

HOW THE POST-FRAMING ADOPTION OF THE BARE-PROBABLE-CAUSE STANDARD DRASTICALLY EXPANDED GOVERNMENT ARREST AND SEARCH POWER

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I INTRODUCTION

The general theme running through most of the articles in this symposium is that recent Supreme Court decisions have expanded police authority by relaxing—or eviscerating—the Fourth Amendment’s “probable cause” standard for arrests and searches. I concur in that assessment: the Burger, Rehnquist, and Roberts Courts have pretty much destroyed the constitutional checks against arbitrary police intrusions. However, I write to expose another, earlier part of the story that has been almost entirely overlooked: that the now-accepted doctrine that probable cause alone can justify a criminal arrest or search did not emerge until well after the framing of the Bill of Rights in 1789 and constituted a significant departure from the criminal-procedure standards that the Framers of the Bill thought they had preserved.

Framing-era common-law criminal-procedure doctrine was accusatory in character and structured according to assessments of “necessity.” In particular, arrest or search authority arose from, and depended upon, a foundational accusation by a named and potentially accountable complainant that a crime *actually* had been committed “in fact.” Probable cause could suffice as to the identity of the criminal, but not for the fact of the crime. Thus, probable cause alone regarding the commission of a crime—what I call “bare probable cause”—was not a standard that the Framers intended to apply to criminal arrests or searches.

Instead, the notion that bare probable cause that a crime might have been committed suffices to justify a warrantless arrest, or issuance of an arrest warrant, dates back only to roughly the middle of the nineteenth century. The

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notion that bare probable cause suffices to justify a criminal search warrant has a similarly short history. Additionally, although the post-framing adoption of bare probable cause as the standard for warrantless felony arrests increased opportunities for peace officers to make warrantless searches of arrestees incident to lawful arrests, the doctrine that bare probable cause could justify a warrantless search made other than as an incident of a lawful arrest was not invented until the 1920s. Thus, the post-framing adoption of the bare-probable-cause standard by American judges was itself a drastic relaxation of the arrest and search protections that the American Framers thought they had preserved in constitutional provisions.

Indeed, when American judges adopted the bare-probable-cause standard, they effectively rejected the accusatory criminal procedure that the Framers had undertaken to preserve and instead opened the way for the development of modern investigatory criminal procedure. In particular, the adoption of the relaxed bare-probable-cause arrest standard facilitated the development of the discretionary authority that characterizes modern policing and thus drastically increased government criminal-justice power. And all this happened long before recent Supreme Court opinions drained the modern bare-probable-cause standard of significant content.

The reason this story will be unfamiliar is that the conventional history of what is now referred to as “search and seizure” doctrine has been shaped by bogus claims about the historical Fourth Amendment that appear in modern Supreme Court opinions. According to that account, the Framers intended for the first clause of the Fourth Amendment to create an across-the-board “reasonableness” standard for all government searches and seizures. Moreover, because “probable cause” was explicitly stated as the required justification for particularized warrants in the second clause of the Amendment, modern opinions have also construed bare probable cause to be the general “touchstone” for assessing “Fourth Amendment reasonableness.”¹ Thus, the modern Supreme Court has treated bare probable cause that a crime *might have been* committed as the basic Fourth Amendment standard for justifying government arrests and searches, whether made with or without a warrant. Indeed, modern Supreme Court opinions have even claimed that bare probable cause has always been the general common-law arrest and search standard.

However, these judicial-chambers concoctions bear little resemblance to the actual history of arrest and search authority. The first rule for recovering authentic constitutional history is to discount any historical claim that appears

1. The Fourth Amendment reads,

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 (emphasis added). The italicized first clause is now often referred to as the “Reasonableness Clause,” while the unitalicized second clause is referred to as the “Warrant Clause.”

in a judicial opinion. This is necessary because judicial opinions are exercises in justification, not reports of rigorous research.² Moreover, because “we have always done it that way”—that is, precedent—is the most basic criterion for legal justification, judges have routinely pretended to be merely applying prior law when they actually departed from it and innovated—sometimes drastically. As a result, judicial opinions regarding arrest and search law tend to bury the actual history of doctrinal change under successive layers of fabricated myth³—and that has also been the case with other aspects of criminal procedure.⁴ Indeed, this obscurantist tendency has been especially pronounced when, as currently, judges purport to adhere to the “original meaning” of constitutional provisions—an approach that often consists largely of creative or even arbitrary textualism rather than significant historical inquiry.⁵

2. Professor Reid has nicely summed up judicial use of history:

Today a judge writing a decision in, let us suppose, a native American land case, does not say to his clerk, “What rule does history support?” Rather, the judge tells her, “We’re going to adopt such-and-such rule. Find me some history to support it.” It will not matter to the judge or his colleagues on the court the quality of the historical evidence that she finds.

John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, in *THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW* 228 (Ellis Sandoz ed., 1993).

3. This indictment of judicial-chambers history is based on nearly two decades of research into historical arrest and search law. See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Original Fourth*] (documenting that the Fourth Amendment was originally understood only to set warrant standards, but not to create any generalized reasonableness standard for warrantless arrests or searches); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. City of Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002) [hereinafter Davies, *Arrest*] (contrasting actual framing-era arrest law to the historical claims in recent Supreme Court opinions); Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L.J. 1 (2007) [hereinafter Davies, *Correcting History*] (documenting that the law of arrest was a salient component of “law of the land” and “due process of law” provisions, rather than of the Fourth Amendment).

