be issued by judicial officers without traditional probable cause. See *infra* text accompanying notes 21-39 & 104-09.

Although *Griffin* is the first case in which the Court interpreted the Fourth Amendment to prohibit a warrant requirement for searches that do not require probable cause, it was asked to reach that conclusion several years earlier. See *United States v. Montoya De Hernandez*, 473 U.S. 531, 554-55 (1985) (Brennan, J., dissenting).

<sup>11</sup> See *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (rejecting defendant's contention that he was subject to a Fourth Amendment seizure when a police officer chasing him commanded him to stop; "The language of the Fourth Amendment, of course, cannot sustain respondent's contention. The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement . . . ."); *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) ("[T]he irreducible literal meaning of the [Confrontation] Clause . . . [is] 'a right to meet face to face all those who appear and give evidence at trial.'" (citations omitted)); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring) ("[I]f the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 650-56 (1990); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

<sup>12</sup> See *Griffin*, 483 U.S. at 882-87 (Blackmun, J., dissenting). Justice

searches and seizures based upon an inappropriately low level of suspicion, it is indeed perplexing how Justices Marshall and Brennan could have been among its proponents. The *Griffin* dissenters, however, do not propose a warrant requirement to authorize a search or seizure upon an inappropriately low level of suspicion, a use that this Article refers to as an "offensive" use of a warrant. Instead, they favor a warrant requirement to control the discretion of an officer conducting a search or seizure *properly* authorized on less than probable cause, a use that this Article refers to as a "defensive" use of a warrant. Justice Scalia, on the other hand, concludes that this defensive use is prohibited by the text of the Fourth Amendment and precedent. Moreover, he cautions that the *Griffin* dissenters have not considered the "implications" of their warrant proposal "for the body of Fourth Amendment law."<sup>13</sup> Although the point of this observation is somewhat cryptic, perhaps Justice Scalia is suggesting that an interpretation of the Fourth Amendment that would authorize a warrant requirement in *Griffin* is more likely to result in warrants being used offensively rather than defensively.

This Article examines the related issues of whether the Fourth Amendment can and should be interpreted to authorize warrants unsupported by the traditional definition of probable cause. This Article is divided into four parts. Part I explores the interpretive theory of the Fourth Amendment applied in *Camara*, which relies upon the unreasonable search and seizure clause to vary the probable cause requirement. A variable standard of probable cause can authorize a warrant requirement for any reasonable search or seizure, whether or not supported by the traditional definition of probable cause.

The second part of this Article examines Justice Scalia's plain meaning interpretation of the Fourth Amendment in *Griffin*.<sup>14</sup> Justice Scalia contends that this interpretation is compelled by the text of the Amendment and is consistent with its precedent. The Amendment's text, however, is not disposi-

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Blackmun's opinion was joined by Justices Brennan and Marshall.

<sup>13</sup> *Id.* at 878.

<sup>14</sup> Although courts frequently claim that interpretation is not involved in a decision applying the plain meaning rule, interpretation is inherent in any application of the rule. See 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.02, at 91-92 (5th ed. 1992).

tive of whether a warrant requirement can be imposed in *Griffin*, and Justice Scalia's interpretation of the Amendment implicitly challenges the legitimacy of *Camara*. Moreover, under Justice Scalia's interpretation, the presumption that warrantless searches are unconstitutional<sup>15</sup> is radically altered: the constitutionality of a search that is reasonable without probable cause depends on the absence, rather than the presence, of a warrant requirement.

The third part of this Article discusses two interpretations of the Fourth Amendment that can authorize defensive use of warrants even if *Camara's* variable standard of probable cause is overruled. The Article concludes by considering whether interpreting the Fourth Amendment to authorize warrants without probable cause is more likely to erode, rather than protect, Fourth Amendment values.

## I. CAMARA AND VARIABLE PROBABLE CAUSE

Although the text of the Fourth Amendment does not define probable cause, the framers' concept was one of particularized suspicion; that is, suspicion must focus on a specific person, place or thing. The importance of particularized suspicion to the framers derived from their hatred of general warrants, which issued without particularized suspicion,<sup>16</sup> as well

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<sup>15</sup> "[I]t is settled . . . that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (quoting *Mancusi v. DeForte*, 392 U.S. 364, 370 (1968) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967))). "Thus the most basic constitutional rule in this area is that 'searches conducted . . . without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); see also *United States v. United States Dist. Court for the Eastern Dist. of Michigan*, 407 U.S. 297, 318 (1972) ("Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights."); *Chimel v. California*, 395 U.S. 752, 761 (1969) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.") (quoting *McDonald v. United States*, 335 U.S. 451 (1948)); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) ("[T]he police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure."). But see *infra* note 181 (discussing whether the presumption exists in name only).

<sup>16</sup> The importance of general warrants in fomenting the Revolution has been

described by the Court in the following manner:

Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." The historic occasion of that denunciation, in 1761 at Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there', said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'"

Payton v. New York, 445 U.S. 573, 583 n.21 (1980) (citations omitted); see also United States v. Chadwick, 433 U.S. 1, 7-8 (1977); G.M. Leasing Corp. v. United States, 429 U.S. 338, 355 (1977); Stanford v. Texas, 379 U.S. 476, 481-82 (1965); Frank v. Maryland, 359 U.S. 360, 363-66 (1959), overruled by Camara v. Municipal Court, 387 U.S. 523 (1967); Boyd v. United States, 116 U.S. 616, 624-25 (1886).

An example of the scope of authority allowed under a writ appears in the Paxton writ, which was issued in Massachusetts in 1755. That writ allowed all subjects to

from Time to time at his or their Will as well in the day as in the Night to enter and go on board any Ship, Boat, or other Vessel riding lying or being within or coming to said port . . . to View & Search & strictly to examine in the same, touching the customs and Subsidies to us due, And also in the day Time together with a Constable or other public officer . . . to enter and go into any Vaults, Cellars, Warehouse, Shops or other Places to search and see whether any Goods, Wares or Merchandise [were illegally concealed]; and to open any Trunks, Chests, Boxes, Fardells or Packs made up or in Bulk [in which such goods] are suspected to be packed or concealed.

JOSIAH QUINCY, JR., MASSACHUSETTS REPORTS, App. I, at 404-05 (1865). Although writs of assistance are referred to as general warrants, the writs differed from general warrants in several respects. A writ authorized Crown officers to search for uncustomed goods based upon their own suspicions. General warrants allowed searches and seizures in connection with specific instances of wrongdoing. Thus, while both a writ and a general warrant failed to specify the place to be searched and things to be seized, a writ provided even more discretion to the officer since a search under it did not have to be connected to a specific instance of misconduct. See NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101 (The Johns Hopkins University Studies in Historical and Political Science Series LV, No. 2, 1937). Moreover, a general warrant expired upon its execution, while a writ of assistance provided authority to search throughout the reign of the sovereign. O. M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in THE ERA OF THE AMERICAN REVOLUTION* 40 (Richard B. Morris ed., 1939). For a comprehensive discussion of the general warrants and their impact on the adoption of the Fourth Amendment, see JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19-45

as the language of the Warrant Clause itself, which requires warrants to "particularly describ[e] the place to be searched, and the persons or things to be seized."<sup>17</sup> It is therefore not surprising that the Court has held that probable cause generally requires particularized suspicion.<sup>18</sup> The one exception is in the case of an administrative search. In this instance, probable cause does not refer to particularized suspicion, "but merely to a requirement of reasonableness."<sup>19</sup> The use of a variable reasonableness standard to define probable cause can be traced to *Camara v. Municipal Court*.<sup>20</sup>

### A. *Camara v. Municipal Court*

In *Camara*, the Court held that warrantless, non-consensual searches for housing code violations were unconstitutional. The searches, however, could proceed if authorized by a warrant and supported by probable cause.<sup>21</sup> The type of probable cause for a *Camara* warrant, however, radically differs from that ordinarily required for a search. Suspicion that a particular building violates the housing code is not required. Instead, probable cause exists when a search is undertaken pursuant to "reasonable legislative or administrative standards for conducting an area inspection."<sup>22</sup> Those standards can be based on neutral criteria, including the time between inspections, the type of building to be inspected and the condition of the area.<sup>23</sup>

Although *Camara* abandoned the traditional definition of probable cause to authorize housing inspections, the Court did not dispense with a warrant requirement. Instead, it relied upon the Fourth Amendment's "one governing principle" that

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(1966); LASSON, *supra*, at 51-78.

<sup>17</sup> U.S. CONST. amend IV, *supra* note 2.

<sup>18</sup> See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."); *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1970) ("[S]ome quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.").

<sup>19</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987).

<sup>20</sup> 387 U.S. 523 (1967).

<sup>21</sup> *Id.* at 539-40.

<sup>22</sup> *Id.* at 538.

<sup>23</sup> *Id.*

"except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."<sup>24</sup> The Court then cited several reasons why housing inspections should not be an exception to that principle.

Without a warrant requirement, the decision to search would be left solely to the officer's discretion.<sup>25</sup> That authority, the Court emphasized, "is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."<sup>26</sup> Prior judicial authorization was especially necessary because the inspections invade the "sanctity of [the] home,"<sup>27</sup> and a warrant reassures the homeowner that the inspector is acting lawfully.<sup>28</sup> Moreover, a warrant requirement would not defeat the public interests furthered by the inspections.<sup>29</sup> The inspections, therefore, would be subject to a warrant requirement with a magistrate determining whether the inspections were undertaken pursuant to a neutral plan.<sup>30</sup>

Three justices vigorously dissented in *Camara* and argued that the search was reasonable without a warrant. The dissenters disagreed with the majority's conclusion that a warrant protects privacy interests and argued that the decision "prostitutes" the Warrant Clause.<sup>31</sup> They characterized the magistrate's function in issuing a *Camara* warrant as that of being a "rubber stamp."<sup>32</sup> That *Camara* would split the Court

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<sup>24</sup> *Id.* at 528-29 (citations omitted).

<sup>25</sup> *Id.* at 532.

<sup>26</sup> *Id.* at 532-33.

<sup>27</sup> *Id.* at 531.

<sup>28</sup> *Id.* at 532; see also *United States v. Chadwick*, 433 U.S. 1, 9 (1977) (warrant requirement assures subject of the lawfulness of the officer's conduct); *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) ("[A] major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality.").

<sup>29</sup> *Camara*, 387 U.S. at 533.

<sup>30</sup> *Id.* at 547. The Court anticipated, however, that in most instances the inspectors would obtain the homeowner's consent and avoid the need for obtaining a warrant. *Id.* at 539-40.

<sup>31</sup> *Id.* at 546 (Clark, J., dissenting). Justices Harlan and Stewart joined Justice Clark's dissent.

<sup>32</sup> *Id.* at 547-48. For a discussion of the appropriate role of a magistrate in issuing a *Camara* warrant, see LaFave, *supra* note 3, at 23-27. See also *Mosher Steel-Virginia v. Teig*, 327 S.E.2d 87, 94 (Va. 1985) ("The warrant-issuing official must be given sufficient details by which to test the reasonableness of the decision

is not surprising. Just eight years earlier, a sharply divided Court in *Frank v. Maryland*<sup>33</sup> upheld the constitutionality of warrantless housing inspections.<sup>34</sup>

Writing for a five-member majority in *Frank*, Justice Frankfurter rejected the argument of the dissenters that a warrant requirement, identical to the one eventually adopted in *Camara*, should be imposed on the inspections.<sup>35</sup> Justice Frankfurter derisively referred to the warrant proposal as "a synthetic search warrant" and concluded that "[i]f a warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue."<sup>36</sup> Justice Frankfurter's concept of probable cause was therefore one of particularized suspicion, which by definition is lacking when inspections are authorized pursuant to a routine plan. Consequently, the imposition of a warrant requirement on such inspections would consequently violate the Warrant Clause.

In overruling *Frank*, the Court in *Camara* sought to foreclose Justice Frankfurter's argument that there is a constitutional bar against imposing a warrant requirement without particularized suspicion. Rather than accept Justice Frankfurter's premise that probable cause always requires

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to inspect."); *City of Seattle v. Leach*, 627 P.2d 159, 161-62 (Wash. Ct. App. 1981) (noting that the documents submitted in support of an administrative warrant did not describe the inspection program in sufficient detail, thus preventing the magistrate from being able to determine whether the inspection plan was reasonable).

<sup>33</sup> 359 U.S. 360 (1959), *overruled by* *Camara v. Municipal Court*, 387 U.S. 523 (1967).

<sup>34</sup> In *Frank*, the Court reasoned that inspections to detect housing code violations "touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion." *Id.* at 367. The Court concluded that a warrant requirement would cripple the effectiveness of the inspection programs and was unnecessary to establish their reasonableness. *Id.* at 372.

The Court analyzed the search in *Frank* under both the Fourth and Fourteenth Amendments. This is probably best explained by the fact that whether the Fourth Amendment applied to the states had not yet been settled. *See* Sundby, *supra* note 1, at 389-90 & n.17.

<sup>35</sup> Justice Douglas, writing the dissent in *Frank* and joined by Chief Justice Warren and Justices Black and Brennan, argued that "[t]he test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought" and noted that "[t]he passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant." *Frank*, 359 U.S. at 374, 383 (Douglas, J., dissenting).

<sup>36</sup> *Id.* at 373.

particularized suspicion, *Camara* expanded the concept of probable cause. This was done by applying an interpretive theory of the Fourth Amendment that relies upon the unreasonable search and seizure clause to define the meaning of probable cause in the Warrant Clause.<sup>37</sup>

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<sup>37</sup> The relevance of the Fourth Amendment's congressional history to interpretive theories that place significance on the fact that the Fourth Amendment has two clauses is a fascinating issue.

Professor Lasson has concluded that "[t]he most interesting thing about the passage of the Fourth Amendment to the Constitution . . . is that the House seems never to have consciously agreed to the Amendment in its present form." LASSON, *supra* note 16, at 101. The text of the Amendment debated and approved by the House of Representatives contained a single clause aimed at preventing the abuses associated with general warrants: "The right of the people to be secure 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.*

A proposal to change the Amendment to its present form and, thereby, separately protect the right to be free from unreasonable searches and seizures was defeated by the House. Despite the defeat, the committee responsible for arranging the Bill of Rights reported the Amendment to the House in the form that the House had earlier rejected. The committee's error was not noticed by the House, and the reported Amendment was eventually approved by Congress and the states. Whether the committee's error was an honest mistake or an intentional attempt to ignore the first House vote rejecting a two-clause amendment has never been determined. It is interesting to note, however, that the committee's chair, Representative Benson, was the author of the two-clause amendment first defeated by the House. *Id.* at 101.

