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# **TERRY V. OHIO, THE WARREN COURT, AND THE FOURTH AMENDMENT: A LAW CLERK'S PERSPECTIVE**

EARL C. DUDLEY, JR.\*

I feel very much like one who, to use a current term, has been "outed" from a closet in which I have resided for thirty years. When John Barrett first invited me last fall to participate in this conference, he told me that he had learned from my co-clerk Ty Brown that I was the law clerk who worked for Chief Justice Warren on *Terry v. Ohio*<sup>1</sup> and its companion cases.<sup>2</sup> I responded that I had no difficulty acknowledging in a private conversation with a fellow academic that I had been the Chief's law clerk on *Terry*, but that I had never spoken in public—or even in any detail in private—about my work for the Chief Justice on any case. This was because of the stress he placed on confidentiality. I still recall vividly our first meeting with Chief Justice Warren in the fall of 1967. He told us that he considered us his lawyers and that our work for him was covered by the attorney-client privilege. He acknowledged that we would discuss the work of the Court with clerks from other chambers, but said that he expected what was said and done in his chambers to remain there.

John said that he would honor my views but that he hoped I would in any event attend the conference. We did not speak again until February, and this time John said there was something I should know. He had recently been doing research at the Library of Congress and had been given access to the Warren papers. He had read—and indeed made copies of—many of the preliminary drafts and memoranda I had prepared for the Chief in *Terry*, *Sibron*, and *Peters*. So much for the attorney-client privilege!

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

<sup>2</sup> See *Sibron v. New York*, 392 U.S. 40 (1968) (deciding *Sibron v. New York* and *Peters v. New York*).

John was kind enough to send me copies of the memos that he had copied from the *Terry* file, and so I had the eerie experience of rereading words I had written thirty years ago on a topic that has continued to interest me, one which in recent years I have come to teach in law school regularly.

Despite my trip down memory lane, what I want to say about *Terry*, its companions and its progeny derives, not so much from those once-confidential drafts and memos, but largely from the opinions as published and the historical setting in which the Court first ventured into the world of "stop and frisk."

First the historical setting. Two powerful political and legal vectors intersected in the *Terry* cases in 1968.

In 1960, the Civil Rights movement, which had largely received support and encouragement from the Supreme Court, but had relatively little to show for it, took its case from the courthouses to the streets. While bus boycotts, and rallies and demonstrations in support of lunch-counter sit-ins and of voting rights for black citizens effectively dramatized the continuing scourge of racism, they also created a backlash even among those sympathetic to the underlying cause. At the same time, despite legislative victories such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965, frustration at the slow rate of progress boiled over into riots in urban ghettos from Newark to Detroit to Los Angeles. It was the decade of the long, hot summers. When opponents of the Vietnam War also took to the streets beginning in about 1967, political tension and violence escalated even further. Only two months before *Terry* was handed down, there was a major outbreak of rioting in many cities, including Washington, D.C., in the wake of the assassination of Dr. Martin Luther King, Jr.

At the same time, the Supreme Court had come under heavy fire for its decisions enforcing the constitutional claims of those accused of crimes. In 1964 the Court's criminal procedure decisions were for the first time a major target of the Republican presidential campaign, and similar attacks were to be expected in the upcoming 1968 election.

In this context the police made a politically powerful, and common-sensical argument that they needed greater authority to deal with street encounters that always had the potential to escalate into violence. Several states passed statutes authorizing "stop and frisk" tactics, and the courts of other states recognized

such authority under common law and state constitutional rubrics.

Individually, the Justices of the Supreme Court may have felt differing degrees of sympathy with the arguments of the police, but collectively they were unwilling to be—or to be perceived as—the agents who tied the hands of the police in dealing with intensely dangerous and recurring situations on city streets.