4. See generally Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right” in Chavez v. Martinez*, 70 TENN. L. REV. 987 (2003) [hereinafter Davies, *Original Fifth Amendment*] (documenting the difference between the original understanding of the right against compelled self-accusation and the understanding asserted in recent Supreme Court opinions); Thomas Y. Davies, *Not the “Framers’ Design”: How the Framing-Era Ban Against Hearsay Evidence Refutes the Crawford-Davis “Testimonial” Formulation of the Scope of the Confrontation Right*, 15 BROOK. J.L. & POL’Y 349 (2007) [hereinafter Davies, *Not the Framers’ Design*] (documenting the difference between the original understanding of the Sixth Amendment Confrontation Clause and the understanding asserted in recent Supreme Court opinions).

5. In normal usage, “original meaning” would connote the way the persons involved in the adoption of a constitutional provision understood that text at the time of its adoption. But the justices and commentators who identify themselves as “originalists” do not seek out the actual historical meaning of a provision, but parse the language of the text with a historical dictionary to arrive at what they term the “original public meaning.” In practice, the creative textualism that can be accomplished by this method allows the “originalist” justices and commentators to impose their own preferred meaning on the text while pretending to adhere to the “original meaning”—even though their version bears little similarity to the historical meaning. Thomas Y. Davies, *Selective Originalism: Sorting Out*

Moreover, until quite recently, academic constitutional histories were overwhelmingly sycophantic and undertook merely to embellish the Supreme Court's judicial-chambers concoctions. As a result, the conventional academic histories generally exhibit the same fictions as the judicial history.⁶ The overall result is that our constitutional past is actually a quite foreign and only poorly explored territory.

To get the history right, it is necessary to disregard the prochronistic⁷ expectations embedded in the conventional history as to how the history “must” connect up somehow with current doctrine. Instead, it is necessary to reconstruct the authentic past directly from the pertinent historical materials themselves—while resisting, so far as possible, one's own preexisting conceptions. Then one must work forward in time while paying close attention to indications of departures, innovations, and changes. If one does that, the story of probable cause is fairly clear, but quite different from the story that readers familiar with the conventional history will expect.

Indeed, the notion that the Fourth Amendment was meant to be the primary constitutional provision to regulate arrest and search standards is itself only a modern judicial invention. The real history is that the Fourth Amendment was only a focused response to the then-recent controversy over the use of general warrants for *revenue searches of houses*—that is, searches to enforce customs and excise taxes. As a result, the text of the Fourth Amendment and its reference to “unreasonable searches and seizures”—which was a pejorative label for the gross illegality of searches and seizures made under unparticularized, and thus unjustified, general warrants—sheds little light on the Framers' understanding of *criminal* arrest and search standards. Mere “reasonableness” never constituted a justification for a criminal arrest or search at the time of the framing. Likewise, the most plausible explanation why the federal Framers adopted bare probable cause as the standard for issuing valid warrants was that they were concerned primarily with regulating *revenue search warrants*, and that was the one area where bare probable cause had emerged as the accepted standard for issuance of search warrants.

In contrast to the modern myths, the historical record actually indicates that the American Framers intended to preserve common-law arrest and search standards—standards that appeared to be settled and uncontroversial during the framing era—in the “law of the land” and “due process of law” clauses that they included in the initial state declarations of rights and in the “due process of

Which Aspects of Giles's Forfeiture Exception to Confrontation Were or Were Not “Established at the Time of the Founding,” 13 LEWIS & CLARK L. REV. 605, 670–71 (2009).

6. See Davies, *Correcting History*, *supra* note 3, at 27–28 (criticizing the conventional history of the Fourth Amendment); *id.* at 39–43 (criticizing the conventional history of the Fifth Amendment Due Process Clause).

7. A “prochronism” is a specific form of anachronism in which aspects of a later period in time are erroneously imposed on an earlier period. Prochronistic expectations pose a serious obstacle to recovering accurate legal history.

law” clause of the federal Fifth Amendment.⁸ Indeed, the judicial-chambers and conventional accounts of arrest history are so defective that they virtually omit any mention of these provisions that explicitly forbade a person being “taken” or “arrested” except according to “the law of the land” or “due process of law.” Yet those provisions were included in the initial American declarations of rights more often than provisions that banned general warrants. Hence, to recover the authentic history of arrest and search authority—and the role that bare probable cause plays in that story—one must put aside modern Fourth Amendment mythology.

This article undertakes to disentangle the authentic history of bare probable cause from the judicial and conventional myths by telling the story that actually appears in the historical sources. Part II describes the common-law arrest and search standards that were quite consistently set out in the common-law authorities ranging from Sir Edward Coke’s early-seventeenth-century writings through the other leading treatises and justice-of-the-peace manuals that Americans consulted during the framing era. It explains that common-law criminal procedure was accusatory rather than investigatory, and that the foundational component of the common-law standards for a warrantless arrest or issuance of an arrest or criminal search warrant was a sworn accusation, by a named and potentially accountable complainant (there was no such thing as a “confidential informant”), that a crime *actually* had been committed “in fact”—not mere probable cause to think a crime *might have been* committed. It also explains why framing-era Americans understood that the accusatory arrest and search standards constituted salient components of the Cokean conception of “the law of the land” and its near synonym, “due process of law.” Because these common-law arrest and search standards seemed well settled, the American state and federal Framers were content to invoke them simply by using the traditional labels, expecting (wrongly, as it would turn out) that American judges would zealously preserve and protect those common-law standards.