This inauspicious birth of a two-clause amendment, however, should have little impact on its interpretation. Whether or not the House originally intended the Amendment to have two clauses, it eventually adopted the Amendment in the form that Representative Benson had proposed. Moreover, by initially rejecting a two-clause amendment, the House was not necessarily expressing its view that the one-clause amendment only prohibited general warrants but failed to protect the broader right to be free from unreasonable searches and seizures. Instead, an equally plausible explanation is that the House viewed the one-clause amendment as broad enough to protect the general right to be free from unreasonable searches and seizures since it specified one way that right could be violated. *Id.* at 101-02.

Representative Benson may well have feared that the original one-clause amendment failed to protect adequately the right to be free from unreasonable searches and seizures. In support of his proposal, Benson argued that the one-clause amendment "was good as far as it went, [but he thought] it was not sufficient." *Id.* at 103 (emphasis omitted). However, Benson's fears about the limited scope of a one-clause amendment did not necessarily reflect the House's intent when it rejected his proposal. *Cf.* Ronald Dworkin, *How to Read the Civil Rights Act*, in *A MATTER OF PRINCIPLE* 316 (1985) (pitfall in statutory interpretation is to rely on legislative arguments against a bill's enactment as evidence of the legislature's intent in enacting law). But while the history surrounding the Amendment's adoption does not weaken interpretations that rely upon the existence of two clauses, it does illustrate how precarious constitutional interpretive

*Camara* concluded that housing inspections pursuant to a neutral plan further important governmental interests that outweigh the privacy interests of the buildings' owners. The inspections were, therefore, reasonable searches under the Amendment's first clause.<sup>38</sup> This determination of reasonableness was simultaneously used to establish probable cause for a warrant under the Amendment's second clause, with the Court concluding that "[i]f a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."<sup>39</sup>

### B. *Limiting Variable Probable Cause to Administrative Searches*

If probable cause is flexible enough to authorize searches without particularized suspicion, then perhaps it is also flexible enough to vary the quantum of suspicion for searches and seizures that require particularized suspicion. For example, a warrant to search a warehouse for a narcotics might issue upon a lesser degree of suspicion than one to search a dwelling for gambling devices. A search in the narcotics case arguably implicates higher societal interests and lower privacy interests than a search in the gambling case because of the seriousness of the crime and the type of place to be searched.<sup>40</sup> Applying *Camara's* methodology, the public interest in combatting drugs could permit a less demanding standard of particularized suspicion to establish probable cause for a warrant.<sup>41</sup>

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arguments that rely upon the framers' "original intent" can sometimes be. *See also infra* note 58 (authorities discussing the significance of "original intent" in constitutional interpretation).

<sup>38</sup> *Camara v. Municipal Court*, 387 U.S. 523, 534-39 (1967).

<sup>39</sup> *Id.* at 539.

<sup>40</sup> *See Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (proposed variable standard of probable cause dependent on type of crime involved). For arguments in favor of a variable standard of probable cause, see Alschuler, *supra* note 1, at 243-56. *See also* Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 501-06 (1984). For arguments against a variable standard, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393-94, 415 (1974). *See also infra* notes 172-78 and accompanying text.

<sup>41</sup> While *Camara* did not require particularized suspicion to establish probable cause for the housing inspections, the Court stressed that such suspicion was necessary for criminal investigatory searches.

In *Terry v. Ohio*, decided one year after *Camara*, the Court had an opportunity to apply variable probable cause to a search requiring particularized suspicion.<sup>42</sup> The Court in *Terry* upheld a limited weapons search of a suspected armed robber without probable cause to arrest. If the Court had analyzed the search under the interpretative theory of the Fourth Amendment it had applied in *Camara*, it could have held that the officer's conduct was reasonable under the Amendment's first clause and, therefore, *supported* by probable cause. Unlike *Camara*, where no exigency justified dispensing with a warrant, the need for immediate action to protect the officer in *Terry* would have excused compliance with the warrant requirement.<sup>43</sup>

But the *Terry* Court applied only a portion of its *Camara* analysis. Although it balanced the competing interests implicated by the search to uphold its reasonableness, it also assumed the nonexistence of probable cause. The unreasonable search and seizure clause thus took on independent significance to uphold a warrantless search on less than probable cause. The stage was now set for the Court to authorize a wide range of warrantless searches and seizures without probable cause.<sup>44</sup>

Following *Terry*, the Court has followed two inconsistent approaches to defining probable cause. On the one hand, it has rejected a "multifactor balancing test" of probable cause, stressing instead the need for "[a] single, familiar standard . . . to guide police officers who have only limited time and experience to reflect and balance the social and individual interests involved in the specific circumstances they confront."<sup>45</sup> Conse-

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[I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

*Camara*, 387 U.S. at 535.

<sup>42</sup> 392 U.S. 1 (1968).

<sup>43</sup> See Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 40, 54-56 (1968).

<sup>44</sup> See *infra* note 62.

<sup>45</sup> *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979). In *Dunaway*, New York urged the Court "to adopt a multifactor balancing test of 'reasonable police conduct under the circumstances' to analyze seizures that do not amount to technical ar-

quently, the Court has created a reduced degree of particularized suspicion—reasonable suspicion<sup>46</sup>—and applies that standard under the unreasonable search and seizure clause to uphold criminal investigatory searches and seizures unsupported by probable cause.<sup>47</sup> On the other hand, the Court has reaffirmed *Camara* and has used variable probable cause to impose a warrant requirement in the absence of particularized suspicion.<sup>48</sup> The Court, however, only applies variable probable cause to administrative searches.<sup>49</sup>

Unlike criminal investigatory searches, administrative searches are conducted pursuant to regulatory schemes de-

rests." *Id.* at 213 (footnote omitted). The Court declined, concluding that [t]he familiar threshold standard of probable cause for Fourth Amendment seizures . . . provides the relative simplicity and clarity necessary to the implementation of a workable rule.

. . . [T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." 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 interest involved in the specific circumstances they confront.

*Id.* at 213-14 (citations omitted).

<sup>46</sup> See *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987) (contrasting the quantum of evidence establishing traditional probable cause "from a lesser quantum such as 'reasonable suspicion'").

<sup>47</sup> See, e.g., *United States v. Hensley*, 469 U.S. 221, 229 (1985) ("if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion"); *United States v. Place*, 462 U.S. 696, 706 (1983) (temporary seizure of luggage may be justified based upon reasonable suspicion of wrongdoing not amounting to probable cause).

<sup>48</sup> *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (warrantless inspections to determine OSHA violations are unconstitutional; inspections can proceed if authorized by administrative warrant supported by probable cause based on "reasonable legislative or administrative [inspection] standards"); See *v. City of Seattle*, 387 U.S. 541, 545 (1967) (warrantless fire inspections of buildings held unconstitutional but can be authorized by administrative warrant with probable cause determined "against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved"); see also *Almeida-Sanchez v. United States*, 413 U.S. 266, 283-85 (1973) (Powell, J., concurring) ("area" warrant might serve as substitute for particularized probable cause to support searches by roving border patrols).

<sup>49</sup> "In the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness." *Griffin*, 483 U.S. at 877 n.4.

signed to further specific societal objectives, such as to promote safe work places or to assure that a closely regulated industry is operated properly.<sup>50</sup> Although both criminal and administrative searches may be aimed at enforcing criminal sanctions, an administrative search is undertaken as one aspect of broader governmental regulation of a problem.<sup>51</sup> The Court, however, has never explained why the standard of probable cause can only be varied for administrative searches, nor has it applied variable probable cause consistently to all searches that could be characterized as administrative.<sup>52</sup>

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<sup>50</sup> See *New York v. Burger*, 482 U.S. 691 (1986); *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall*, 436 U.S. at 307 (OSHA inspections); see also Peter S. Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011, 1016 (1973) ("The phrase 'administrative search' encompasses governmental investigatory intrusions that are not the traditional searches for criminal evidence; there is no single type of 'administrative search.'").

<sup>51</sup> Before *Burger*, the Court drew a distinction between administrative and ordinary searches in that an administrative search could not be undertaken solely to investigate criminal activity. See *Michigan v. Clifford*, 464 U.S. 287, 294-95 (1984) (distinction between administrative and other search warrants for fire scene depends on whether object of search is criminal); *Donovan*, 452 U.S. at 598 (when commercial property is searched for criminal evidence, a warrant based upon probable cause is necessary); *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) (probable cause standard applies if evidence sought is to be used in a criminal prosecution).

In *Burger*, the Court upheld an administrative search uncovering criminal evidence, which was undertaken pursuant to a general regulatory scheme. The Court stated that "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect." *Burger*, 482 U.S. at 716. Justice Brennan's dissent criticized the majority for ignoring the distinction between searches for administrative as opposed to criminal violations. "The [C]ourt, thus, implicitly holds that if an administrative scheme has certain goals and if the search serves those goals, it may be upheld even if no concrete administrative consequences could follow from a particular search." *Id.* at 728 (Brennan, J., dissenting). Despite Justice Brennan's criticism, it should be noted that the Court in *Burger* appeared to assume that an administrative search undertaken as a pretext to uncover criminal evidence would be unconstitutional. See *id.* at 716-17 n.27; see also Gregory E. Birkenstock, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 GEO. L.J. 843, 858 (1992) ("Even if an administrative search can be expected to uncover evidence of crimes, the search is still evaluated by the diminished administrative search standards unless there is evidence that the regulatory scheme is a pretext for a search aimed at criminal law enforcement."); Project, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals, 1990-1991*, 80 GEO. L.J. 939, 1029 (1992) ("[t]he presence of both administrative and investigative purposes . . . will not invalidate an otherwise lawful administrative search, provided that the administrative purpose is dominant").

<sup>52</sup> See, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656

### C. *Camara Reconsidered*

The contrasts between the majority and dissenting opinions in *Camara* are striking, and they implicate the fundamental meaning and purpose of the Fourth Amendment. For the majority, probable cause is a flexible standard that varies depending on the competing privacy and societal interests raised by a particular search; for the dissenters, probable cause always requires particularized suspicion. For the majority, Fourth Amendment values are furthered by imposing a warrant requirement on searches for housing code violations; for the dissenters, a warrant requirement diminishes Fourth Amendment protection. Both perspectives are supported by the text of the Amendment and the history surrounding its adoption.

Implicit in the framers' conception of probable cause was the requirement of particularized suspicion.<sup>53</sup> *Camara's* reformulation of probable cause to allow warrants to issue without particularized suspicion, therefore, can be criticized as sanctioning the same type of general warrant that led to the Amendment's adoption.<sup>54</sup> Thus, through its redefinition of

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(1989) (upholding Customs Agency's plan to implement drug testing of specified classes of employees without a warrant or individualized suspicion). The Court emphasized that "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions," but the Court did not apply variable probable cause in upholding the drug testing program. *Id.* at 668.

The search in *Griffin* also could have been analyzed under the administrative search doctrine as it had been undertaken pursuant to a statutory scheme regulating the conditions of probation. See *infra* text accompanying notes 64-65. The fact that the search was undertaken in part by police officers and led to the institution of criminal charges against Griffin does not prevent analysis of the search under the administrative search doctrine. See *Burger*, 482 U.S. at 717-18.

<sup>53</sup> See *supra* text accompanying notes 16-17.

<sup>54</sup> Dissenting from the imposition of a warrant requirement on OSHA searches undertaken without particularized suspicion, Justice Stevens equated administrative warrants with the general warrants condemned by the framers:

Since the general warrant, not the warrantless search, was the immediate evil at which the Fourth Amendment was directed, it is not surprising that the Framers placed precise limits on its issuance. The requirement that a warrant only issue on a showing of particularized probable cause was the means adopted to circumscribe the warrant power. . . . If the Court were correct in its view that . . . [searches without particularized suspicion], if undertaken without a warrant, are unreasonable in the constitutional sense, the issuance of a 'new-fangled warrant' . . . without

probable cause, *Camara* has been characterized as avoiding the specific commands of the Warrant Clause by authorizing "a new-fangled 'warrant' system that is entirely foreign to Fourth Amendment standards."<sup>55</sup>

On the other hand, although the Fourth Amendment was adopted in response to the abuses associated with general warrants, it does not necessarily follow that its framers would have equated a *Camara* warrant with the warrants they condemned. While both *Camara* warrants and general warrants issue without particularized suspicion, the purpose of a *Camara* warrant is to eliminate the executing officer's discretion. The purpose of a colonial general warrant was to sanction the officer's unbridled discretion. A *Camara* warrant is used defensively: when a search is appropriately authorized without probable cause it eliminates discretion by ensuring that the decision to invade privacy is undertaken pursuant to criteria beyond the officer's control. Colonial general warrants did exactly the opposite and were used offensively: they provided the officers with the authority to search at their whim.

In prohibiting general warrants in the Warrant Clause,

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any true showing of particularized probable cause would not be sufficient to validate them.

Marshall v. Barlow's, Inc., 436 U.S. 307, 328 (1978) (Stevens, J., dissenting); see also Silas Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 25-26 (1988) (citing the administrative search cases, the authors comment that the Court, "in a stunning reversal of the text and history from which [the Fourth Amendment] emerged, has held that in certain contexts, the Fourth Amendment actually requires general warrants that demonstrate the absence of particularity and probable cause"). Professor Bookspan has commented on the irony of the Court upholding administrative warrants unsupported by particularized suspicion:

Historical analysis of the Fourth Amendment may amount to nothing more than speculation. When we speak of the Framers's intent, we must acknowledge that they surely were not all of one mind. Nevertheless, it seems rather apparent that administrative searches were the violations with which the Framers were intimately familiar and primarily concerned at the time of the drafting. Intrusions by King George's roving patrols, authorized by the writs of assistance to look for administrative violations of the tax and customs rules, were the very searches against which the colonists were reacting. It is, thus, most ironic that modern interpretation reduces Fourth Amendment protections in just the situation that we most clearly can trace back to its origin.

Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 507 n.178 (1991).

<sup>55</sup> See v. City of Seattle, 387 U.S. 541, 547 (1967) (Clark, J., dissenting).

the framers could not have intended the unreasonable search and seizure clause to authorize the same general searches if conducted without a warrant. That result would have made the Fourth Amendment a paper tiger in eliminating the abuses associated with general warrants: warranted searches without particularized suspicion would be prohibited, while warrantless searches would be allowed. Indeed, it was colonial opposition to warrantless customs searches that led to their authorization by the writs.<sup>56</sup> The searches sanctioned by the colonial general warrants were unreasonable and, therefore, unconstitutional, whether or not conducted pursuant to a warrant, because the decision to invade privacy was within the sole discretion of the officer. But while the framers considered customs searches without particularized suspicion unreasonable, it is uncertain how they viewed the type of searches authorized by *Camara*. Searches to protect the public health and safety undertaken pursuant to neutral criteria may have been viewed as constitutionally reasonable although not supported by the framers' concept of probable cause.<sup>57</sup>

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<sup>56</sup> LANDYNSKI, *supra* note 16, at 31-32.