On the other hand, many of the Justices were skeptical about the scope of the authority claimed by the police. The President's Commission on Law Enforcement and the Administration of Justice, chaired by Attorney General Katzenbach, had just issued its massive report, which was critical of many police practices, including some aspects of so-called "aggressive patrol" tactics in urban ghettos.<sup>3</sup>

Moreover, there was some reluctance to recognize authority on the part of the police to detain a person for investigative purposes on less than the traditional standard of probable cause. Such detention could quickly expand for all purposes into an arrest. Nor was there universal trust in the neutrality of the authorities. While the red-baiting fever of the 1950s had eased somewhat, J. Edgar Hoover was still the Director of the FBI, the House Committee on Un-American Activities and its counterpart, the Senate Permanent Subcommittee on Investigations, were still very powerful, global communism was still seen as the major threat to democratic institutions, and political tensions ran high on a number of fronts, but especially over the war in Vietnam. Nor had First Amendment doctrine yet attained its current robust state. In this context, the power to "detain" for "investigation" on mere "suspicion" seemed, at least, susceptible of major abuse.

I recall not being surprised by the vote to affirm in *Terry*, though I was taken a bit aback by its initial unanimity. (Justice Douglas voted at first with the majority but later changed his vote.) This unanimity, I soon learned, masked an almost complete lack of consensus about just *how* simultaneously to recognize and to cabin this new police authority. The Court's fum-

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<sup>3</sup> See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-84 (1967). These tactics, the Commission found, were directed all too often at minority groups, and if employed without considerable restraint, inevitably gave rise to resentments that further fanned the flames of violence and political unrest. *Id.*

bling effort to find a satisfactory solution to this problem, and the evident difficulty of that effort, are for the most part plain on the face of the published opinions.

One thing, I suppose, that is not apparent from the published opinions is the evolution of *Terry's* solution to the doctrinal conundrum that confronted the Court.

Without ever facing an explicit challenge on the point, the Court had historically read the Fourth Amendment's two clauses *in pari materia*. The Warrant Clause's standard of "probable cause" had been taken to define the "reasonableness" of a search and seizure, even where obtaining a warrant was excused as impracticable.<sup>4</sup> This made a good deal of sense, for while the Court had occasionally wavered, it had generally encouraged law enforcement officers to go before a magistrate whenever possible before conducting a search,<sup>5</sup> and it seemed anomalous to recognize a broader authority in the police acting alone than that which a magistrate could grant them under the Warrant Clause.<sup>6</sup>

This conundrum led to early efforts to articulate the *Terry* standard in terms of "probable cause," but "probable cause" to do less intrusive things than full-body searches and formal arrests. These efforts foundered on the rather obvious fact that no one really suggested that Officer McFadden in *Terry* had "probable cause" to believe much of anything.

It was Justice Brennan who suggested, after the initial Warren draft had sat for several weeks without collecting any votes, what emerged eventually as the doctrinal solution—the analytical separation of the amendment's two clauses. In a context—swiftly developing street encounters—where obtaining a warrant was inherently impracticable, Justice Brennan argued, the strictures of the Warrant Clause were simply inapplicable, and the definition of a "reasonable" search could and should be cut free from the standard of "probable cause." Convinced that this offered a more sensible way to analyze the new authority that the

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<sup>4</sup> See, e.g., *Henry v. United States*, 361 U.S. 98, 100-02 (1959) (stating that felony arrests without warrants require probable cause).

<sup>5</sup> See, e.g., *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (explaining that an impartial judicial officer, not a police officer or government enforcement agent, must decide, whenever practicable, when the right of privacy reasonably yields to the power to search).

<sup>6</sup> See *Terry*, 392 U.S. at 35-39 (Douglas, J., dissenting) (objecting to allowing an officer to act without "probable cause" in a situation wherein a magistrate would have lacked authority to issue a warrant).

Court was prepared to recognize, the Chief Justice incorporated this approach into a new draft. This doctrinal move led to the defection of Justice Douglas.

There remained, however, a major fault line that *is* quite apparent on the face of the opinions. This division involved whether, and to what extent, to recognize a power of investigative detention on less than probable cause.