Part III then explains how “probable cause” standing alone—what I call “bare probable cause”—came to be included as the minimum justification for issuance of a warrant in the Fourth Amendment. Bare probable cause had emerged as a standard in English law for revenue search warrants for untaxed or smuggled goods. The most likely explanation for this departure from the criminal-procedure crime-in-fact requirement was that customs and excise enforcement lacked the victim-complainants upon whom accusatory criminal procedure usually relied. Thus, customs and excise search warrants were necessarily issued on a revenue officer’s showing of probable cause to suspect smuggling or tax evasion, rather than upon an accusation that a violation had actually occurred in fact.

8. For clarity, I depart from the usual convention and use “due process of law” when referring to the framing-era understanding and “Due Process” when referring to the broader modern meaning.

This part also explains that the federal Framers were especially concerned with regulating the use of warrants for *customs or excise searches* of houses—but that they had conflicting interests. On the one hand, they knew that customs and excise collections would be the primary source of revenue for the new national government. On the other hand, they were well aware that Parliament’s approval of the use of unparticularized “general warrants” for customs searches of houses in the American colonies had given rise to an important prerevolutionary grievance and also well aware that Anti-Federalists had reignited that grievance during the ratification debates of 1787–1788 by warning that the new Congress would authorize general warrants for revenue searches of houses. To quiet those fears, the federal Framers definitively banned the use of unparticularized general warrants in the Fourth Amendment. But to avoid hamstringing federal revenue collections, the Framers adopted the bare-probable-cause standard for search warrants that had emerged in English revenue law, rather than the more-stringent crime-in-fact standard for common-law criminal warrants. Notably, however, nothing in the legislative history of the Bill of Rights indicates that the federal Framers imagined they were displacing the settled common-law *criminal* arrest and search standards when they adopted bare probable cause as the *minimum* standard for issuance of particularized warrants in the Fourth Amendment.

Part IV describes how nineteenth-century courts began to adopt bare probable cause as a general standard for *warrantless felony arrests* when the Cokean tradition of accusatory common-law standards was either lost or rejected. The crucial innovation occurred in the early nineteenth century when English judges, who were concerned with urban unrest and rising property crimes, jettisoned the “felony in fact” requirement for warrantless arrests by permitting peace officers (but not private persons) to make warrantless felony arrests on the officer’s own assessment of probable cause that a felony *might have been committed*. American state judges, who shared much the same concerns as their English counterparts, then imported that relaxed standard for warrantless felony arrests by peace officers around the middle of the nineteenth century (though not without some controversy). By the end of the nineteenth century most American jurisdictions accepted bare probable cause—circumstances indicating that a felony might have been committed—as the standard for warrantless felony arrests.

The importance attached to probable cause during this period seems to have prompted courts to define the concept more precisely, and they settled on a fairly uniform definition by the late nineteenth century; namely, that probable cause existed when reasonably trustworthy information would justify a prudent person in the belief that the person who was to be arrested had committed a crime, or that evidence or contraband would be found in the particular place to be searched. Notwithstanding this definition, the new bare-probable-cause standard provided police officers with significant discretion to decide when to make arrests, and that discretionary authority had such far-reaching effects that it was the catalyst for the transformation of criminal procedure. Notably, it does

not appear that American judges paid much attention to constitutional provisions while this transformation played out. Rather, the standards for warrantless arrests by police officers seem to have been effectively deconstitutionalized during this period.

Part V describes how bare probable cause also took on further importance during the early twentieth century when the Supreme Court invented what we now call “search and seizure” doctrine by reinventing the Fourth Amendment. In the initial Fourth Amendment cases the justices largely reconstitutionalized the old common-law rule, rooted in the earlier Cokean conception of “the law of the land,” that an arrest or search in a house required a criminal warrant. But the justices did so by reading an implicit warrant requirement into the text of the Fourth Amendment, rather than by treating that requirement as a requisite of the “due process of law” required by the Fifth Amendment. However, the scope of the warrant requirement became problematic when Prohibition presented the federal courts with a need to address whether and how the Fourth Amendment should apply to the searches of automobiles that would be necessary if police were to be able to enforce Prohibition by seizing illegal liquor.

As a practical matter, it was not feasible for police to obtain warrants for searches of automobiles. But there was a doctrinal obstacle to justifying warrantless searches of automobiles. A warrantless search for illegal liquor could not be justified as a search made incident to a lawful arrest because Prohibition violations were typically misdemeanors rather than felonies, but American courts had adopted bare probable cause as a justification for only warrantless *felony* arrests, not for misdemeanor arrests. With regard to warrantless misdemeanor offenses, American courts still applied the common-law rule that a warrantless arrest could be made only when an officer actually observed an on-going breach of the peace. But that standard could not be met because the illegal liquor in automobiles was rarely in plain view when the vehicle was stopped.