<sup>57</sup> In *Frank*, Justice Frankfurter cited several state statutes that authorized warrantless health and welfare inspections before adoption of the Fourth Amendment. *Frank v. Maryland*, 359 U.S. 360, 367-71 (1959), *overruled by Camara v. Municipal Court*, 387 U.S. 523 (1967). The statutes led Justice Frankfurter to conclude that "[i]nspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history." *Frank*, 359 U.S. at 367.

In overruling *Frank*, the Court in *Camara* did not require the inspections to be undertaken pursuant to particularized suspicion, relying in part on *Frank's* conclusion that such programs "have a long history of judicial and public acceptance." *Camara*, 387 U.S. at 537. In imposing a warrant requirement, however, *Camara* did not address Justice Frankfurter's argument in *Frank* that the inspection programs with a long history of acceptance authorized *warrantless* inspections.

When the Fourth Amendment was adopted, the significance of warrantless health and safety inspections in determining the framers' "original intent" was problematic. At least five interpretations are possible. First, the framers may have approved of the warrantless inspections as reasonable searches. Second, they may have approved of the warrantless inspections only if supported by traditional probable cause. Third, they may have approved of the inspections only if supported by traditional probable cause and a warrant. Fourth, they may have approved of the inspections if supported by neutral inspection criteria and authorized by a warrant. Fifth, and most likely, the framers may have never thought about the issue and, thus, had no intent one way or the other. There is no indication in the pre-constitutional history as to which of these five possibilities accurately reflects the framers' intent, or lack thereof.

Arguably, the third possible interpretation of the framers' intent is best sup-

Significantly, the pre-constitutional history does not establish that the framers intended the Fourth Amendment to *preclude* a warrant requirement for searches and seizures that are constitutionally reasonable but not supported by the traditional definition of probable cause.<sup>58</sup> Since the term probable cause is not self-defining, and since the Amendment contains a general prohibition against unreasonable searches and seizures, the framers may have intended the definition of probable cause to be determined by evolving standards of reasonableness, even though their concept of probable cause required particularized suspicion. This view of the framers' intent supports the decision in *Camara*. More likely, however, the framers had no specific intent on how the two clauses should relate to each other or whether a variable standard should define probable cause.<sup>59</sup> In any event, it is highly unlikely that they envisioned or intended the Amendment to preclude the imposition of a warrant requirement on searches and seizures that are constitutionally reasonable but not supported by the Court's definition of traditional probable cause. An absolute prohibition on the use of warrants in this instance would have been intolerable to the framers whose purpose in adopting the Fourth Amendment was to protect against the invasion of privacy by executive officers acting with unbridled discretion.<sup>60</sup>

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ported by the text and the purpose of the Amendment: it retains the framers' original understanding of probable cause and furthers the Amendment's preference for advance judicial approval of searches. On the other hand, the framers may have intended the unreasonable search and seizure clause to apply to the issue and result in either the first, second or third alternatives. Of course, if the framers intended either the second or the third alternatives, *and* the framers' original intent should be decisive in the interpretation of the Fourth Amendment, both *Camara* and *Frank* were wrongly decided, as neither decision required particularized suspicion as a prerequisite for a search.

<sup>58</sup> For the argument that the framers' original intent is inaccessible, or if ascertainable, should not be of primary significance in constitutional interpretation, see, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); John Hart Ely, *Constitutional Interpretivism; Its Allure and Impossibility*, 53 IND. L.J. 399 (1977-78); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); John C. Wofford, *The Binding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). *But see* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-72 (1977).

<sup>59</sup> See *supra* note 37.

<sup>60</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985) ("The basic purpose of

Indeed, relying upon the unreasonable search and seizure clause to vary the standard of probable cause allows the Court to use warrants defensively for any reasonable search and seizure. Under this approach, it would be irrelevant whether a search is characterized as "administrative" or "criminal investigatory," whether it is supported by particularized suspicion or undertaken pursuant to a neutral inspection plan or whether it is supported by traditional probable cause or merely reasonable suspicion.

*Camara* is written, however, as if the determination that a search or seizure is reasonable had always been the test for probable cause. In fact, variable probable cause was a significant departure from precedent. The Court's failure to acknowledge that it was redefining probable cause deprives *Camara* of some of its legitimacy and may partially explain the Court's reluctance to apply a variable standard of probable cause to other searches and seizures. The irony of *Camara* is that one of the Court's leading decisions emphasizing the importance of the warrant requirement in furthering the underlying purpose of the Amendment is itself vulnerable to the objection of being inconsistent with the Amendment's underlying principles.

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[the Fourth Amendment], as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions of governmental officials."') (quoting *Camara v. Municipal Court*, 387 U.S. 523, 527 (1967)).

Professor Amsterdam concludes that the Amendment was adopted to prevent indiscriminate searches and seizures, which are objectionable for two reasons:

The first is that they expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against *unjustified* searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. The second is that indiscriminate searches and seizures are conducted at the discretion of the executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This latter concern runs against *arbitrary* searches and seizures: it condemns the petty tyranny of unregulated rummagers.

Although conceptually severable, these two concerns are indissolubly linked throughout the preconstitutional history . . . .

Amsterdam, *supra* note 40, at 411 (footnote omitted).

## II. GRIFFIN AND THE CHALLENGE TO DEFENSIVE USE OF WARRANTS

*Griffin v. Wisconsin* is one of a growing number of cases upholding warrantless searches and seizures without probable cause.<sup>61</sup> Many have criticized the Court's increasing tendency to apply a balancing test under the unreasonable search and seizure clause to dispense with the warrant and probable cause requirements.<sup>62</sup> The question that divided the Court in *Griffin*, however, was not whether it was reasonable to dispense with the probable cause requirement. All justices agreed that it was. Instead, *Griffin* raises the question of whether the Fourth Amendment precludes defensive use of warrants when a non-administrative search or seizure is authorized *without* traditional probable cause. In concluding that it does, the Court in *Griffin* implicitly suggests that *Camara* was wrongly decided.

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<sup>61</sup> See, e.g., *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (police officers may conduct warrantless stops of automobiles without probable cause pursuant to non-discretionary scheme to detect drivers under the influence of intoxicants); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (government employers and supervisors may conduct warrantless searches of employee offices without probable cause); *T.L.O.*, 469 U.S. at 325 (school officials may conduct warrantless searches of students without probable cause).

<sup>62</sup> See, e.g., *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (focusing on the reasonableness clause rather than the Warrant Clause makes the Fourth Amendment "virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give that supple term [of reasonableness]"); *T.L.O.*, 469 U.S. at 362 (Brennan, J., dissenting) ("the Fourth Amendment's protections should not be defaced by 'a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify a search and seizure'" (citation omitted)); *Id.* at 369 (balancing tests "amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will"); Bookspan, *supra* note 54, at 508 ("While a reasonableness standard acknowledges the need to address the substantive choices required by competing interests, it establishes a balancing scale of justice that too easily can be tipped by the heavy hand of government."); James B. Jacobs & Nadine Strossen, *Mass Investigation Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 631-32 (1985) ("[T]he balancing approach markedly diminishes fundamental, historically rooted, Fourth Amendment protections."); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 100 (1992) ("The danger is not so much that balancing occurs, but rather that when governmental interests are so often perceived as vital, the resulting balancing test mocks individual privacy rights."). See generally Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989).

The dispute about whether to impose a warrant requirement in *Griffin* arose in analyzing the constitutionality of a warrantless search of a probationer's home without probable cause.<sup>63</sup> Justice Scalia's majority opinion upheld the challenged search because it was authorized by probation department regulations<sup>64</sup> which allowed warrantless searches upon reasonable suspicion that probationers possessed contraband.<sup>65</sup> Four dissenting justices agreed with the majority that probable cause was unnecessary to sustain the search.<sup>66</sup> Three of the dissenters, however, in an opinion written by Justice Blackmun, argued that the search was unreasonable because it was not authorized by a warrant.<sup>67</sup>

Justice Scalia cited several reasons why it is reasonable to

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<sup>63</sup> The search was undertaken after a police detective told a probation officer "that there were or might be guns in Griffin's apartment." *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). Based solely on that tip, two probation officers and three police officers conducted a warrantless search of Griffin's apartment and found a handgun. *Id.* at 870-71. Griffin was convicted of being a felon in possession of a firearm. Griffin appealed his conviction, arguing that the handgun was the fruit of an unlawful search. *Id.* at 872. The Wisconsin Supreme Court affirmed Griffin's conviction, holding that the search was supported by reasonable grounds to believe weapons were present and that the warrantless search was reasonable under the Fourth Amendment because of a probationer's diminished expectation of privacy. In upholding the search, the United States Supreme Court concluded that it was "most unlikely" that the searching officers had sufficient information to establish probable cause. *Id.* at 878.

<sup>64</sup> *Id.* at 870-71.

<sup>65</sup> *Id.* at 880. The probation regulations required reasonable grounds to search, a standard the Court equated with reasonable suspicion. *Id.* at 875. The Court reasoned that if probable cause were required to search probationers, "[t]he probationer would be assured that so long as his illegal . . . activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected." *Id.* at 878.

<sup>66</sup> *Id.* at 887.

<sup>67</sup> Justices Blackmun, Marshall and Brennan argued that the search should have been conducted pursuant to a warrant and that the officers lacked reasonable grounds to search. *Id.* at 882, 887-90 (Blackmun, J., dissenting). The remaining dissenting justice, Justice Stevens, joined only the portion of Justice Blackmun's dissent that argued that the probation officers lacked reasonable grounds to search Griffin's house. Thus, for Justice Stevens the warrantless search would have complied with the Fourth Amendment if reasonable grounds had existed. *Id.* at 890 (Stevens, J., dissenting).

Justice Stevens's position in *Griffin* is consistent with his view that administrative search warrants unsupported by the traditional standard of probable cause are unconstitutional. See *Michigan v. Clifford*, 464 U.S. 287, 302 (1984) (Stevens, J., concurring); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325-26 (1978) (Stevens, J., dissenting); *Michigan v. Tyler*, 436 U.S. 499, 513 (1978) (Stevens, J., concurring); see also *infra* note 166.

dispense with a warrant requirement.<sup>68</sup> Most concern the needs of an effective probation system, but one focuses on the text of the Fourth Amendment. Because the Amendment's second clause provides that no Warrants shall issue but upon probable cause,<sup>69</sup> Justice Scalia concluded that a warrant unsupported by probable cause violates a clear constitutional prohibition.<sup>70</sup> "[W]here the matter is of such a nature as to require a judicial warrant," Justice Scalia reasoned, "it is also of such a nature as to require probable cause."<sup>71</sup> Moreover, Justice Scalia argued that precedent supports this literal interpretation.<sup>72</sup> Justice Blackmun, however, responded, "[T]here is no need to deny the protection by the warrant requirement simply because a search can be justified by less than probable cause,"<sup>73</sup> and noted that the Court previously had imposed a warrant requirement on searches unsupported by probable cause.<sup>74</sup>

#### A. *Reconciling Camara*?

*Camara's* variable standard of probable cause presents a significant obstacle to Justice Scalia's interpretation of the Warrant Clause. Under a variable standard, the reasonableness of the search undertaken in *Griffin* would establish probable cause to impose a warrant requirement. Justice Scalia attempted to reconcile *Camara* with his position in *Griffin* by

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<sup>68</sup> Justice Scalia observed that "[a] warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than a probation officer as the judge of how close a supervision the probationer requires." *Griffin*, 483 U.S. at 876. Justice Scalia also noted that "the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct . . . and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create." *Id.* (citations omitted). But some of *Griffin's* conclusions concerning the needs of a probation system that justify dispensing with the warrant requirement are of questionable validity. See *Griffin*, 483 U.S. at 882-86 (Blackmun, J., dissenting); see also *Massachusetts v. LaFrance*, 525 N.E.2d 379 (Mass. 1988); William B. Weiler, *Griffin v. Wisconsin: Warrantless Probation Searches—Do the State's Needs Warrant Such Strict Measures?*, 21 J. MARSHALL L. REV. 921 (1988).

<sup>69</sup> U.S. CONST. amend. IV, *supra* note 2.

<sup>70</sup> See *supra* note 10.

<sup>71</sup> *Griffin*, 483 U.S. at 877.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 882 n.1.

<sup>74</sup> *Id.*

distinguishing between administrative and judicial warrants.

The Constitution prescribes, in other words, that where the matter is of such a nature to require a judicial warrant, it is also of such a nature as to require probable cause. Although we have *arguably* come to permit an exception to that prescription for administrative search warrants, which may but do not necessarily have to be issued by courts, we have never done so for constitutionally mandated judicial warrants.<sup>75</sup>

Judicial warrants thus differ from administrative warrants based on two factors. First, administrative warrants can be, but do not have to be, issued by judicial officers.<sup>76</sup> Judicial warrants presumably can be issued only by judicial officers. Second, the warrants are supported by different standards of probable cause. Probable cause for judicial warrants is established by a quantum of particularized suspicion,<sup>77</sup> while probable cause for administrative warrants is established by a variable reasonableness standard.<sup>78</sup> Thus, when Justice Scalia concluded that the Warrant Clause prohibits judicial warrants without probable cause, what he really meant is that warrants that must be issued by judicial officers must also be supported by the quantum of particularized suspicion that establishes traditional probable cause.

There are two problems with Justice Scalia's attempt to reconcile *Camara* with his interpretation of the Warrant Clause. First, the text of the Warrant Clause does not authorize different standards of probable cause to support different categories of warrants. If the plain meaning of the Amendment prohibits a warrant requirement in *Griffin*, it must also prohibit a warrant requirement in *Camara*. In both cases traditional probable cause did not exist, yet in *Camara* a warrant requirement was imposed, while in *Griffin* the Court concluded

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<sup>75</sup> *Id.* at 877-78 (emphasis added) (citations omitted).

<sup>76</sup> *Id.* at 877 & n.5.

<sup>77</sup> The *Griffin* Court equated the "ordinary requirement of probable cause" for judicial warrants with "a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as 'reasonable suspicion.'" *Id.* at 877 n.4. The quantum of suspicion required to establish traditional probable cause is unclear. See *infra* notes 86-93 and accompanying text.