From the outset, it was Chief Justice Warren's instinct to uncouple the "frisk" from the "stop" and to give the Court's explicit blessing only to the former. The Court's unanimous vote, after all, was almost certainly prompted by the Justices' collective recognition of the need of police officers to protect themselves and bystanders from armed men whose encounters with authority could—and often did—escalate quickly into violence. A determination that it was "reasonable" for policemen confronted with actors they reasonably suspected of criminal activity to "seize" them and conduct a limited "search" for dangerous weapons did not necessarily involve approval of the much more amorphous and troublesome power to "detain" a person for purposes of investigation on less than probable cause to arrest. Such a power was not merely susceptible of significant abuse, it was very difficult either to define or to confine. As the Court's subsequent efforts—*Mendenhall*,<sup>7</sup> *Chesternut*,<sup>8</sup> and *Hodari D.*,<sup>9</sup> to mention but three—have shown, it is often nearly impossible to locate the moment at which an initially consensual encounter has produced a "seizure" for purposes of Fourth Amendment analysis. And there was concern that, because the threshold of the power to "frisk" for safety reasons would necessarily be quite low, the power to "stop" or detain, if linked to the power to "frisk," would be exercised on very little suspicion indeed.

For others, principally Justices Harlan and White, the power to "frisk" for weapons flowed as a matter of logic from, and hence was doctrinally dependent upon, an antecedent power to "stop," or as Justice Harlan put it, to conduct a "forcible stop." Only if the officer was justified in forcibly inserting himself into a developing situation and controlling the actions of the individuals involved would the need arise to pat the latter down to determine

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<sup>7</sup> *United States v. Mendenhall*, 446 U.S. 544 (1980).

<sup>8</sup> *Michigan v. Chesternut*, 486 U.S. 567 (1988).

<sup>9</sup> *California v. Hodari D.*, 499 U.S. 621 (1991).

whether they were armed.<sup>10</sup>

Rightly or wrongly—and I should confess that my memos reveal that I strongly advocated this position—Chief Justice Warren held the line and declined to reach the issue of the power to “stop” (or at least to detain for investigative purposes on less than probable cause). Thus the debate that occupied considerable time and effort within the Court played itself out in footnote 16 and its accompanying text in Chief Justice Warren’s *Terry* opinion<sup>11</sup> and the concurring opinions of Justices Harlan and White. The investigative “stop” was left for another day.

Thus the standard description of *Terry* is ironically deficient in two respects. The majority opinions in *Terry*, *Sibron*, and *Peters* carefully refrained from approving—indeed, they circumambulated Robin Hood’s barn to avoid approving—what have become known universally as “*Terry* stops.” And nowhere in Chief Justice Warren’s opinion will you find the words “reasonable suspicion” that have come to exemplify the *Terry* standard. Instead, the opinion carefully employs and adapts the language of *Brinegar v. United States*,<sup>12</sup> the classical statement of the probable cause standard, while recognizing that officers may conduct protective searches when possessed of a lesser quantum of information.<sup>13</sup>

The facts in *Terry* and *Sibron* helpfully allowed the Court to avoid deciding the issue of investigative detention. Neither Officer McFadden in *Terry* nor Patrolman Martin in *Sibron* had done anything prior to their physical searches that seemed to resemble a “forcible stop.” Thus the Court could easily focus on the physical intrusions alone in those cases, approving Officer McFadden’s protective patdown for weapons and disapproving Patrolman Martin’s grab for glassine envelopes of heroin. The facts in *Peters*, the third case before the Court, were another matter, however. There off-duty Officer Lasky, after observing what he thought was an attempted burglary in the hallway of his apartment building, chased Peters down two flights of stairs and collared him in the stairwell. Only after engaging in a fairly obvious “forcible stop” did Officer Lasky pat Peters down for weap-

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<sup>10</sup> See *Terry*, 392 U.S. at 31-34 (Harlan, J., concurring); *id.* at 34-35 (White, J., concurring).

<sup>11</sup> See *id.* at 19-20 & n.16.