In response to this doctrinal impediment, federal judges began to read the first clause of the Fourth Amendment as though it positively permitted any search that could be said to be “reasonable” in the circumstances—regardless of whether it was incident to a lawful arrest—and thus announced that warrantless *searches* of automobiles for liquor were “not unreasonable”—and thus were constitutional—so long as the searching officers had bare probable cause that a Prohibition offense might be being committed. Notably, it was at this time that judges began to construe the first clause of the Fourth Amendment as though it constituted a “Reasonableness Clause” that applied independently of the standards for valid warrants stated in the second clause.

Parts VI and VII then bring the story of bare probable cause up to the present. Part VI discusses the rulings of the Warren Court that generally strengthened, but sometimes undermined, regulation of police conduct. Part VII discusses the rulings of the Burger, Rehnquist, and Roberts Courts. It first

identifies early Burger Court opinions that reinforced the fictional historical pedigree ascribed to the bare-probable-cause standard, then discusses the Burger Court's drastic redefinition of bare probable cause as information indicating merely a "fair probability" or "substantial chance" of criminal conduct in *Illinois v. Gates*⁹—a formulation that undercut the definition used during the previous two-and-a-half centuries. This part also describes two other significant relaxations of prior doctrine: the Rehnquist Court's extension of the minimalist notion of bare probable cause to permit warrantless arrests even for previously nonarrestable petty offenses in *Atwater v. City of Lago Vista*,¹⁰ and the Roberts Court's unanimous but truly bizarre ruling in *Virginia v. Moore* that, because the Fourth Amendment requires only bare probable cause, even an *unlawful* arrest for a *nonarrestable* offense satisfies Fourth Amendment "reasonableness" provided that the arresting officers had bare probable cause that some offense had been committed.¹¹

Finally, in a brief concluding part I argue that the drastic discontinuities in the authentic history of constitutional arrest and search standards demonstrate that current constitutional criminal procedure bears little resemblance to that which the Framers thought they had preserved. Hence, recent "originalist" attempts to portray current doctrine as though it comports with the Framers' understanding have been little more than result-driven fabrications. But I do not argue that we should return to the actual original understanding of arrest and search authority; far too much has changed for the authentic original meanings of the Fifth or Fourth Amendments to answer modern issues or serve modern needs. Instead, the primary value of recovering the actual history of probable cause is that it illuminates the degree to which judges have expanded government arrest and search power during the two centuries since the framing.

II

THE COMMON-LAW ARREST AND SEARCH STANDARDS THE FRAMERS SOUGHT TO PRESERVE IN "DUE PROCESS OF LAW"

Several common misconceptions tend to get in the way of appreciating the historical common-law standards that informed the Framers' understanding of criminal procedure. One is the conceit of American exceptionalism—the myth that the American Framers created novel principles and standards in their various declarations and bills of rights. That is not the case with arrest and search protections. The state and federal Framers did not undertake to formulate new arrest or search standards, but instead undertook to constitutionalize—and thereby preserve—the arrest and search standards that were already settled elements of the common law.¹²

9. 462 U.S. 213 (1983).

10. 532 U.S. 318 (2001).

11. *Virginia v. Moore*, 553 U.S. 164 (2008).

12. A few of the rights protected in the Constitution or Bill of Rights were definitely novel (for example, the Nonestablishment Clause), but most restated protections that had been forged in earlier

A second misconception is that framing-era common law was too inconsistent, inchoate, or confused to form the basis for constitutional standards. However, at least with regard to arrest and search doctrine, the common-law standards were set out quite consistently in the legal authorities that shaped the Framers' understanding. Because case reports themselves were not widely available in America, the most influential legal authorities were the treatises that summarized the decided cases¹³—especially those by Sir Edward Coke,¹⁴ Sir Matthew Hale,¹⁵ and Serjeant William Hawkins¹⁶—and derivative works that excerpted the more-important points in the treatises. The latter included Richard Burn's leading multi-volume English justice-of-the-peace manual¹⁷ and the similar manuals, which typically borrowed heavily from Burn's, that were published in framing-era America,¹⁸ as well as William

English controversies. *See generally*, SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS (Richard L. Perry & John C. Cooper eds., 1959). In particular, the Framers were quite conversant with earlier English constitutional history and the language they chose for the criminal-procedure provisions in the American declarations and bills of rights largely invoked the settled resolutions of earlier controversies. *See, e.g.*, Davies, *Correcting History*, *supra* note 3, at 91–92 (discussing the historical origins of the “due process of law” and “law of the land” provisions in early state declarations of rights); Davies, *Original Fourth*, *supra* note 3, at 669–74 (discussing the origins and historical understanding of the term “law of the land”).

13. *See* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 143–44 (2005) [hereinafter Davies, Crawford].

14. EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND (four volumes, first published 1628–1644). For bibliographic information, see 1 A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 21, 258, 360, 449–52, 546 (W. Harold Maxwell & Leslie F. Maxwell eds., 2d ed. 1955) [hereinafter Maxwell].

15. MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (two volumes, Sollum Emlyn ed., 1736). For bibliographic information, see 1 Maxwell, *supra* note 14, at 362. Hale's treatise was still only in draft form when he died in 1676. 1 HALE, *supra*, at i n.a., xiv–xvi.

16. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (two volumes, first published 1716 & 1721) [hereinafter HAWKINS]. Several subsequent editions were published in 1771 with no significant changes to the text. For bibliographic information, see 1 Maxwell, *supra* note 14, at 362–63. Thomas Leach edited a 1787 edition of Hawkins's treatise in which Leach added substantial new material to the existing text. WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN (Thomas Leach ed. 1787) [hereinafter LEACH'S HAWKINS].

17. RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER (1755). Multi-volume editions of this work were published into the nineteenth century. *See* 1 Maxwell, *supra* note 14, at 225–26; *see also* Davies, *Not the Framers' Design*, *supra* note 4, at 415 (discussing the prominence of Burn's manual). Because Burn's manual was constantly revised during the latter half of the eighteenth century, it is especially valuable for determining continuity or change in doctrine.

18. Four substantial justice-of-the-peace manuals were published in America between 1765 and 1789, each of which borrowed heavily from Burn's English manual. The earliest is CONDUCTOR GENERALIS (James Parker ed., Woodbridge, N.J., 1765). Several later editions of this manual were published, including a 1788 edition printed in New York City by John Patterson for Robert Hodge (the edition cited in this article), and a second, slightly different 1788 edition printed in New York City by Hugh Gainé. The three other substantial American justice-of-the-peace manuals are AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER (Joseph Greenleaf ed., Boston, 1773) [hereinafter GREENLEAF'S ABRIDGMENT]; RICHARD STARKE, OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE (Williamsburg, Va. 1774); and SOUTH CAROLINA JUSTICE (Philadelphia, 1788) (attributed to John Fauchaud Grimké, Davies, Crawford, *supra* note 13, at 185 n.256). *See also*

Blackstone's *Commentaries*.¹⁹ Notably, the treatment of arrest and search authority in these works was little changed from that which had appeared in Coke's writings in the early seventeenth century.²⁰

A. The Accusatory Character of Framing-Era Common-Law Arrest and Search Standards

Framing-era criminal-procedure doctrine was accusatory rather than investigatory in character.²¹ In contrast to modern procedure, the government was usually not authorized to investigate to discover criminal activity or even to collect evidence for prosecutions.²² (The primary exception was the coroner's inquest regarding possible homicides.)²³ Indeed, except when executing a judicially issued warrant, a peace officer such as a constable generally had no more arrest or search authority than did a private person.²⁴ Instead, the government usually provided only a forum for adjudicating a private complainant's accusation of crime, and the legal force—in the form of arrest authority—to compel the accused's attendance at trial. The evidence-gathering, initiation, and prosecution of a criminal charge depended primarily on the initiative of a named complainant who was willing to take the risks that accompanied that role,²⁵ namely: (1) the potential for physical resistance to an

Davies, *Arrest*, *supra* note 3, at 280 n.122 (providing a more-complete discussion of American justice-of-the-peace manuals).

19. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (four volumes first published 1765, 1766, 1768, 1769). To avoid prochronistic errors, the citations to Blackstone's *Commentaries* in this article are to the edition that framing-era Americans would have consulted, the first American edition printed by Robert Bell in Philadelphia in 1771–1772. See Davies, *Correcting History*, *supra* note 3, at 51 n.135 (discussing the importance of consulting the editions of treatises actually used by framing-era Americans).

20. See Davies, *Correcting History*, *supra* note 3, at 72–81.

21. Although historical doctrine is well preserved, we have very little information regarding actual practice. The original understanding of the constitutional provisions dealing with criminal procedure was shaped by the prevailing doctrine, not by the departures from doctrine that occurred in practice. There is reason to think that actual practice always tends to shortcut doctrine to some degree.

22. It is sometimes contended, though, that the conduct of examinations of the arrestee and of witnesses against the arrestee during Marian committal proceedings by justices of the peace were equivalent to modern police interrogations. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (Scalia, J., majority opinion). The comparison is inapt in a variety of ways. See Davies, *Crawford*, *supra* note 13, at 202–04.

23. See, e.g., 4 BLACKSTONE, *supra* note 19, at 271.

24. See, e.g., 2 HAWKINS, *supra* note 16, at 80–81 (“[A]s to the justifying of such Arrests by the Constable's own Authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it . . .”).

25. See, for example, the following description of criminal justice in Boston:

Through the eighteenth century the use of legal force was ordinarily a direct response to the demands of private citizens for help. The victim of robbery or assault called a watchman, if available, and afterward applied to a justice for a warrant and a constable to make or aid in the arrest. The business of detection was largely a private matter, with the initiative encouraged through a system of rewards and fines paid to informers. Neither state nor town

arrest (which generally was lawful if the arrest was not legally justified);²⁶ and (2) the potential for liability for damages in a subsequent civil lawsuit for trespass, false imprisonment, or malicious prosecution if the arrestee was not convicted of the crime for which the arrest was made. Being a complainant was not to be taken lightly.²⁷

Additionally, mere “reasonableness” never sufficed to justify a criminal arrest or search in common-law procedure.²⁸ Even probable cause that a crime might have been or likely had been committed—the modern formulation that I call “bare probable cause”—*never sufficed* to justify either a warrantless arrest or search, or even issuance of an arrest warrant or search warrant. Rather, at common law, an arrest or search usually was justified only if there was both (1) a sworn accusation that a crime *actually* had been committed “in fact” and (2) a sworn factual showing of at least “probable cause of suspicion” (alternatively stated as “reasonable cause of suspicion”) as to *who* had committed the crime. Of the two, the required accusation that a crime had been committed “in fact” was the more fundamental—so much so that common-law authorities often used the term “fact” as a synonym for the crime charged.²⁹ “Probable cause of suspicion,” though, applied only to the *identity* of culprit or the *location* of stolen goods, not to the commission of the crime.