<sup>78</sup> "In the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness." *Griffin*, 483 U.S. at 877 n.4.

that a warrant requirement would violate the Fourth Amendment. In trying to reconcile the two cases, Justice Scalia merely emphasizes that the meaning of the Warrant Clause is not as clear as he suggests.

Second, it is misleading for Justice Scalia to attempt to characterize administrative warrants as "arguably" creating an exception to the constitutional requirement that judicial warrants be supported by traditional probable cause. Instead, the administrative search cases allow judicial officers to issue warrants upon probable cause, albeit a different standard of probable cause than required by the traditional definition.<sup>79</sup> Indeed, if Justice Scalia is correct and administrative warrants are exceptions to the prohibition in the Warrant Clause, the meaning of the Fourth Amendment is not clear from its text, which prohibits *all* warrants without probable cause. Thus, by attempting to reconcile *Camara* with his interpretation of the Warrant Clause, Justice Scalia has either established that *Camara* was wrongly decided or that a warrant requirement in *Griffin* is not textually precluded. But even if *Camara* was wrongly decided, the plain meaning of the Warrant Clause would not answer the interpretive question posed by *Griffin*.

### B. *In Search of the Plain Meaning of the Warrant Clause*

Although the plain meaning rule<sup>80</sup> is most often applied

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<sup>79</sup> See *supra* notes 37-39 & 48-51 and accompanying text.

<sup>80</sup> The Court has explained the plain meaning rule as follows:

. . . [T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.

*Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citations omitted); see also *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'") (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Even the plain meaning of an enactment can be disregarded if a literal interpretation would lead to absurd results.

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports

in interpreting statutes, it can apply to constitutional interpretation as well.<sup>81</sup> Yet, the most frequently litigated constitutional provisions are framed in general terms,<sup>82</sup> and it is therefore not surprising that the plain meaning rule is only occasionally applied in constitutional litigation.<sup>83</sup> The assump-

are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

*Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892); *see also* *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940) ("[E]ven when the plain meaning [of legislation] did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.") (citation omitted). *See generally* 2A SINGER, *supra* note 14, § 46.07.

<sup>81</sup> *See* *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819):

[A]lthough the spirit of the instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.

*But see* *Oliver v. United States*, 466 U.S. 170, 186-87 (1984) (Marshall, J., dissenting) (The Bill of Rights, unlike statutes, was not designed "to prescribe with 'precision' permissible and impermissible activities. . . . [W]e strive, when interpreting these seminal constitutional provisions, to effectuate their purposes. . . ."); *but see also* Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1391 (1989) ("[L]iteralism is never a very a [sic] sensible method of constitutional interpretation, and with respect to the Fourth Amendment, it is especially bizarre because the evidence is clear that the Framers themselves never focused their attention on the precise language of the amendment."); *see supra* note 37 (discussing how the Fourth Amendment was adopted by Congress in a form apparently different than intended).

<sup>82</sup> *See* *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.").

The most frequently cited example of a constitutional provision having a plain meaning is the requirement that the President be thirty-five years old. U.S. CONST. art. II, § 1, cl. 5. *But see* Anthony D'Amato, *Aspects of Deconstruction; The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989) (discussing cases where the meaning of the words of this constitutional provision may be uncertain).

<sup>83</sup> *See, e.g.,* *Solorio v. United States*, 483 U.S. 435, 447 (1987) (relying on plain meaning of Art. I, § 8, cl. 14 to hold that court martial jurisdiction is dependent on the sole factor of the military status of defendant).

tion behind the rule—that words have meaning independent of the context in which they are used or applied—has been frequently criticized.<sup>84</sup> Nevertheless, with Justice Scalia's appointment to the Court, the plain meaning rule has taken on increased significance in both statutory and constitutional interpretation.<sup>85</sup> But, the plain meaning rule cannot decide the question posed by *Griffin* because the meaning of the Fourth Amendment's prohibition against warrants without probable cause is not self-defining.

Consider the facially ambiguous probable cause requirement.<sup>86</sup> The Amendment does not address what probable cause is or how it is established. While the framers required some degree of suspicion to support every warranted search and seizure, questions concerning the necessary *degree* of suspicion were probably far from their minds. There is no reported discussion of the question in the pre-constitutional history, nor is it clear that the framers viewed probable cause as requiring the same degree of suspicion for every warranted search and seizure. We do not know whether the framers would have

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<sup>84</sup> See, e.g., 2A SINGER, *supra* note 14, § 46.01 (Statements of plain meaning rule "cannot be taken at face value since parties litigate the issue of meaning all the way to a court of last resort. In many instances, expressions of the plain meaning rule represent an attempt to reinforce confidence in an interpretation arrived at on other grounds."); Michael R. Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 DAYTON L. REV. 31 (1979); Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1300 (1975) ("Nor is it necessary to expend much effort in proving the semantic invalidity of the notion that words . . . can have fixed meanings apart from the context in which they are used. As is so often the case, the shorter answer was given by Judge Learned Hand, when he said that '[t]here is no surer way to misread any document than to read it literally.'") (footnotes omitted).

<sup>85</sup> See *supra* note 11 and accompanying text. Before Justice Scalia's appointment, commentators disagreed on the importance the Court attributed to the plain meaning rule. Compare Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982) (plain meaning approach is now predominant) with Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1982) ("[A]lthough the Court still refers to the 'plain meaning' rule, the rule has effectively been laid to rest.").

<sup>86</sup> A dictionary definition of the adjective "probable" lists several definitions. Some, but not all, suggest a standard of more-likely-than-not. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged ed. 1967) ("1. likely to occur or prove true . . . 2. having more evidence for than against . . . 3. affording ground for belief").

considered the degree of particularized suspicion supporting the search in *Griffin* as establishing probable cause. What we do know, however, is that the common-law concept of probable cause was not very demanding.<sup>87</sup>

Until recently it was unclear whether satisfying a preponderance standard was required to establish probable cause.<sup>88</sup> In *Illinois v. Gates*,<sup>89</sup> however, the Court stressed that probable cause is not susceptible to a mathematical formula.<sup>90</sup> Instead, the Court described probable cause as "a fluid concept—turning on an assessment of probabilities in particu-

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<sup>87</sup>Hale spoke consistently of "probable cause to suspect" rather than "probable cause to believe," and his illustration revealed that probable cause was not always an extremely demanding concept. For example, if one member of a gang of robbers had been identified and if a second person later were found traveling in his company, these facts alone would justify an arrest of the known robber's traveling companion. Other sources confirmed that very little evidence could establish probable cause in the pre-revolutionary period. Several authorities declared that, so long as an offense had been committed, the common opinion of the public that a particular person had committed it would justify his arrest.

Alschuler, *supra* note 1, at 253-54 (citations omitted).

The Virginia Declaration of Rights of 1776, upon which many of the provisions of the Bill of Rights were based, did not even require probable cause to support a warrant. Section X provided "[t]hat general warrants, whereby an officer or messenger may be commanded to search suspected place *without evidence* of a fact committed . . . are grievous and oppressive, and ought not be granted." VA. DECLARATION OF RIGHTS § X (1776), reprinted in 7 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1492-1908, at 3814 (F.N. Thorpe ed., 1909) (emphasis added).

<sup>88</sup> For example, the Court had held that probable cause to arrest exists when evidence is "sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). This standard led one commentator to observe that "such a belief would clearly not be warranted if the facts available to the officer made it as likely as not that he was wrong." Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 306-07 (1984). *But see* *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (probable cause "does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands"); Daniel M. Harris, *The Return to Common Sense: A Response to "The Incredible Shrinking Fourth Amendment"*, 22 AM. CRIM. L. REV. 25 (1984) (when the Fourth Amendment was adopted, probable cause did not require proof of a preponderance standard).

<sup>89</sup> 462 U.S. 213 (1983).

<sup>90</sup> *Id.* at 231 ("Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a 'practical, nontechnical conception.'" (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949))). Professor Grano argues that *Gate's* reliance upon *Brinegar* "is deceiving because the *Brinegar* Court did not address the probable cause 'standard' at all." Grano, *supra* note 40, at 336-37.

lar contexts—not readily, or even usefully, reduced to a neat set of legal rules.”<sup>91</sup> This “fluid concept” was equated with the standards of “fair probability,” “the totality of the circumstances,” “substantial chance” and a “practical common sense decision.”<sup>92</sup>

The Court’s attempt in *Gates* to clarify probable cause is antithetical to a plain meaning interpretation of the Warrant Clause because the standards used to give meaning to the probable cause requirement are not discernable from the Amendment’s text. Moreover, the impreciseness of those standards underscores that, even when clarified through interpretation, the quantum of suspicion required for probable cause is hardly free from ambiguity.<sup>93</sup>

Consider now the warrant requirement. Is any authorization to search or seize a “warrant” or should the term be limited to authorizations for the type of searches and seizures sanc-

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<sup>91</sup> *Gates*, 462 U.S. at 232.

<sup>92</sup> *Gates* abandoned the *Aguilar* and *Spinelli* two-prong test for determining the existence of probable cause based on informants’ tips. In its place, the Court held that probable cause should be determined by

the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

*Id.* at 238 (citations omitted). Elsewhere in its opinion, the Court noted that “probable cause requires only a probability or substantial chance of criminal activity, not the actual showing of such activity.” *Id.* at 245 n.13.

<sup>93</sup> Additional ambiguity arises from the attempt to contrast traditional probable cause with the lesser quantum of suspicion, reasonable suspicion, that supports some searches and seizures. *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (“[W]e use ‘probable cause’ to refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as ‘reasonable suspicion.’”). Reasonable suspicion, the Court has stated, requires awareness “of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). It is appropriate to question, however, whether persons required to enforce and interpret the criminal law can distinguish meaningfully the “practical common-sense” and “fair probability” standards that establish probable cause from the quantum of certainty that establishes reasonable suspicion. Perhaps the most that can be said about the quantum of suspicion that establishes traditional probable cause is that it is more demanding than reasonable suspicion and, like Justice Stewart’s concept of obscenity, judges “know it when they see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

tioned by common-law warrants?<sup>94</sup> A seizure of several suspects for fingerprinting without probable cause, for example, was unknown to the framers. If a court issues a "Judicial Authorization" to seize a suspect to obtain fingerprints based merely upon reasonable suspicion, has a warrant been issued?<sup>95</sup> If the judge who had sentenced Griffin to probation issued an "Order to Determine Whether Probation Shall be Revoked" which authorized a search of Griffin's house for weapons, would a warrant have been issued? The text of the Amendment does not answer either question. It prohibits warrants without probable cause, but it defines neither a warrant nor probable cause.

Assuming we know what a warrant is, who can issue one? Although judicial officers issued the writs of assistance that so troubled the colonists,<sup>96</sup> executive officers issued other general warrants.<sup>97</sup> In prohibiting warrants without probable cause, the Amendment would appear to address warrants issued by any governmental official. On its face, however, the Amendment is silent on who can issue a constitutional warrant.

By interpreting the Amendment to require "neutral and detached" judicial officers to issue most search warrants, the Court furthers the Amendment's preference for before-the-fact approval of searches by persons removed from "the often competitive enterprise of ferreting out crime."<sup>98</sup> In contrast, ad-

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<sup>94</sup> Cf. *California v. Acevedo*, 111 S. Ct. 1982, 1993 (1991) (Scalia, J., concurring) (Fourth Amendment affords protection of common law and "includes the requirement of a warrant, where the common law required a warrant"); *California v. Hodari D.*, 499 U.S. 621 (1991) (relying on common-law definition of seizure to determine whether commanding someone to stop constitutes a seizure under the Fourth Amendment when the suspect does not submit to the command).

<sup>95</sup> See *infra* notes 141-59 and accompanying text.

<sup>96</sup> See LANDYNSKI, *supra* note 16, at 31-37 (noting that while the writs were supposed to be issued by the courts, most judges refused their issuance).

<sup>97</sup> Executive officers issued general warrants in England, and undoubtedly they did so in the colonies. See TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 25-27 (1969) (general warrants in England were ordinarily issued by executive rather than judicial officers).

<sup>98</sup> *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). The reason for requiring a warrant to be issued by a neutral and detached judicial officer was eloquently stated by Justice Jackson:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and

detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . .

When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman . . . .

*Id.* (footnotes omitted); see also *United States v. United States Dist. Court for the Eastern Dist. of Michigan*, 407 U.S. 297, 317 (1972) ("The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy . . . ."); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."). This preference for warranted searches, however, has not been extended to seizures of persons in public. See *United States v. Watson*, 423 U.S. 411, 417 (1976) (police may make a warrantless felony arrest in public even though they have time to obtain a warrant).

Whether or not the Amendment reflects a preference for search warrants is much disputed. The leading proponent of the view that it does not, Professor Taylor, argued that "Justice Frankfurter, and others who have viewed the Fourth Amendment primarily as a requirement that searches be covered by warrants, have stood the [A]mendment on its head. Such was not the history of the matter, such was not the original understanding." TAYLOR, *supra* note 97, at 46-47. Rather, Taylor argues that the framers "were not concerned about warrantless searches, but about overreaching warrants. . . . Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches . . . ." *Id.* at 41. Thus, in Taylor's view, the Warrant Clause was not intended to prohibit warrantless searches, but only general warrants. Chief Justice Rehnquist and Justices Stevens and Scalia have accepted Taylor's argument. See *California v. Acevedo*, 111 S. Ct. 1982 (1991) (Scalia, J., concurring) ("the supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law"); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (Fourth Amendment does not require search warrants, but only that searches be reasonable; preference for warrants is merely "judicially created preference"); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 328 (1978) (Stevens, J., dissenting); see also Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 72 ("The Fourth Amendment does not reflect mistrust of searches made without warrants issued by magistrates; it reflects a concern, consistent with the general mistrust of officialdom in the Constitution and Bill of Rights, that magistrates might issue unreasonably broad warrants."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1178-81 (1991) (common-law warrants were used to protect officers from trespass actions, not to protect privacy).

Professor Grano argues that when considered in its context, Taylor's attack on the view that the Amendment creates a preference for search warrants only concerned the issue of whether a warrant must support a search incident to an arrest. Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 616 (1982). If, however, Taylor intended to attack the

ministrative search warrants can issue upon neutral criteria as one component of a regulatory scheme designed to further purposes broader than the mere enforcement of the criminal law. Under such circumstances, it can be argued that executive officers are unlikely to have a strong personal stake in the outcome of an administrative search and presumably can make an independent assessment of whether a proposed search is undertaken pursuant to the administrative scheme.<sup>99</sup> However, the plain meaning of the Amendment neither compels nor prohibits the distinction between judicial and administrative warrants; the Amendment's text is silent on the issue.