<sup>12</sup> 338 U.S. 160 (1949).

<sup>13</sup> See *Terry*, 392 U.S. at 20-27.

ons, finding and removing from his pocket hard objects that could have been knives but turned out to be burglar's tools. The majority held that Officer Lasky was possessed of probable cause for an arrest and thus that the search was properly incident to that arrest.<sup>14</sup> Justice Harlan argued, rather powerfully I have always thought, that this decision lowered the standard of probable cause dramatically in an effort to avoid applying the *Terry* analysis to an obvious "stop" case.<sup>15</sup>

Despite what I thought then, it seems to me now that a powerful argument can be made that the line the Chief Justice—and the majority—drew in the *Terry* trilogy was at least an unrealistic one. Justice Harlan may have had it backwards. That is, the power to "frisk" inevitably drew with it the power to "stop" for investigation, not the other way around. But he was correct that the two do seem inevitably linked with one another. It was thus perhaps inevitable that the line was breached, and the Court recognized a power to restrain the liberty of citizens on less than probable cause where at least before the officer acted there was no reasonable apprehension of danger.<sup>16</sup>

On the other hand, it is just possible that the *Terry* opinion's careful avoidance of the issue of investigative detention on less than probable cause may have elevated for the Court the serious difficulty of that issue and helped to sensitize it to the need for careful restraint in this area. It is perhaps difficult to say whether the Court would have been as careful to emphasize the limits of the power to detain in cases such as *Hayes*<sup>17</sup> and *Dunaway*,<sup>18</sup> had the police's claim to this authority received a more enthusiastic reception in *Terry*.<sup>19</sup> It does seem highly likely, however, that *Terry*'s exclusive focus on the self-protective justification for the "frisk" power contributed to the Court's subsequent restraint respecting investigative intrusions on personal

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<sup>14</sup> See *Sibron*, 392 U.S. at 66-67.

<sup>15</sup> See *id.* at 74-76 (Harlan, J., concurring).

<sup>16</sup> Interestingly, though the Court assumed early that *Terry* authorized investigative stops on less than probable cause in *Brown v. Texas*, 443 U.S. 47, 51 (1979), it did not actually hold this outside the distinct border seizure context until 1985 in *United States v. Hensley*, 469 U.S. 221 (1985).

<sup>17</sup> *Hayes v. Florida*, 470 U.S. 811 (1985).

<sup>18</sup> *Dunaway v. New York*, 442 U.S. 200 (1979).

<sup>19</sup> Cf. *Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983) (declining to decide "whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry*").



security. The Court did recognize a "plain feel" doctrine in *Minnesota v. Dickerson*,<sup>20</sup> but applied it with great care to the facts of that case, so as to limit as far as possible the officer's authority on less than probable cause to explore the contours of a person's body in search of evidence.

*Terry* was, in short, a first, cautious step along an uncharted path, and I think it fair to say that the opinion's restraint set an important example for the Supreme Court and lower courts in later cases in their approach to the myriad issues that grow out of what Chief Justice Warren called "the protean variety of the street encounter."<sup>21</sup>

I cannot resist imposing on this now-captive audience one last point about *Terry*, the Warren Court and the Fourth Amendment. The knee-jerk liberal, pro-defendant, anti-police image that the Court in general, and Chief Justice Warren and Justice Brennan in particular, have been saddled with over the years is quite plainly undeserved, at least as far as the Fourth Amendment is concerned. The Supreme Court in the Warren years made four major forays into Fourth Amendment jurisprudence. Two of them were obviously pro-police, and a third has at a minimum turned out that way. Indeed, it is fair to say that the Warren Court completely restructured Fourth Amendment analysis in a way clearly—and properly—favorable to law enforcement. Moreover, the two most important pro-police opinions in this restructuring project were written by Brennan and Warren themselves.