Common-law procedure was also far more focused on arrest authority than on search authority. That was partly because, in the absence of forensic science or possessory crimes such as drug offenses, there was little in the way of tangible evidence to be searched for other than stolen goods. Additionally, the focus on arrest standards reflected the degree to which arbitrary arrests, made on order of the crown, had been a salient historical abuse of criminal-justice power in English constitutional history.³⁰ Perhaps in response to that historical

made any provision for the identification or pursuit of the unknown offender, except perhaps through the coroner’s inquest.

ROGER LANE, *POLICING THE CITY: BOSTON 1822–1885* 7 (1967).

26. Davies, *Original Fourth*, *supra* note 3, at 625.

27. It appears that the remedy for an innocent person who was the subject of a *warrantless* arrest was an action for false imprisonment, *see infra* note 37 and notes 189–91 and accompanying text, while the redress for an innocent person arrested *by warrant* was an action for malicious prosecution, *see infra* note 80. Additionally, a householder could obtain damages in a trespass action for an unlawful, warrantless “breaking” of a house, or for an unsuccessful warrant search for stolen goods. *See infra* notes 94–95 and accompanying text. Little seems to be known as to how often such damage remedies were pursued or won.

28. Framing-era sources sometimes used the terminology of “reasonable cause of suspicion” as a synonym for “probable cause of suspicion.”

29. *See, e.g.*, 2 HAWKINS, *supra* note 16, at 75 (“[T]o raise a Hue and Cry, you ought to go to the Constable of the next Town, and declare the Fact, and describe the Offender, and the Way he is gone”); 4 BLACKSTONE, *supra* note 19, at 301 (noting that the name of the township “in which the fact was committed” must be included in an indictment). *See also infra* note 120 and accompanying text, and note 176 (discussing the use of the “evidence of a fact committed” standard in several of the state bans against general warrants).

30. *See* Davies, *Correcting History*, *supra* note 3, at 45–47 (discussing the arrest controversies that prompted the Petition of Right in 1628).

abuse, common-law authorities tended to assess criminal-justice authority in terms of “necessity.”

Thus, in his 1790–1791 lectures on law in Philadelphia, James Wilson borrowed from Blackstone in making the following statement:

Every wanton, or causeless, or unnecessary act of authority, exerted, or authorized, or encouraged by the legislature over the citizens, is wrong, and unjustifiable, and tyrannical: for every citizen is, of right, entitled to liberty, personal as well as mental, in the highest possible degree, which can consist with the safety and welfare of the state. [We are servants of the law so we can be free.]³¹

Likewise, Blackstone, following earlier authorities, described authority for warrantless arrest as arising from the “necessity of the thing.”³² This necessity criterion is readily apparent in the general restriction of criminal arrest and search authority to instances of crimes committed “in fact,” as well as in the usual restriction of warrantless arrest authority to only the most serious criminal charges.

B. Warrantless-Arrest Standards

Warrantless-arrest authority was much broader for accusations of felony in fact than for accusations of less-serious offenses.³³ The reasons are apparent: It was most important for public safety to catch and punish the potentially dangerous criminals who committed the set of very serious and often violent crimes denoted as felonies; and the severe punishment inflicted on a convicted felon—often death and complete forfeiture of property—were especially likely to prompt the accused to flee. In contrast, because there was less urgency to arrest for less-than-felony offenses, common law permitted warrantless arrests for nonfelony offenses only in certain situations.³⁴

1. Warrantless Arrests for Felony Offenses

Common law provided two alternate grounds upon which a warrantless *felony* arrest could be lawful. The first was an *ex post* justification: The arrest was lawful if the arrestee was subsequently convicted of the felony. This actual-guilt justification reflected both an earlier tradition of *ex post* justification and practical reality. In the absence of an exclusionary rule, the legality of an arrest

31. 2 WORKS OF JAMES WILSON 649 (Robert G. McCloskey ed. 1967) (bracketed passage translated from Latin); *cf.* 1 BLACKSTONE, *supra* note 19, at 122 (“[E]very wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny.”).

32. 3 BLACKSTONE, *supra* note 19, at 127 (“[Authority for confining or detaining a person] may arise either from some process of the courts of justice; or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, *for the necessity of the thing*, either by common law, or act of parliament; such as the arresting of a felon by a private person without a warrant . . .” (emphasis added)).

33. Common law defined the category of felonies more narrowly than modern criminal law. For example, such relatively serious crimes as assaults, battery, wounding, kidnapping, or even attempts to commit felonies were not deemed felonies. *See* 4 BLACKSTONE, *supra* note 19, at 215–16.