Against this background, interpreting the Fourth Amendment to permit the imposition of a judicial warrant requirement for searches and seizures that are constitutionally reasonable without traditional probable cause does not conflict with the plain meaning of the Fourth Amendment. The War-

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Amendment's general preference for search warrants, Grano concludes that "he failed to prove his point." *Id.* Grano contends that regardless of whether the framers specifically stated a preference for warrants in the Amendment, "history undeniably supports the proposition that the framers opposed leaving the power to search and seize solely in executive hands" and that "the framers' basic purpose [in enacting the Amendment was] . . . seeking judicial control over executive officials whom they did not trust to make search and seizure decisions on their own." *Id.* at 620, 621.

In contrast to Grano, Professor Wasserstrom concludes that it "is an untenable position" to argue that the basic purpose of the Fourth Amendment was to require prior judicial approval for searches and seizures. Wasserstrom, *supra* note 88, at 283. Wasserstrom argues "that there is no evidence that the framers intended to control executive discretion through the mechanism of the special warrant." *Id.* at 296. Nevertheless, Wasserstrom concludes that the Court was correct in interpreting the Amendment to state a preference for warrants since it furthers values identical to those reflected by the framers in outlawing general warrants. "[B]y outlawing general warrants in the Warrant Clause, the colonists sought to ensure that executive discretion would be judicially controlled in very much the same way that the Court now seeks to control that discretion through the warrant requirement." *Id.* at 294-95.

Wasserstrom's position is similar to that of Professor Amsterdam, who contends that the framers lacked any intent regarding when warrants should be required but left that issue to the courts. Amsterdam, *supra* note 40, at 398-99, 410-12. Amsterdam agrees with Taylor's often-quoted observation that in interpreting the Amendment to state a preference for warrants, the Court has "stood the Amendment on its head." However, unlike Taylor, Amsterdam approves of this outcome, concluding that the Court's interpretation of the Fourth Amendment is similar to the way that "the Court has stood the commerce clause on its head in order to allow a collection of states to grow into a nation." *Id.* at 410.

<sup>99</sup> *But see infra* text accompanying notes 106-09.

rant Clause does not state that judicial warrants must issue upon traditional probable cause. Rather, it requires that something known as a "warrant" must be supported by something that establishes "probable cause." What those two terms mean is subject to interpretation, and *Camara* emphasizes just how flexibly the Fourth Amendment can be interpreted to further its underlying purpose of controlling the unbridled discretion of governmental officials.

### C. Implications of Griffin

Justice Scalia's interpretation of the Fourth Amendment in *Griffin* prohibiting judicial warrants unsupported by traditional probable cause is *dicta* since the Court held that the warrantless search in that case was reasonable.<sup>100</sup> However, if the Fourth Amendment must be interpreted as advanced by Justice Scalia, *Griffin's dicta* may have a far greater impact on Fourth Amendment jurisprudence than its holding.

#### 1. Overruling *Camara*

Applying variable probable cause to authorize administrative search warrants, but refusing to apply it to other searches and seizures is symptomatic of the Court's lack of a coherent theory for interpreting the Fourth Amendment.<sup>101</sup> Considering the importance of particularized suspicion to the framers' concept of probable cause,<sup>102</sup> the inconsistency with which variable probable cause has been applied<sup>103</sup> and the changes on the Court since *Camara*,<sup>104</sup> the continued viability of

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<sup>100</sup> See *supra* note 68 and accompanying text.

<sup>101</sup> Professor Bradley has referred to the Fourth Amendment as "the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." Bradley, *supra* note 1, at 1468; see also Sundby, *supra* note 1, at 383 ("In its Fourth Amendment jurisprudence, the United States Supreme Court has struggled continually, and unsuccessfully, to develop a coherent analytical framework.").

<sup>102</sup> See *supra* notes 16-17 and accompanying text.

<sup>103</sup> See *supra* note 52.

<sup>104</sup> *Camara* was written by Justice White. No other member of the 1992 Court had joined his *Camara* opinion. Moreover, in 1978, when Justice White voted as part of a five-member majority to impose a *Camara*-type warrant for an administrative search, see *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), three members

*Camara's* variable standard of probable cause is questionable.<sup>105</sup>

*Griffin* itself may signal the eventual overruling of *Camara* through its characterization of the administrative search cases as "arguably" permitting an exception to the constitutional requirement that judicial warrants be supported by traditional probable cause.<sup>106</sup> Justice Scalia distinguished between administrative and judicial warrants based on the ability of executive officers to issue administrative, but not judicial warrants. But as the *Griffin* dissenters noted, judicial officers *can* issue administrative warrants.<sup>107</sup> In *Camara*, the Court in fact assumed that it had imposed a *judicial* warrant requirement,<sup>108</sup> and this understanding was shared by the dissenters.<sup>109</sup> Justice Scalia's distinction between judicial and administrative warrants, therefore, may be one without a difference if judicial officers must issue both types of warrants. In this event, *Camara*, a decision that Justice Scalia characterizes as an "arguable" exception to the constitutional requirement that judicial warrants be supported by traditional probable cause, may not survive further review by the Court.

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of the 1992 Court (Justices Stevens, Blackmun and Rehnquist) dissented and argued that the Warrant Clause states a "requirement that a warrant only issue on a showing of *particularized* probable cause . . ." *Id.* at 328 (Stevens, J., dissenting) (emphasis added).

<sup>105</sup> *Griffin's* reliance upon *Frank* for the rule "that 'if a search warrant be constitutionally required, the requirement cannot be flexibly interpreted to dispense with the rigorous constitutional restrictions for its issue,'" *Griffin v. Wisconsin*, 483 U.S. 868, 878 (1987), casts further doubt on the viability of *Camara*. What is significant about this quote from *Frank* is that immediately preceding it, Justice Frankfurter belittled a warrant authorizing periodic inspections of housing as a "synthetic search warrant." *Frank v. Maryland*, 359 U.S. 360, 373 (1959). *Camara*, of course, repudiated this characterization. The *Griffin* Court's reliance upon *Frank* to argue against "flexibly interpret[ing] the Warrant Clause" strongly suggests that the Rehnquist Court believes that *Camara* was wrongly decided.

<sup>106</sup> *Griffin*, 483 U.S. at 877.

<sup>107</sup> *Id.* at 882 n.1 (Blackmun, J., dissenting).

<sup>108</sup> *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967) (the determination whether to issue an inspection warrant involves "questions which may be reviewed by a neutral magistrate").

<sup>109</sup> See *v. City of Seattle*, 387 U.S. 541, 548 n.1 (1967) (Clark, J., dissenting) (Requiring a court-imposed warrant "could more appropriately be the function of the agency involved than that of the magistrate. . . . It is therefore unfortunate that the Court fails to pass on the validity of the use of administrative warrants.").

## 2. Prohibiting Defensive Use of Warrants for Non-Administrative Searches

Under Justice Scalia's interpretation of the Fourth Amendment, a holding that a search or seizure does not require traditional probable cause removes the possibility of imposing a judicial warrant requirement. This inability to impose a warrant requirement can put a court in a constitutional straitjacket.<sup>110</sup> Although a court can authorize searches and seizures without traditional probable cause, it cannot use warrants defensively to protect privacy interests. If a warrant requirement is a prerequisite to establishing the reasonableness of a search or seizure, a court faces two unattractive choices.

The first is to minimize the importance of a warrant and to uphold the constitutionality of the warrantless conduct. The second is to conclude that a warrant is necessary to establish the reasonableness of the conduct. In this instance, a court must hold that the search or seizure cannot occur because it lacks the constitutional authority to impose a warrant requirement. Under the first approach, the privacy interests that would be protected by defensive use of a warrant are sacrificed to further the societal interest in authorizing the conduct without probable cause. Under the second approach, the societal interest that would be furthered by authorizing the conduct without probable cause is sacrificed because of the court's inability to establish the reasonableness of the conduct through a warrant requirement. The facts in *People v. Madson*<sup>111</sup> and *United State v. Onyema*<sup>112</sup> highlight the dilemma that a court can face under Justice Scalia's interpretation of the Warrant Clause.

In *Madson*, the police suspected the defendant of murder but apparently did not have probable cause to arrest. A Colorado Rule of Criminal Procedure allows a court to order a suspect to be taken into custody to obtain non-testimonial evi-

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<sup>110</sup> Professors Haddad, Zagel, Starkman and Bauer have suggested that interpreting the Amendment to prohibit a warrant requirement for administrative searches places a straitjacket on the Court. See JAMES B. HADDAD ET AL., CRIMINAL PROCEDURE 419 (3d ed. 1987).

<sup>111</sup> 638 P.2d 18 (Colo. 1981).

<sup>112</sup> 766 F. Supp. 76 (E.D.N.Y.), *remanded without opinion* by 952 F.2d 393 (2d Cir. 1991).

dence.<sup>113</sup> The affidavit in support of the order must establish probable cause that a crime has been committed and reasonable grounds, not amounting to probable cause, that the suspect has committed the crime.<sup>114</sup> Pursuant to this rule, Madson was seized and the police obtained a variety of nontestimonial evidence, including a handwriting exemplar.<sup>115</sup> At trial, a critical piece of evidence was a letter allegedly written by Madson to the victim, and the exemplar apparently established that the letter was genuine.<sup>116</sup> On appeal, Madson argued unsuccessfully that the court rule authorizing his detention was unconstitutional since it allowed a seizure without probable cause.<sup>117</sup> In upholding the seizure, the Colorado Supreme Court emphasized that the order authorizing Madson's

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<sup>113</sup> An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge and establishing the following grounds for the order:

- (1) That there is probable cause to believe that an offense has been committed;
- (2) That there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
- (3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

COLO. R. CRIM. P. 41.1(c).

The Colorado rule, which was adopted by the Colorado Supreme Court in October 1969, is essentially identical to a federal rule of criminal procedure proposed in early 1971 and later rejected by the Committee of Rules of Practice and Procedure of the Judiciary Conference of the United States. Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712, 715 (1972); see *United States v. Holland*, 552 F.2d 667, 673-74 (5th Cir. 1977). The Committee specifically rejected the Rule because it "evoked a number of serious questions which required further study." *Id.* at 674. The Committee also believed that the federal courts would have little need for the procedures contained in the Rule. *Id.*

Legislation implementing similar procedures found in Rule 41.1 was introduced in the Senate in 1969 and later reintroduced in 1971. This legislation also failed to be enacted. *Id.* at 673; Note, *supra*, at 715. These procedures for ordering nontestimonial identification evidence may have failed to be adopted, despite the *dicta* in *Davis* (and later in *Hayes*), because they "raise serious constitutional questions in that the procedures authorized are so similar to searches as to severely test the Fourth Amendment's fundamental prohibition against searches and intrusions without probable cause." Note, *supra*, at 744.

<sup>114</sup> COLO. R. CRIM. P. 41.1(c).

<sup>115</sup> *Madson*, 638 P.2d at 22.

<sup>116</sup> *Id.* at 23-24.

<sup>117</sup> *Id.* at 31.

seizure required prior judicial approval.<sup>118</sup>

Assuming that the court order authorizing Madson's seizure is the equivalent of a judicial warrant,<sup>119</sup> and that the constitutionality of Madson's seizure depends on a warrant requirement, Justice Scalia would presumably have prohibited the warranted seizure because it was not supported by probable cause. An otherwise reasonable method of investigation designed to confirm or dispel quickly a suspect's involvement in a crime would have been lost because of the inability to use a warrant defensively. Under Justice Scalia's approach, the seizure of Madson without probable cause could only occur if its reasonableness did not depend on prior judicial authorization. In cases where a search or seizure without probable cause may be the only way to establish probable cause, a court might diminish the importance of a warrant requirement to uphold the warrantless conduct. The facts in *United State v. Onyema*<sup>120</sup> illustrate this situation.

In *Onyema*, Customs agents had reasonable suspicion that Onyema was importing heroin into the country in balloons he had swallowed.<sup>121</sup> Without obtaining a warrant, the agents shackled Onyema to a bed and waited patiently for nineteen hours for him "to move his bowels and confirm his guilt or innocence, and, if the former, to deliver up all the contraband."<sup>122</sup> After relieving himself, Onyema was directed to wash his feces, separate the heroin and to turn the drugs over to the officers.<sup>123</sup>

Onyema moved to suppress the heroin as the fruit of an unlawful seizure. In holding that the initial seizure was reasonable, the district court acknowledged that a warrantless seizure and detention of a person entering the country is ordinarily constitutional upon reasonable suspicion of criminal activity.<sup>124</sup> Nevertheless, the court held that the circumstanc-

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<sup>118</sup> *Id.* at 32.

<sup>119</sup> The ability of a court to authorize a search or seizure without issuing a warrant is discussed *infra* at text accompanying notes 141-59.

<sup>120</sup> 766 F. Supp. 76 (E.D.N.Y.), *remanded without opinion* by 952 F.2d 393 (2d Cir. 1991).

<sup>121</sup> *Id.* at 77.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 78.

<sup>124</sup> *Id.* at 79, 84.

es surrounding Onyema's extended detention were so intrusive that it required judicial authorization.<sup>125</sup> On appeal, the Second Circuit, in an unpublished opinion, remanded the district court's decision, suggesting that the case was controlled by a second circuit opinion which appeared to authorize Onyema's warrantless seizure.<sup>126</sup>

It may very well be that the Fourth Amendment *does* authorize the highly intrusive detention of Onyema without a warrant and without probable cause.<sup>127</sup> However, the question of whether Onyema's warrantless detention is constitutionally reasonable is very different than the issue of whether the Fourth Amendment *could* be interpreted to authorize a warrant requirement if the reasonableness of his detention was held to depend on judicial authorization. *If* judicial authorization is required, Justice Scalia would not permit the detention unless the police had probable cause to arrest. A finding of probable cause, however, depended upon the discovery of the

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<sup>125</sup> *Id.* at 80-81.

<sup>126</sup> *United States v. Onyema*, 952 F.2d 393 (2d Cir. 1991). The Second Circuit's order cited *United States v. Esieke*, 940 F.2d 29 (2d Cir. 1991). In *Esieke*, the Second Circuit held that the warrantless detention of the defendant upon suspicion of smuggling drugs into the country for a period of one and one-half days in leg irons and handcuffs did not violate the Fourth Amendment. The court "acknowledge[d] that this is an extremely close case," but felt that its holding was compelled by the Supreme Court's decision in *United States v. Montoya de Hernandez*. *Id.* at 36. See *infra* note 127 for a discussion of *Montoya de Hernandez*.