*Mapp v. Ohio*<sup>22</sup> was the lone significant Warren Court Fourth Amendment decision that was clearly pro-defendant, and I submit that *Mapp* is less properly viewed as a Fourth Amendment case than as the opening move in the incorporation project. Appalled by the barbarous systems of criminal justice that persisted in a few states into the 1960s, Chief Justice Warren helped lead the campaign to force these states to provide sounder and more humane procedures through the expedient of applying most of the strictures of the Bill of Rights to the states. *Mapp* applied the exclusionary rule, and hence the constraints of the Fourth Amendment itself, to the states, but it was hardly innovative as far as Fourth Amendment doctrine is concerned. The

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<sup>20</sup> 508 U.S. 366 (1993).

<sup>21</sup> *Terry*, 392 U.S. at 15.

<sup>22</sup> 367 U.S. 643 (1961).

search in *Mapp* was egregious, and the officers' high-handed treatment of a woman living alone doubtless contributed to the Court's evident loss of patience with the regime of *Wolf v. Colorado*.<sup>23</sup>

The Warren Court's first really significant contribution to Fourth Amendment doctrine as such came in 1966 in *Schmerber v. California*,<sup>24</sup> written by Justice Brennan. The Court had long labored under the constraints of the intellectual structure laid down in *Boyd v. United States*.<sup>25</sup> That case essentially "married" the Fourth and Fifth Amendments in a matrix forged by property law, to produce a "substantive" analytical structure for the Fourth Amendment. *Boyd* held that a person's papers were the equivalent of testimony for Fifth Amendment purposes, and that any effort to circumvent the protections of the Self-Incrimination Clause by a search for such items was inherently "unreasonable" under the Fourth Amendment. The government could search for and seize only those items—stolen property, contraband, etc.—to which it had a possessory interest superior to that of the subject of the search and seizure. *Boyd* and its later corollary, *Gouled v. United States*,<sup>26</sup> meant that the government's law enforcement interest in the evidentiary use of personal property was insufficient to permit a search for and the seizure of such property, regardless of how much probable cause existed to believe that the property was evidence of criminal activity.

To be sure, the Court from the beginning struggled against the constraints of the *Boyd* analytical framework, concluding, for example, that "instrumentalities" of crime were subject to seizure, perhaps—though it did not quite say so—on a "deodand" forfeiture analogy and then giving very broad content to this category of seizable items.<sup>27</sup> But in 1966 the *Boyd* structure with its "marriage" of the Fourth and Fifth Amendments and *Gouled's* "mere evidence" rule remained intact. Indeed, it was expressly

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<sup>23</sup> 338 U.S. 25 (1949) (holding that the Fourteenth Amendment does not require exclusion in state court of evidence obtained by unreasonable search and seizure).

<sup>24</sup> 384 U.S. 757 (1966) (upholding, against Fourth, Fifth, and Sixth Amendment challenges the introduction in evidence of expert testimony concerning a blood sample taken forcibly from a person arrested for driving while intoxicated).

<sup>25</sup> 116 U.S. 616 (1886); see also Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977) (tracing the doctrinal development of Fourth and Fifth Amendment law in the wake of *Boyd*).

<sup>26</sup> 255 U.S. 298 (1921).

<sup>27</sup> See *Marron v. United States*, 275 U.S. 192 (1927).

on the basis of *Boyd* that Justice Black had concurred in the result in *Mapp*.<sup>28</sup>

Justice Brennan's opinion for the Court in *Schmerber* in one stroke toppled the structure built on *Boyd*, "divorced" Fourth Amendment analysis from Fifth Amendment analysis and replaced the old structure with a "procedural" view of Fourth Amendment constraints that is more faithful to the constitutional language. The Fifth Amendment, Brennan said, was concerned exclusively with "testimony," and however much information might be derived from a person's blood, it could not reasonably be termed testimonial. The propriety under the Fourth Amendment of the forcible seizure of the defendant's blood from his veins for evidentiary purposes turned exclusively on a series of procedural considerations. The police had probable cause to believe that Schmerber had been driving drunk, but the evanescent nature of the alcohol content of his blood made obtaining a warrant impracticable. The seizure of the blood was "reasonable" under the first clause of the Fourth Amendment because the blood test was a very good way to determine whether Schmerber was drunk when he was seen driving erratically and because the procedure was performed "reasonably" by medical personnel in a hospital setting.<sup>29</sup>

Only one year later, with Justice Brennan again at the controls, the Court drove home its rejection of the *Boyd-Gouled* structure in *Warden v. Hayden*,<sup>30</sup> where it expressly abandoned the so-called "mere evidence" rule limiting the categories of items that police could seize.