34. Davies, *Arrest*, *supra* note 3, at 321–26.

could be tested only after the arrestee's trial (or after the complainant failed to prosecute), and a convicted felon was in no position to bring a trespass action. Indeed, because there was no writ of error from a criminal conviction, and death was a common penalty for felony, a conviction was often quite final.³⁵ Thus, framing-era authorities usually listed the guilt (conviction) of a person arrested for a felony as a justification of a felony arrest.³⁶

The alternative justification for a warrantless arrest—and the justification that was probably most important to a person considering whether to make an arrest—was *ex ante*, and it applied if the arrestee was “innocent”—that is, not actually convicted of the felony either because the arrest was dismissed, the arresting person failed to prosecute, or the defendant was acquitted at trial. In that case, an arrestee could test the lawfulness of the arrest in an “action”—a lawsuit for damages—against the arresting persons.³⁷ Under the *ex ante* standard, a warrantless arrest was lawful only if (1) the arresting person could prove a felony had been committed in fact, and (2) the arresting person could prove information sufficient to establish “probable cause of suspicion” that the arrestee was the suspected felon.³⁸ Moreover, the use of Marian committal and bail procedure (so named because it was required by statutes enacted during the reign of Mary Tudor) meant that the arresting person needed to be prepared to make at least a strong showing on these points immediately after an arrest was made.³⁹

35. There was no writ of error permitting appeal of a criminal conviction in the federal courts until the late nineteenth century. Davies, *Selective Originalism*, *supra* note 5, at 617 n.63. During the framing era, a motion for a new trial was usually the only form of review of a felony conviction.

36. Davies, *Original Fourth*, *supra* note 3, at 631–32. This actual-guilt justification was sometimes stated simply by referring to the validity of an arrest of a “felon”—a term that connoted a person who had actually committed a felony. This justification has fallen into disuse and effectively disappeared from modern doctrine. *See infra* note 245.

37. The damages remedy for a warrantless arrest was an action for false imprisonment, which was usually accompanied by a claim of assault and battery. *See* 3 BLACKSTONE, *supra* note 19, at 127, 138. If the warrantless arrest was not immediately dismissed by the justice of the peace during the committal proceeding, and particularly if the grand jury indicted the arrestee, it appears that the arrestee would have had to bring an action for malicious prosecution, which appears to have been harder to win. *See infra* note 80 and accompanying text.

The *ex ante* justification could also come into play if the arrestee killed a person who had attempted to arrest him and he was prosecuted for homicide. Killing a constable or other person attempting a lawful arrest was murder; if the arrest or attempted arrest would have been unlawful, though, the killing was only manslaughter, a much less-serious crime. Davies, *Original Fourth*, *supra* note 3, at 625 n.204.

38. *See, e.g.*, 2 WORKS OF JAMES WILSON, *supra* note 31, at 685 (“It is a general rule, that, at any time, and in any place . . . if a treason or felony has been committed, [every private person] is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.”).

39. During the framing era, Marian committal procedure served as roughly the equivalent of the modern *Gerstein* probable-cause hearing that is required to test the grounds for a warrantless arrest. Under Marian procedure, anyone who made a felony arrest (either with or without warrant) was required to promptly take the arrestee to a justice of the peace for the justice to decide whether to bail the arrestee, commit him to prison, or release him. The justice was required to take and record, in writing, the sworn information of the complainant (often called the “informer”) and any additional witnesses the complainant could provide. In effect, this procedure put some pressure on a complainant

Failure of proof regarding the first *ex ante* prong—the fact of a committed felony—was said to be “fatal” to the lawfulness of the arrest; in that case the arresting person was seriously exposed to trespass liability.⁴⁰ In some instances proving the fact of a felony would not have been problematic, as when a murder victim’s body had been found. Proof of the fact of felony could be problematic in a case of larceny, though, if the allegedly stolen property was never recovered.⁴¹

In contrast, the second prong of the *ex ante* standard—reasonable or probable cause of suspicion as to the identity of the felon—could be met in various ways. Thus, the framing-era authorities indicated that this prong could be shown by the “common fame of the country” (provided such fame had some probable ground), by the person being found in circumstances that raised a strong presumption of guilt (such as holding a knife above the body of a victim), by the person absconding on learning he had been accused, or by the person’s keeping company with known thieves (at least when a theft had occurred).⁴² However, these lists of the various grounds of probable suspicion always ended with a caution to the effect that “generally no such cause of suspicion . . . will justify an arrest, where in Truth no such Crime hath been committed.”⁴³

There was also a requirement that the person making the arrest had to *personally* suspect the arrestee of being the felon.⁴⁴ This may sound metaphysical, but it likely reflects the evidentiary principle that one could swear only to what one personally knew, rather than what one had been told by

to offer *prima facie*, sworn proof of the guilt of the arrestee contemporaneously with the arrest. See Davies, Crawford, *supra* note 13, at 126–29 (describing the accusatory criminal procedure used in the framing era). Because the general rule was that “hearsay is no evidence,” the factual justification for the arrest had to be provided by witnesses with personal knowledge of the events and circumstances. See generally Davies, *Not the Framers’ Design*, *supra* note 4 (describing the prominence of the ban against hearsay in framing-era evidence doctrine).

40. See CONDUCTOR GENERALIS 109, 116–17 (New York, Hodge ed. 1788) (extracting an essay by Saunders Welch, a London High Constable, advising constables that it is “absolutely necessary” that a felony actually have been committed if they are to justify a warrantless arrest, and that a mistake on this point would be “fatal”). Cf. 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 244 (1824) (“[W]ithout a fact suspicion is no cause of arrest; that is, there must be a felony or offense, in fact, committed, and suspicion is only to the person.”); 5 *id.* at 588 (stating that arrest without warrant requires proof of felony and reasonable cause of suspicion as to the person).