<sup>127</sup> See *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (upholding 16-hour warrantless detention of person entering country upon reasonable suspicion of drug smuggling). The district court in *Onyema* distinguished the holding in *Montoya de Hernandez* by noting that the defendant in that case merely challenged the degree of suspicion required to support her detention and not the fact that the detention was accomplished without a warrant. *Onyema*, 766 F. Supp. at 79-80.

*Montoya de Hernandez*, Justice Brennan expressed disbelief that a warrant requirement might be imposed in administrative search cases, such as *Camara*, but not in the instant case:

Something has gone fundamentally awry in our constitutional jurisprudence when a neutral and detached magistrate's authorization is required before the authorities may inspect "the plumbing, heating, ventilation, gas, and electrical systems" in a person home, investigate the back rooms of his workplace, or poke through the charred remains of his gutted garage, but *not* before they may hold him in indefinite involuntary isolation at the Nation's border to investigate whether he might be engaged in criminal wrongdoing.

*Montoya de Hernandez*, 473 U.S. at 555-56 (Brennan, J., dissenting) (footnote omitted).

balloons, which were found only because Onyema was detained without probable cause. Thus, if a court were to hold that Onyema's extended detention requires a warrant, the practical effect would be that he could not be detained when he entered the country because probable cause did not then exist to support a warrant. Under such circumstances, it is understandable how a judge bound by Justice Scalia's interpretation of the Warrant Clause might be inclined to hold that the warrantless detention was reasonable: to hold otherwise would mean that a suspect such as Onyema escapes prosecution. Thus, interpreting the Fourth Amendment to prohibit defensive use of warrants may lead to a devaluation of the importance of a warrant requirement in order to authorize searches and seizures undertaken without probable cause.<sup>128</sup>

On one level, the division on the *Griffin* Court is a classic clash between form and substance. For the majority, the text of the Warrant Clause is dispositive. The dissenters, on the other hand, appear ready to disregard the text to further the underlying purpose of the Amendment. The two competing approaches, however, also reflect the justices' failure to examine rigorously the underlying assumptions and implications of two fundamentally conflicting approaches to interpreting the Fourth Amendment.

Justice Scalia's approach implies that the Constitution and precedent are so clear on the disputed point that for one to argue otherwise suggests illiteracy. The meaning of the Warrant Clause, however, cannot be discerned solely from its text because the terms "warrant" and "probable cause" are not self-defining.<sup>129</sup> Moreover, Justice Scalia's unpersuasive attempt to distinguish between administrative and judicial warrants

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<sup>128</sup> Alternatively, a court might be tempted to hold that the challenged conduct is not a search or seizure, thus removing the conduct from any Fourth Amendment regulation. See *California v. Acevedo*, 111 S. Ct. 1982, 1993 (1991) (Scalia, J., concurring) ("Our intricate body of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating [exceptions to a warrant requirement], enabling a search to be denominated not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement."); see, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (inspection of garbage placed outside the curtilage is not a search subject to Fourth Amendment analysis); *Oliver v. United States*, 466 U.S. 170 (1984) (trespass on open fields is not a search under the Fourth Amendment).

<sup>129</sup> See *supra* text accompanying notes 86-98.

ultimately undercuts his textual interpretation.<sup>130</sup> Far from illustrating a rigid approach to interpreting the Amendment, the administrative search cases highlight the Court's ability to interpret the probable cause requirement flexibly to impose a warrant requirement on any constitutionally reasonable search or seizure.

Justice Scalia's position also reflects a narrow view of the Court's authority to rely upon the unreasonable search and seizure clause to dispense with the probable cause and warrant requirements. If the Amendment is flexible enough to authorize searches and seizures without either probable cause or a warrant, is it not also implicitly flexible enough to sanction searches and seizures supported by a warrant but not by probable cause? Even assuming that the Warrant Clause is interpreted to prohibit such warrants, must that preclusion prevail if the unreasonable search and seizure clause is interpreted to authorize such warrants?

But while Justice Scalia's approach may be unpersuasive, so, too, is Justice Blackmun's position. As stressed by Justice Scalia, the *Griffin* dissenters fail to explain how, consistent with the Warrant Clause, a warrant requirement can be imposed on a search that all justices agree *is not* supported by probable cause. It is, after all, one thing to conclude that the concept of probable cause is not susceptible to a precise definition. It is yet another to conclude that even if probable cause is lacking, the Fourth Amendment can still authorize a warranted search or seizure despite the prohibition in the Warrant Clause.

### III. DEFENSIVE USE OF WARRANTS WITHOUT VARIABLE PROBABLE CAUSE

Although it had not explicitly decided the issue before *Griffin*, the Court in two cases had suggested that a warrant requirement could be imposed defensively, even in the absence of probable cause. The first case was *Hayes v. Florida*,<sup>131</sup> decided two years before *Griffin*. In *Hayes*, the police, lacking a warrant or probable cause to arrest, took Hayes from his home

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<sup>130</sup> See *supra* text accompanying notes 75-79.

<sup>131</sup> 470 U.S. 811 (1985).

to the police station to obtain his fingerprints.<sup>132</sup> Hayes's fingerprints matched those found at the crime scene and led to his conviction. Hayes unsuccessfully challenged the admission of his fingerprints in the state courts as the fruit of an illegal seizure.<sup>133</sup>

The issue raised by *Hayes* was strikingly similar to that presented in *Davis v. Mississippi*,<sup>134</sup> decided sixteen years earlier. In *Davis*, the Court held that transporting a suspect to a police station for fingerprinting without probable cause or a warrant violated the Fourth Amendment.<sup>135</sup> Not surprisingly, the Court in *Hayes* relied upon *Davis* to hold the detention of Hayes unconstitutional.<sup>136</sup> At the same time, the Court in *Hayes* reaffirmed *dicta* from *Davis* strongly suggesting that a seizure to obtain fingerprints without probable cause would be constitutional if authorized by a warrant.<sup>137</sup>

In *Davis*, the Court cited *Camara* to support its suggestion that a warrant requirement could be imposed in the absence of traditional probable cause.<sup>138</sup> Despite the *Davis* and *Hayes dicta*, it is unlikely that the Court today would apply *Camara's* variable standard of probable cause to uphold a judicially authorized seizure for fingerprinting undertaken without traditional probable cause. The Court limits application of variable probable cause to administrative searches, and a judicially authorized seizure for fingerprinting is very different than an

<sup>132</sup> *Id.* at 812-13.

<sup>133</sup> *Id.*

<sup>134</sup> 394 U.S. 724, 726 (1969).

<sup>135</sup> *Id.*

<sup>136</sup> 470 U.S. at 813-16.

<sup>137</sup> The Court in *Hayes* held that the Fourth Amendment is violated when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.

*Id.* at 816 (emphasis added) (footnote omitted).

In declaring the detention in *Hayes* unconstitutional, the Court emphasized that it did "not abandon the suggestion in *Davis* . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting." *Id.* at 817.

<sup>138</sup> 394 U.S. at 727-28.

administrative search. The former is for the sole purpose of criminal investigation, while the latter is undertaken as part of a regulatory scheme designed to further societal objectives that are broader than the enforcement of the criminal law.<sup>139</sup> Moreover, *Griffin's* characterization of the administrative search cases as an "arguable" exception to the text of the Warrant Clause suggests that the current Court is more likely to reject variable probable cause in administrative search cases than to expand its application to criminal cases.<sup>140</sup>

Although variable probable cause is unlikely to be used to impose a warrant requirement for criminal investigatory searches and seizures undertaken without traditional probable cause, the *Davis* and *Hayes dicta* remains inconsistent with Justice Scalia's conclusion that a judicial warrant must be supported by traditional probable cause. The fingerprinting cases presuppose that a judicial warrant can authorize a seizure without traditional probable cause, while *Griffin* concludes that the Fourth Amendment prohibits such warrants. Can the Fourth Amendment be interpreted to authorize a warrant requirement in the absence of traditional probable cause without relying upon the existence of a variable standard of probable cause? The following sections discuss two alternative interpretations to accomplish this result.

#### A. A Warrant by Any Other Name?

Can a judicial officer authorize a search or seizure without issuing a "warrant"?<sup>141</sup> If so, it can be argued that the consti-

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<sup>139</sup> See *supra* text accompanying notes 50-51.

<sup>140</sup> See *supra* text accompanying notes 101-09.

<sup>141</sup> It is clear, however, that a suspect can be subpoenaed to appear before a grand jury to provide non-testimonial evidence in the absence of probable cause to arrest without subjecting the appearance to regulation under the Fourth Amendment. See *United States v. Mara*, 410 U.S. 19 (1973) (grand jury subpoena to obtain handwriting exemplar); *United States v. Dionisio*, 410 U.S. 1 (1973) (grand jury subpoena to obtain voice exemplar). In *Dionisio*, the Court held that the subpoena is not subject to the Fourth Amendment-analysis because "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense." *Id.* at 9. The Court emphasized the difference between the invasion of privacy caused by a subpoena, on the one hand, and an arrest or *Terry* stop, on the other:

The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstance, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as

tutionality of the authorization should be decided under the unreasonable search and seizure clause and not the Warrant Clause. In *Hayes*, the Court interchangeably described a court order for fingerprinting without probable cause as a judicial authorization and as a warrant.<sup>142</sup> The Court may have referred to a judicial authorization for fingerprinting merely as an alternative way to describe a warrant. However, if a judicial authorization for fingerprinting is different than a warrant for fingerprinting, the distinction might be used to bypass the Warrant Clause's prohibition against warrants without probable cause.

The difference between warrants and other forms of judicial authorization was of critical importance to the district court in *United States v. Onyema*.<sup>143</sup> In *Onyema*, the court, without applying a variable standard of probable cause, relied upon the *Davis* and *Hayes dicta* to require judicial authorization for the extended detention of a suspected drug smuggler seized without probable cause.<sup>144</sup> In so doing, the district court rejected the argument that the judicial authorization would violate the Fourth Amendment's prohibition against warrants without probable cause:

While the Warrant Clause provides that warrants may issue only on a showing of probable cause, it does not limit the capacity of the Reasonableness Clause to require some kind of judicial authorization to ensure that a search or seizure is reasonable where less than

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other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

*Id.* at 10 (quoting *United States v. Doe* (Schwartz), 457 F.2d 895, 898 (2d Cir.), cert. denied, 410 U.S. 941 (1972)).

<sup>142</sup> "None of our later cases have undercut the holding in *Davis* that transportation to and investigative detention at the station house without probable cause or *judicial authorization* together violate the Fourth Amendment." *United States v. Hayes*, 470 U.S. 811, 815 (1985) (emphasis added). "[T]he holding in *Davis* [is] that in the absence of probable cause or a *warrant*[,] investigative detentions at the police station for fingerprinting purposes could not be square with the Fourth Amendment." *Id.* "[I]nvoluntary removal of a suspect from his home to a police station . . . absent probable cause or *judicial authorization*" is unconstitutional. *Id.* (emphasis added).

<sup>143</sup> 766 F. Supp. 76 (E.D.N.Y.), remanded without opinion by 952 F.2d 313 (2d Cir. 1991). The facts in *Onyema* are discussed *supra* in notes 121-26 and accompanying text.

<sup>144</sup> *Onyema*, 766 F. Supp. at 82-83.

probable cause is required to justify the intrusion.<sup>145</sup>

The court thus removed its holding from an analysis under the Warrant Clause by concluding that a judicial authorization for a seizure is not tantamount to a warrant authorizing a seizure. This approach is essentially the flip-side of the Supreme Court's recent reliance on the unreasonable search and seizure clause to sanction warrantless searches and seizures without probable cause. Since *Terry*, the Court has recognized that the probable cause requirement in the Warrant Clause is not dispositive of whether searches and seizures analyzed under the unreasonable search and seizure clause require probable cause. The same flexibility in interpreting the unreasonable search and seizure clause to allow searches and seizures without probable cause also might apply to the type of judicial authorization that must support searches and seizures that are reasonable without probable cause. Under this approach, the Warrant Clause would be interpreted to address only the type of suspicion that supports "traditional warrants." A traditional warrant could be defined as the type of judicial authorization that must support a search or seizure requiring traditional probable cause. The requirement in the Warrant Clause that warrants be supported by probable cause, however, need not be dispositive of whether the unreasonable search and seizure clause could sanction searches and seizures by "some [other] kind of judicial authorization"<sup>146</sup> supported by less than probable cause. If a search or seizure without traditional probable cause is authorized under the unreasonable search and seizure clause, a non-traditional warrant requirement could be imposed to establish the reasonableness of the conduct.

Ironically, this approach is suggested by Justice Scalia's attempt in *Griffin* to reconcile *Camara* with his interpretation of the Warrant Clause. Recall that Justice Scalia distinguishes between administrative and judicial warrants and the type of probable cause that supports both.<sup>147</sup> Under the approach suggested here, Justice Scalia's concept of a judicial warrant is the paradigm of the type of authorization addressed in the Warrant Clause. A judicial warrant must be issued by a judi-

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<sup>145</sup> *Id.* at 82.

<sup>146</sup> See *supra* text accompanying note 145.

<sup>147</sup> See *supra* notes 76-78 and accompanying text.

cial officer, it must be supported by a relatively high degree of particularized suspicion and it authorizes a search or seizure undertaken for the sole purpose of criminal investigation. An administrative warrant is very different. It might issue from an executive officer, it does not require any degree of particularized suspicion and it must be authorized under a regulatory scheme addressing a societal concern that is broader than the general need for law enforcement. It is therefore understandable why the *Camara* dissenters decried administrative warrants as "new-fangled warrants."<sup>148</sup> Indeed, administrative warrants are so unlike judicial warrants that the term "administrative inspection authorization" may more appropriately describe the type of advance authorization required by *Camara*. If an administrative inspection authorization is not a traditional warrant, it would not be covered by the Warrant Clause and would not require probable cause. The authorization could be upheld under the unreasonable search and seizure clause without the need to vary the definition of probable cause under the Warrant Clause.

This approach might also be applied in criminal cases to allow judicial authorization of searches and seizures by something other than a warrant. Indeed, in the context of the limited type of seizure to obtain non-testimonial evidence contemplated by the Supreme Court in *Hayes* and *Davis*, lower courts have considered whether searches and seizures that must be judicially authorized can only be authorized by warrants.

Some courts have rejected a distinction between warrants and other judicial authorizations for searches and seizures. For these courts, a warrant by any other name is still a warrant. In *People v. Marshall*,<sup>149</sup> for example, the prosecutor sought judicial authorization to obtain blood and hair samples from a murder suspect.<sup>150</sup> The lower court "granted the request but, in lieu of issuing a search warrant, signed an order captioned 'Order Granting Temporary Detention of [the suspect] For The Purpose of Obtaining A Blood Sample and Hair Sample.'"<sup>151</sup> On appeal, the Michigan Court of Appeals held that in the

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<sup>148</sup> See *supra* note 55 and accompanying text.