A mere two years after *Schmerber* uncoupled the Fourth and Fifth Amendments, *Terry* did the same for the two clauses of the Fourth Amendment in an opinion by Chief Justice Warren to which Justice Brennan made the major doctrinal contribution. The Court thus created a new category of police conduct completely outside the strictures of the Warrant Clause and the "probable cause" requirement, subject only to a "sliding scale" analysis of reasonableness that takes into account both the justification for the initial intrusion on protected values and the scope of that intrusion in light of the prior justification.

The Warren Court's other major treatment of Fourth

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<sup>28</sup> See *Mapp v. Ohio*, 367 U.S. 643, 661-66 (1961) (Black, J., concurring).

<sup>29</sup> *Schmerber*, 384 U.S. at 770-72.

<sup>30</sup> 387 U.S. 294 (1967).

Amendment doctrine, *Katz v. United States*,<sup>31</sup> was handed down earlier in the same term as *Terry*. *Katz* was not thought of at the time as a pro-police decision. The early roots of Fourth Amendment analysis in property law had created problems for the application of the amendment to electronic surveillance. Decisions following *Olmstead v. United States*,<sup>32</sup> had turned upon an almost comic search for some "trespass" that would allow the Court to say that Fourth Amendment protected values had been infringed by electronic surveillance.<sup>33</sup> *Katz* involved a wiretap of a public phone booth. *Katz* had no property interest in the booth, and there was in any event no physical penetration of the space of the booth by the tap. In an opinion by Justice Stewart, joined by the Chief and Justice Brennan, a majority of the Court continued its rewriting of Fourth Amendment doctrine. Building upon Justice Brennan's work in *Schmerber*, the Court in *Katz* jettisoned the property-law moorings of the Fourth Amendment in favor of an analysis focused upon whether an individual enjoys a "reasonable expectation of privacy."<sup>34</sup> The presence or absence of such an expectation swiftly became the litmus test for the application of the Fourth Amendment.

To be sure, *Katz* initially expanded the strictures of the Fourth Amendment to include electronic surveillance, but its new analytical framework has subsequently been used by the Court to exclude from any scrutiny whatever under the amendment broad categories of police investigative conduct. Thus the Court has held that, whether or not police conduct trenches upon property rights, it does not implicate the Fourth Amendment if it invades no "reasonable expectation of privacy" held by the person against whom the resulting evidence is sought to be introduced.<sup>35</sup>

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<sup>31</sup> 389 U.S. 347 (1967).

<sup>32</sup> 277 U.S. 438 (1928), *overruled in part by* *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967).

<sup>33</sup> *See, e.g.,* *Lopez v. United States*, 373 U.S. 427, 438-39 (1963) (affirming constitutionality of police recording of conversation between defendant and undercover agent); *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961) (holding eavesdropping by attaching microphone to heating duct in defendant's home to be physical intrusion violative of Fourth Amendment).

<sup>34</sup> The phrase "reasonable expectation of privacy" was actually not mentioned in the majority opinion, but was used by Justice Harlan in his concurrence. *See Katz*, 389 U.S. at 360 (Harlan, J., concurring).