<sup>149</sup> 244 N.W.2d 451 (Mich. Ct. App. 1976).

<sup>150</sup> *Id.* at 453.

<sup>151</sup> *Id.*

absence of a statute authorizing the detention order, "there is no such 'animal' in this jurisdiction as a court order authorizing the detention of a suspect for the purpose of a search."<sup>152</sup> Despite the title of the detention authorization, the appellate court concluded that it was a warrant because "[i]t was issued upon sworn affidavit, described the person to be searched, and was signed by an impartial magistrate."<sup>153</sup>

On the other hand, in *Arizona v. Grijalva*,<sup>154</sup> the Arizona Supreme Court upheld a court-ordered detention of a suspect to obtain photographs, fingerprints and hair samples without probable cause to arrest.<sup>155</sup> The court emphasized that the detention order, issued pursuant to statute,<sup>156</sup> was very different than an arrest warrant since the order allowed detention for only a limited period.<sup>157</sup> Moreover, the intrusiveness of obtaining the identification evidence was "relatively slight" when compared to an arrest.<sup>158</sup> While acknowledging that the Fourth Amendment requires warrants to be supported by probable cause, the court relied upon the *Hayes* and *Davis dicta* to conclude that "[a] temporary detention order is not, however, of the stature of a warrant necessitating probable cause."<sup>159</sup>

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<sup>152</sup> *Id.* at 457. The court's suggestion that the order might have been upheld if authorized by statute does not necessarily establish that the order would have been constitutional. Although legislative authorization of the detention order would provide the statutory basis for the order, it would not be dispositive of constitutionality under the Fourth Amendment.

<sup>153</sup> *Id.* at 458. Although the prosecutor assumed that probable cause did not exist to support the court order, the appellate court disagreed and upheld the court order as a warrant supported by probable cause. *Id.*

An approach similar to that taken in *Marshall* was followed by the New York Court of Appeals in *In re Death of Abe A.*, 56 N.Y.2d 288, 294, 437 N.E.2d 265, 268, 452 N.Y.S.2d 6, 9 (1982) ("Nomenclature notwithstanding, if the application and the relief comport with all the requisites of a search warrant, it may be taken for what it is.") (citation omitted); see also *In re Order Req. Fingerprinting of a Juv.*, 537 N.E.2d 1286, 1289 (Ohio 1989) (Sweeney, J., dissenting) (A court order authorizing detention without probable cause "constitutes nothing more and nothing less than a search warrant.").

<sup>154</sup> 533 P.2d 533 (Ariz. 1975).

<sup>155</sup> *Id.* at 534-35.

<sup>156</sup> 5A ARIZ. REV. STAT. ANN. § 13-1424 (1989), *renumbered as* 5B ARIZ. REV. STAT. ANN. § 13-3905 (1989 & Supp. 1993). Other states have similar statutes. See, e.g., 4A IDAHO CODE § 19-625 (1987); N.C. GEN. STAT. § 15A-271-279 (1988); UTAH CODE ANN. § 77-8-1 (1982).

<sup>157</sup> *Grijalva*, 533 P.2d at 535.

<sup>158</sup> *Id.* at 536.

<sup>159</sup> *Id.* at 535. Similarly, in *United States v. Holland*, 552 F.2d 667 (5th Cir.

There are, however, two significant problems with interpreting the unreasonable search and seizure clause to authorize what is essentially a form of "mini-warrant" unsupported by traditional probable cause. First, the type of judicial authorization contemplated in cases such as *Onyema* and *Grijalva* appears to be the functional equivalent of a warrant. Limiting the use of "mini-warrants" to administrative searches and minimally intrusive criminal investigatory searches and seizures does not respond to the concern that a "judicial authorization" for a search or seizure has the same essential attributes as a warrant. Attempting to bypass analysis under the Warrant Clause merely by giving a different name to something that for all intents and purposes is the equivalent of a warrant seems as formalistic and unconvincing as Justice Scalia's conclusion that the text of the Fourth Amendment prohibits a warrant requirement in *Griffin*. Second, even if a judicial authorization under the unreasonable search and seizure clause is not the functional equivalent of a warrant, judicial authorizations, although designed to protect privacy, can be used to weaken Fourth Amendment protection, a concern addressed in the final Part of this Article.

### B. *Trumping the Warrant Clause*

This section begins with the assumption that the Warrant Clause requires traditional probable cause for all judicially authorized searches and seizures. In this instance, the Warrant Clause would prohibit judicial authorization of the seizures in *Davis* and *Hayes* and the searches in *Camara* and *Griffin*. It is a familiar rule of interpretation, however, that the meaning of an enactment cannot be discerned by reliance upon only a single section or clause.<sup>160</sup> This is particularly true in

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1977), the court distinguished between a warrant and an order issued without probable cause requiring a prisoner to provide a handwriting exemplar.

[T]he order below was not a search warrant either in form or in substance. A search warrant is not an order but is a grant of authority for a law enforcement officer to search premises for and to seize specified objects already in existence. Nothing need be done by the person who is the cause or object of the search. The order below, however, was directed solely to a subject of the investigation and ordered him to create something—namely, handwriting exemplars.

*Id.* at 675.

<sup>160</sup> This principle, known as the "whole statute" approach to interpretation, has

Fourth Amendment jurisprudence where the warrant and probable cause requirements of the Warrant Clause are prime determinants of constitutionality under the unreasonable search and seizure clause.<sup>161</sup> Even if the Court holds that the Warrant Clause prohibits judicial authorization of a search or seizure unless supported by traditional probable cause, imposing a warrant requirement without traditional probable cause may sometimes be necessary under the unreasonable search and seizure clause.

The balancing test frequently applied under the unreasonable search and seizure clause makes that provision ideally suited to authorize defensive use of warrants. Competing privacy and societal interests are frequently identified, weighed and balanced under that clause in deciding whether a search

been summarized as follows:

A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

2A SINGER, *supra* note 14, § 46.05 (footnote omitted).

The Supreme Court has recognized that the "whole statute" approach to statutory interpretation also applies to constitutional interpretation. *See* Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607 (1944); *see also* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819) ("Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable.").

<sup>161</sup> *See* United States v. United States Dist. Court for the Eastern Dist. of Michigan, 407 U.S. 297, 315 (1972) ("Though the Fourth Amendment speaks broadly of 'unreasonable searches and seizures,' the definition of 'reasonableness' turns, at least in part, on the more specific commands of the Warrant Clause."). Reliance on the warrant and probable cause requirements to determine reasonableness, is not, however, absolute. As noted by Justice Kennedy,

[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. . . .

We have recognized exceptions to this rule, however . . . .

*Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (citations omitted).

or seizure without probable cause is constitutionally reasonable.<sup>162</sup> For some searches and seizures, an appropriate balance might only be reached if the unreasonable search and seizure clause is interpreted to permit the issuance of warrants without traditional probable cause. Without the ability to strike this balance, a court is confronted with the either/or choice of authorizing a search or seizure without a warrant or not authorizing it all.<sup>163</sup> For the reasons previously discussed, this choice is likely to be resolved by devaluing the importance of a warrant to authorize the warrantless search or seizure.<sup>164</sup>

The issue of whether the Fourth Amendment authorizes warrants to be used defensively therefore involves a clash between fundamentally inconsistent interpretations of the Amendment's two clauses. Imposing a warrant requirement may be necessary under the unreasonable search and seizure clause to establish the constitutionality of a search or seizure undertaken without probable cause, but to do so would violate the Warrant Clause.

There is no indication that the framers intended the Fourth Amendment to prohibit a warrant requirement when a search or seizure otherwise would be constitutionally reasonable without the Court's definition of traditional probable cause.<sup>165</sup> Instead, the overriding goal of the Fourth Amendment of protecting privacy by controlling the discretion of executive officers can be furthered by imposing a warrant requirement on this conduct.<sup>166</sup> If the only way that a search or sei-

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<sup>162</sup> See *supra* notes 61-62 and accompanying text.

<sup>163</sup> See *supra* notes 111-13 and accompanying text.

<sup>164</sup> See *supra* notes 120-28 and accompanying text.

<sup>165</sup> See *supra* notes 57-58 and accompanying text.

<sup>166</sup> When searches and seizures are authorized without traditional probable cause, a warrant requirement can limit discretion and protect privacy from unjustified and arbitrary governmental interference. For administrative searches, a warrant controls discretion by insuring that the decision to invade privacy is undertaken pursuant to neutral criteria. See *supra* text accompanying notes 25-30. For criminal investigatory searches and seizures upon reasonable suspicion, the need for a warrant requirement may be even more compelling than if the conduct required probable cause.

Searches and seizures upon reasonable suspicion carry an inherently greater risk of invading the privacy of an innocent person than if the intrusion required probable cause. The quality and quantity of the evidence supporting the search in *Griffin*, for example, hardly present a compelling justification for searching a

dwelling. Griffin's home was searched based solely upon a tip from a police detective to a probation officer "that there were or might be guns in Griffin's apartment." See *supra* note 63. The tip failed to reveal the source of its information, and the detective thought most likely to have provided the tip could not recall doing so. *Griffin v. Wisconsin*, 483 U.S. 868, 887-88 (1987) (Blackmun, J., dissenting).

If the information supporting the search in *Griffin* is an example of the type of evidence that establishes reasonable suspicion, that standard grants substantial discretion to executive officers in deciding when to invade privacy. This no doubt led the dissenters to criticize the standard applied in *Griffin* to uphold the search as being no standard at all: "The content of a standard is found in its application and, in this case, I cannot discern the application of any standard whatsoever." *Id.* at 887 (Blackmun, J., dissenting). That discretion, in turn, increases the possibility of arbitrary conduct. Since a relatively low level of suspicion justifies a search or seizure, police officers have considerable flexibility to act for purposes of harassment or as a pretext for other intrusions that require probable cause.

Imposing a warrant requirement on searches and seizures that require only reasonable suspicion serves several purposes. First, a warrant narrowly defines the permissible scope of a search. See *Marron v. United States*, 275 U.S. 192, 196 (1927) (purpose of the particularity requirements is to limit discretion of officer executing the warrant). There is as much need to describe particularly the objects of a search to control the discretion of the officers searching Griffin's home upon reasonable suspicion as there would be if the search required probable cause. For example, assume that Griffin had successfully completed his probationary period and was suspected of unlawfully possessing a concealable firearm in his house after having been convicted of a felony. Traditional probable cause would be required to search, and the search could only be conducted pursuant to a warrant that particularly described the object of the search. The search of the home of Griffin, the probationer, involves the same intrusion as the search of Griffin, the convicted felon. If a warrant requirement is necessary to control the discretion in one case, it would serve the same purpose in the other. This is not to suggest, however, that it may not be reasonable to dispense with a warrant requirement when the home of Griffin the probationer is searched, for that determination would be based on factors other than the need to control the discretion of the searching officer.

A judicial warrant requirement also forces the government to establish the justification for its conduct to a neutral and detached officer before it can invade privacy. It is unable to rely simply upon the judgment of an officer charged with enforcing the law who, because of an interest in "making a case," may act hastily and resolve any doubts about the lawfulness of conduct in the government's favor. Thus, the warrant requirement helps prevent unjustified searches and seizures. In doing so, it deters arbitrary conduct.

Arbitrary searches and seizures, which also are often likely to be impulsive, flourish when a low level of suspicion supports an intrusion without prior judicial approval. An officer is less likely to act arbitrarily if first required to appear before a judicial officer and establish the grounds for a search or seizure. See *Latta v. Fitzharris*, 521 F.2d 246, 257 (9th Cir. 1975) ("The requirement that an officer articulate his reasons for making a search before he searches is a substantial deterrent to impulsive and arbitrary official conduct.") (citation and footnote omitted). Additionally, by making a record of the justification for an intrusion before it occurs, the warrant process prevents the outcome of a search or seizure from in-

zure without probable cause can be made reasonable is through a warrant requirement, the unreasonable search and seizure clause should be interpreted to authorize a warrant and trump the prohibition in the Warrant Clause. The Warrant Clause, designed to control the discretion of executive officers, should not be applied mechanically to preclude that control simply because a search or seizure is constitutionally reasonable without probable cause.

One might respond that the Warrant Clause, as a specific prohibition, should prevail over a conflicting interpretation under the general reasonableness inquiry mandated by the

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fluencing a subsequent determination of whether it was justified at its inception.

The assumption that search warrants protect privacy interests has been challenged by Justice Stevens. Emphasizing that a search warrant authorizes forcible "unannounced, immediate entry and search," *Michigan v. Tyler*, 436 U.S. 499, 513 (1978) (Stevens, J., concurring), Justice Stevens has argued that a warrant "is not simply a device providing procedural protection for the citizen; it also grants the government increased authority to invade the citizen's privacy." *Id.* at 514 n.2 (citing *Wyman v. James*, 400 U.S. 309, 323-24 (1971)).

Justice Steven's concern that warranted searches may be more intrusive than warrantless searches is overstated. Notice must generally be given before a warrant is executed and force used. *See generally* 4A LAFAVE, *supra* note 1, § 4.8(a)-(c). Although there are circumstances that justify an unannounced, forcible warranted search, they are the exceptions rather than the rule. *Id.* 4.8(d)-(g). Moreover, while there theoretically may be a right to refuse a warrantless search, that right sometimes carries a price. The regulations authorizing the search in *Griffin*, for example, provide that refusal to submit to a search is itself a violation of probation. *Griffin*, 483 U.S. at 371. Further, the request to conduct a warrantless search may convey that there is no right to refuse.

Justice Stevens's concern about warranted searches was raised in objecting to administrative warrants that authorize searches without particularized suspicion. There is substantial disagreement about whether the probable cause showing for administrative warrants is effective in protecting privacy interests and, if effective, whether that protection is outweighed by the societal interest in permitting warrantless searches. *See supra* notes 31-36 and accompanying text. However, criminal investigatory search warrants are considered so important in protecting privacy interests that warrantless searches are presumptively unconstitutional. *See supra* note 15. The same privacy interests can be implicated by a criminal investigatory search requiring traditional probable cause and a search that is constitutional upon reasonable suspicion. If a warrant requirement is not to be imposed on a search requiring only reasonable suspicion, the justification cannot be that it is ineffective in protecting privacy interests, since it would be presumed effective if the search required traditional probable cause.

The effectiveness of the warrant process in insuring meaningful review by a neutral officer is not without its detractors. *See, e.g.,* Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405 (1986); Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173 (1987); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

unreasonable search and seizure clause. However, the rule of construction that "the specific controls the general,"<sup>167</sup> like any other rule of construction, merely aids interpretation and does not apply if a contrary intent appears.<sup>168</sup> The Amendment's preference for before-the-fact review of the decision to invade privacy is itself derived from the Warrant Clause. This "one governing principle"<sup>169</sup> of Fourth Amendment jurisprudence reflects an intent not to preclude the protection afforded by a warrant requirement merely because a search or seizure is reasonable without probable cause.<sup>170</sup> At the same time, like the two other interpretations of the Fourth Amendment discussed in this Article which authorize defensive use of warrants, the ability to trump the Warrant Clause can also be applied to erode Fourth Amendment protection.

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<sup>167</sup> It is generally held that a specific enactment addressing an issue should control over a more general provision. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring in part and concurring in the judgment). See generally 2A SINGER, *supra* note 14, § 51.05.

<sup>168</sup> 2A SINGER *supra* note 14, § 51.05 n.3. The so-called "cannons of construction" are frequently criticized as being contradictory and subject to manipulation. See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

<sup>169</sup> See *supra* text accompanying note 24.

<sup>170</sup> An argument that the prohibition against defensive use of warrants in the Warrant Clause should prevail over the authorization of such warrants under the unreasonable search and seizure clause also may incorrectly assume that the former is more specific than the latter in addressing the constitutionality of defensive use of warrants. Of course, if something is a "warrant" it must be supported by something known as "probable cause." What those two terms mean raises as many, if not more, questions of interpretation as deciding whether imposing a warrant requirement on a search or seizure that does not require probable cause is the only way to establish the constitutional reasonableness of that conduct.

The Warrant Clause, because of its emphatic command, initially appears more specific in prohibiting judicial warrants without traditional probable cause than the unreasonable search and seizure clause appears in authorizing such warrants. However, this specificity exists only as a consequence of the Court's interpretation of the warrant and probable cause requirements to preclude defensive use of warrants under the Warrant Clause. The authorization of defensive use of warrants in the unreasonable search and seizure clause is no less specific than the prohibition of such warrants in the Warrant Clause, since both are dependent on judicial interpretations of words that have no plain meaning. See *supra* notes 80-99 and accompanying text.

#### IV. WEAKENING FOURTH AMENDMENT PROTECTION BY AUTHORIZING DEFENSIVE USE OF WARRANTS

Although the Fourth Amendment can be interpreted to authorize defensive use of warrants, there may be significant costs in doing so. Justice Scalia may have been hinting at this when he criticized the *Griffin* dissenters for not considering the impact of allowing warrants to issue without probable cause on Fourth Amendment jurisprudence.<sup>171</sup> Authorizing warrants to issue without probable cause creates the possibility that an interpretation of the Fourth Amendment designed to protect privacy and control discretion will be used to subvert those interests.

##### A. *Varying the Probable Cause and Warrant Requirements*

The discussion to this point envisions that applying *Camara's* variable standard of probable cause to all searches and seizures that are reasonable without traditional probable cause will result in warrants being used defensively to protect privacy interests. An expanded application of variable probable cause, however, can also lead to warrants being used offensively. Instead of being used to impose a warrant requirement when searches and seizures are appropriately authorized without traditional probable cause, a variable standard might be applied to reduce the degree of suspicion for warranted searches and seizures that now appropriately require traditional probable cause.<sup>172</sup>

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<sup>171</sup> See *supra* text accompanying note 13.

<sup>172</sup> For example, in the previously discussed hypothetical of a search of warehouse for drugs, see *supra* text accompanying notes 40-41, a search might be authorized upon a degree of particularized suspicion that is less than that now required to establish traditional probable cause.

A second concern raised by a variable standard of probable cause concerns its effect on the administration of justice. Under a variable standard, a multitude of levels of particularized suspicion could support different categories of intrusions, transforming the Amendment "into one immense Rorschach blot." Amsterdam, *supra* note 40, at 393. A sliding scale of suspicion Professor Amsterdam notes, "could achieve the infinitely sensible result that two-minute street detentions are allowable upon a 37 percent probability of criminality, four-minute street detentions are allowable upon a 39 percent probability of criminality, and so on." *Id.* at 376. But such fine distinctions would be accomplished at the cost of making the Amendment far more difficult to interpret and apply. *Id.* at 394-75.

Variable probable cause may also lower the standard of suspicion for warrantless searches and seizures. In this instance, however, variable probable cause does not create new authority to sanction warrantless conduct without traditional probable cause; the conduct can already be authorized under the unreasonable search and seizure clause. Variable probable cause, however, could prompt the Court to reexamine cases imposing a traditional probable cause standard on broad categories of warrantless searches and seizures and potentially result in a lowering of the required degree of particularized suspicion for some of that conduct.<sup>173</sup>

Similarly, interpreting the unreasonable search and seizure clause to allow non-traditional warrants to issue without probable cause risks eroding Fourth Amendment protection. Existing administrative search doctrine limits judicially authorized searches without traditional probable cause to a narrow category of searches in which a non-traditional warrant requirement protects privacy interests. But if a non-traditional warrant requirement is authorized for all searches and seizures, it could lead to a reduction of the degree of suspicion required for some judicially authorized criminal investigatory

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This is a significant but not fatal concern. Although the Court has stressed the importance of a "single uniform standard" of probable cause for criminal investigatory conduct, *see supra* note 45, it has not defined that standard in a manner that is particularly illuminating to those charged with enforcing and interpreting the criminal law. *See supra* text accompanying notes 87-93. Applying a variable standard to all searches and seizures may force the Court to define the quantum of required suspicion for general categories of searches and seizures more precisely. Additionally, while a variable standard theoretically can lead to the fine gradations of suspicion hypothesized by Professor Amsterdam, the Court is unlikely to apply variable probable cause in that manner. Instead, variable probable cause could lead to the creation of a handful of levels of suspicion that may be easier to apply than the current amorphous standard. *Cf. People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) (establishing four levels of suspicion for police-citizen encounters: "request for information," "common-law right of inquiry," reasonable suspicion and probable cause). *But cf. Emily J. Sack, Note, Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v. De Bour*, 66 N.Y.U. L. REV. 512, 533 (1991) (arguing that instead of providing guidance, *De Bour* has caused confusion at all levels of the criminal justice system).

<sup>173</sup> For example, under the current approach to defining probable cause, it is unlikely that the Court would reexamine the rule that warrantless arrests must be supported by traditional probable cause. Adoption of a variable standard, however, with its emphasis on the flexibility of the standard to respond to a variety of competing interests, might result in the Court lowering the degree of suspicion required for some arrests.

searches and seizures.<sup>174</sup>

Moreover, the current Supreme Court is likely to apply a non-traditional warrant requirement to authorize offensive rather than defensive use of warrants. Consider, for example, the search in *Griffin*. Applying variable probable cause to that search does nothing to control discretion or protect privacy since a majority of the Court held that the warrantless search was constitutional upon reasonable suspicion.<sup>175</sup> On the other hand, a variable standard of probable cause might be applied to the previously discussed hypothetical of a search of a warehouse for drugs<sup>176</sup> and authorize a search warrant without traditional probable cause. Similarly, the Court is unlikely to hold that the seizure and detention of Onyema requires judicial authorization.<sup>177</sup> It is by far easier, for example, to envision the current Court upholding a non-traditional warrant that authorizes, upon reasonable suspicion, a brief entry into a suspected drug dealer's house to seize contraband in plain view and then allowing that evidence to be used to obtain a traditional warrant for a more thorough search.<sup>178</sup>

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<sup>174</sup> Cf. *United States v. Karo*, 468 U.S. 705, 718 n.5 (1984) (Court notes but reserves ruling on government's argument that reasonable suspicion rather than probable cause should be the standard if a warrant requirement applies to monitoring an electronic beeper in the home).

<sup>175</sup> See *supra* text accompanying notes 63-67.

<sup>176</sup> See *supra* notes 40-41 and accompanying text.

<sup>177</sup> See *supra* note 127.

<sup>178</sup> Cf. *Segura v. United States*, 468 U.S. 796 (1984) (illegal warrantless entry to secure premises pending issuance of search warrant does not require suppression of evidence seized pursuant to that warrant even if defendants could establish that the evidence would have been destroyed but for the illegal entry).

The fear that non-traditional warrants could lead to a reduction of the degree of suspicion required for judicially authorized searches and seizures could be addressed if a non-traditional warrant requirement is limited to "non-traditional" searches and seizures such as the electronic monitoring challenged in *Karo*, see *supra* note 174, or the seizures in *Hayes* and *Davis*. This approach could prevent erosion of the probable cause requirement for searches and seizures that have previously required a warrant supported by probable cause, such as a search of a dwelling for criminal evidence or an arrest inside the suspect's house.

There are two problems, however, with an attempt to limit the scope of a non-traditional warrant requirement. The first is that the limitation still allows a reduced level of suspicion for judicially authorized, non-traditional criminal investigatory searches and seizures that might have required a warrant supported by probable cause in the absence of a non-traditional warrant requirement. The second is that the difference between "traditional" and "non-traditional" searches and seizures is not always an easy one to make. Consider, for example, the hypothetical envisioned in the accompanying text. Is the police conduct in that case a tradi-

### B. *Trumping the Warrant Clause*

Allowing the unreasonable search and seizure clause to trump the Warrant Clause and to authorize defensive use of warrants also risks diminishing Fourth Amendment protection. Since this approach would allow a search warrant to issue in *Griffin* upon reasonable suspicion, might not other provisions of the Warrant Clause also be trumped in other cases? For example, could the particularity requirement be ignored for some purely criminal investigatory searches?

It might be argued that this fear is overstated since the interpretation envisioned here permits trumping the Warrant Clause only to further the Amendment's purpose of controlling discretion and protecting privacy. Authorizing a criminal investigatory search warrant upon probable cause, but allowing an officer to decide where to search would not only violate the express language of the Warrant Clause, but would also be directly contrary to the Amendment's purpose. Under such circumstances the unreasonable search and seizure clause should not override the Warrant Clause. On the other hand, allowing warrants to issue without probable cause is not done solely to protect privacy interests; that goal could be accomplished simply by prohibiting a search or seizure undertaken without probable cause. Allowing the unreasonable search and seizure clause to trump the Warrant Clause instead reflects the conclusion that an appropriate balance between competing privacy and societal interests can sometimes be reached only by authorizing searches and seizures without traditional probable cause but requiring advance judicial approval.

The same balancing approach that could support a warrant requirement without traditional probable cause in *Hayes* and *Davis* therefore also might be applied to searches and seizures currently requiring traditional probable cause and a warrant. An "area-wide" warrant, for example, might authorize the search of all houses in a neighborhood known for a high incidence of drug trafficking.<sup>179</sup> The absence of particularized

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tional search because it involves entry into the home to find criminal evidence, or is it a non-traditional search because the scope of the officer's authority is limited to the seizure of evidence in plain view?

<sup>179</sup> Cf. *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966) (police enter over 300 buildings, mostly dwellings, looking for murder suspect and are enjoined from

suspicion and traditional probable cause would not preclude authorizing the warranted search under the unreasonable search and seizure clause which, under the approach discussed here, would reign supreme and trump the prohibition in the Warrant Clause. Thus, analysis under the unreasonable search and seizure clause, which repeatedly has been criticized for diminishing the importance of the warrant and probable cause requirements,<sup>180</sup> could now be applied with a vengeance to reduce the degree of suspicion for warranted searches and seizures that now require traditional probable cause.

## CONCLUSION

Both Justice Scalia and the *Griffin* dissenters fail to consider the implications of interpreting the Fourth Amendment to authorize warrants without probable cause. Justice Scalia avoids this issue by relying upon the supposed plain meaning of the Fourth Amendment. The *Griffin* dissenters correctly assume that the text of the Amendment is not self-defining, but fail to explain how the text can be interpreted to authorize the warrant they envision.

This Article has explored three interpretations of the Fourth Amendment that authorize a warrant requirement for searches and seizures that are constitutionally reasonable without probable cause: variable probable cause, a non-traditional warrant requirement and trumping the Warrant Clause. It is unlikely, however, that the current Supreme Court would adopt any of the three as each relies upon the importance of a warrant requirement in Fourth Amendment jurisprudence, a doctrine to which the Court routinely gives lip service, but then generally ignores.<sup>181</sup> Moreover, even if the Court were to interpret the Fourth Amendment to authorize defensive use of warrants for criminal investigatory searches and seizures, there is reason to fear that it would apply that interpretation

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searching without probable cause).

<sup>180</sup> See *supra* note 62 and accompanying text.

<sup>181</sup> Booksman, *supra* note 54, at 501 (although the Court frequently states its preference for a warrant requirement, it is generally agreed that "[p]erhaps no more frequently quoted statement is less true."); *California v. Acevedo*, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring) ("the 'warrant requirement' ha[s] become so riddled with exceptions that it [is] basically unrecognizable.")

to weaken, rather than strengthen, Fourth Amendment protection. In this regard, Justice Scalia's comment that the *Griffin* dissenters have not considered the impact of warrants without probable cause on Fourth Amendment jurisprudence<sup>182</sup> seems more of a threat than a benign observation.

One might reluctantly conclude, therefore, that Justice Scalia's interpretation of the Fourth Amendment, although not compelled by its text or the Court's jurisprudence, ultimately offers greater protection of Fourth Amendment values than any of the three interpretations discussed in this Article. On the other hand, Justice Scalia's approach will likely lead to continued devaluation of the importance of warrants and to increased authorization of warrantless searches and seizures without traditional probable cause. But this result seems no worse than adopting an interpretation of the Fourth Amendment designed to further its underlying purpose which, in practice, is more likely to be applied to subvert that purpose. Justice Scalia's approach is also likely to lead to the overruling of *Camara's* variable standard of probable cause. But the benefits of imposing a warrant requirement in administrative search cases seem relatively insignificant when compared to the potential erosion of Fourth Amendment values that can result from the Court's ability to authorize offensive use of warrants in criminal cases.

Nevertheless, the fear that an interpretation of the Amendment that authorizes defensive use of warrants will be used to weaken Fourth Amendment protection does not necessarily establish the case against that interpretation. If the Court cannot be trusted in applying any of the three approaches for authorizing defensive use of warrants consistently with Fourth Amendment values, any attempt to limit its interpretive options will likewise be ineffective in preventing the continuing erosion of the Fourth Amendment.

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<sup>182</sup> See *supra* text accompanying note 13.