<sup>35</sup> *E.g.,* *Florida v. Riley*, 488 U.S. 445 (1989) (finding no reasonable expectation that police will not hang a helicopter 400 feet above greenhouse and peer through hole in roof); *Oliver v. United States*, 466 U.S. 170 (1984) (finding no reasonable expectation

When Earl Warren and William Brennan joined the Supreme Court in the mid-1950s, law enforcement agents—or at least government lawyers trying to defend the actions of such agents—had to contend with the intellectual regime of *Boyd* and the “mere evidence” rule, and there was no rubric of police conduct that could be justified upon less than probable cause. When Earl Warren left in 1969, *Boyd* was all but dead, the reach of the Fourth Amendment had been confined to procedural constraints, policemen on the streets had new powers to be exercised in the absence of either a warrant or probable cause, and a door had been opened that would drastically narrow the compass of the amendment in years to come. Even more, the destruction of the *Boyd* framework paved the way for the decisions of the 1970s excluding papers from the sweep of the Self-Incrimination Clause.<sup>36</sup> Not bad for a couple of woolly-headed liberals!

In bringing this to a close, I suppose I need to acknowledge and comment on the fact that Chief Justice Warren dissented in *Schmerber*<sup>37</sup> and joined Justice Fortas’s odd little concurrence in *Hayden*.<sup>38</sup> It was not then the fashion, as it is today, for a Justice to note that he or she joins parts I-A, II-B, and III-C of the Court’s opinion, but dissents from part IV-D, etc. Had it been, we might know with greater assurance whether the Chief Justice agreed with Justice Brennan’s vast rearrangement of the analytical landscape in *Schmerber*. So far as one can tell from the Chief’s dissent itself, however, it appears likely that he had no quarrel with the new approach as such. The dissent is brief, consisting of little more than a citation to Warren’s earlier dissent in *Breithaupt v. Abram*,<sup>39</sup> where he disapproved of the forcible removal of blood from an unconscious man, relying on the due process test of *Rochin v. California*.<sup>40</sup> Thus he did not

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of privacy in open fields posted with “no trespassing” signs); *cf.* *Rakas v. Illinois*, 439 U.S. 128 (1978) (holding passenger in automobile has no reasonable expectation of privacy in interior of car).

<sup>36</sup> See, e.g., *Fisher v. United States*, 425 U.S. 391 (1976) (deciding summons directing attorney to produce documents delivered to him by client was not constitutionally immune under attorney-client privilege).

<sup>37</sup> See *Schmerber*, 384 U.S. at 772 (Warren, C.J., dissenting).

<sup>38</sup> See *Warden v. Hayden*, 387 U.S. 294, 310-12 (1967) (Fortas, J., joined by Warren, C.J., concurring).

<sup>39</sup> 352 U.S. 432, 440 (1957) (Warren, C.J., dissenting).

<sup>40</sup> 342 U.S. 165 (1952) (finding denial of due process in introduction of testimony about contents of defendant’s stomach, which had been forcibly pumped without his consent after his arrest).

mention or controvert the analytical portion of the majority opinion but went straight to what has always seemed to me its Achilles' heel—its failure to take account, in its reasonableness analysis, of the sanctity of the human body. It is one thing to say, as the Court quite properly did in *Schmerber*, that the constraints of the Fourth Amendment are essentially procedural in nature. It is another altogether to say that the standard of "reasonableness" poses no greater barrier to unconsented surgical invasions of the body's interior than to an examination of the contents of a person's coat pocket.

Some doubt as to the extent of the Chief Justice's agreement with the *Schmerber* framework is raised, however, by his joining of Justice Fortas's opinion concurring in the result in *Hayden* but lamenting the overthrow of the "mere evidence" rule. That opinion is strange and, to me at least, not very coherent, and I am not at all sure that it is fairly read to reject the restructuring of Fourth Amendment analysis accomplished in *Schmerber*.

I have taken this little detour from *Terry* itself because my experience with Chief Justice Warren convinced me that he was, above all, an enormously practical man, well-schooled in the craft of government, and best schooled in the practice of law enforcement, which was his field for the majority of his career. The Court's treatment of Fourth Amendment issues under his leadership displayed a practical understanding of the needs of law enforcement and an analytical freshness that is at odds with prevailing scholarly and judicial caricatures.