41. See *infra* notes 180–86 and accompanying text.

42. See, e.g., Davies, *Correcting History*, *supra* note 3, at 74 n.222, 84 n.257 (listing permissible grounds found in framing-era treatises for suspicion that a person was a felon).

43. See 2 HAWKINS, *supra* note 16, at 76; 1 BURN (1770 ed.), *supra* note 17, at 95; 1 *id.* (1785 ed.), at 101–02; GREENLEAF’S ABRIDGMENT, *supra* note 18, at 22; CONDUCTOR GENERALIS, *supra* note 40, at 24–25. Each of these authorities noted that a warrantless felony arrest made on a “hue and cry” was an exception: anyone who made an arrest based on the hue and cry was justified even if there had not been a felony in fact, though the person who had initially raised the hue and cry would have been accountable. See Davies, *Original Fourth*, *supra* note 3, at 622, n.198 (describing hue-and-cry procedure).

44. See, e.g., 2 HAWKINS, *supra* note 16, at 76 (“[N]o Causes of Suspicion whatsoever, let the Number and Probability of them be ever so great, will justify the Arrest of an innocent Man, by one who is not himself induced by them to suspect him to be guilty . . .”).

others, because “a mere Hearsay is no Evidence.”⁴⁵ Thus, it appears that the requirement of personal suspicion meant that a complainant who initiated a warrantless felony arrest had to be prepared to testify to direct knowledge of the grounds for suspecting the arrestee (or perhaps be ready to present other witnesses who could). The bottom line was that probable cause as to the commission of a crime would not suffice; it had to be proved “in fact.” Probable cause of suspicion was sufficient only as to the identity of the felon.

2. Warrantless Arrests for Less-than-Felony Offenses

Except for borderline felonies,⁴⁶ some offenses that usually involved “strangers” (transients who might escape unless promptly arrested),⁴⁷ and a few serious misdemeanors,⁴⁸ common law generally did not allow warrantless arrests for less than felony offenses. The primary exception was that anyone could make a lawful warrantless arrest to stop an *ongoing breach of the peace* (that is, a crime that threatened public order) such as an “affray” (a fight in a public place) because, in that instance, prompt arrest was justified by the need to restore the public peace. Otherwise, arrests for nonfelony offenses, including a completed breach of the peace or other serious misdemeanor, could generally be made only pursuant to a warrant issued by a justice of the peace.⁴⁹

Additionally, because there was no urgency at all to arrest for petty offenses or nuisances, violators were usually subject simply to a summons to appear before the local justice of the peace (with the possibility of arrest by warrant if the accused failed to appear).⁵⁰ The principal exception was that constables had

45. GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 107 (Dublin, Sarah Cotter 1754) (stating that “[t]he Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence”). The framing-era ban against admitting hearsay as evidence was quite rigorous and was subject to few exceptions. See Davies, *Not the Framers’ Design*, *supra* note 4, at 400–08 (discussing Hawkins’ and Gilbert’s statements of the ban against hearsay evidence).

46. For example, a specific rule allowed a temporary arrest in the case of a grievous wounding to determine whether the wound was fatal (in which case there was a felony and a warrantless arrest was justified). See, e.g., 4 BLACKSTONE, *supra* note 19, at 289 (noting warrantless arrest authority “in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue”).

47. See Davies, *Arrest*, *supra* note 3, at 314–17 (discussing Hawkins’ statements that cheating gamblers might be subject to warrantless arrest).

48. Hale had identified a few specific misdemeanors involving serious crimes (for example, leaving “an infant in the cold to the intent to destroy it”) as being subject to warrantless arrest, but these passages were rarely mentioned in other framing-era sources. Davies, *Arrest*, *supra* note 3, at 308–14.

49. See, e.g., 1 BURN (1770 ed.), *supra* note 17, at 96; 1 *id.* (1785 ed.) at 103:

[A] constable may ex officio arrest a breaker of the peace in his view, and keep him in his house, or in the stocks till he can bring him before a justice.

Or any person whatsoever, if an affray be made to the breach of the king’s peace, may without any warrant from a magistrate, restrain any of the offenders, to the end the king’s peace may be kept; but after the affray is ended, they cannot be arrested without an express warrant.

50. See, e.g., 4 BLACKSTONE, *supra* note 19, at 278–80 (discussing summary proceedings before justices of the peace for “divers petty pecuniary mulcts [fines], and corporal penalties, . . . [and] many disorderly offenses” as being instances in which “it is necessary to *summon* the party accused”); 2

order-maintenance authority to detain public drunks and vagrants, and night watchmen may have exercised similar authority to temporarily detain suspicious “nightwalkers” until morning.⁵¹

C. The Absence of Warrantless Searches Other than as an Aspect of a Lawful Warrantless Arrest

A silence—virtually no discussion of warrantless searches—in the framing-era treatises and manuals reveals an important difference between historical and modern doctrine. Indeed, except for passages on search warrants for stolen goods, the framing-era authorities do not identify criminal search authority at all.⁵² This silence does not mean, however, that there was no expectation a person would be searched when a warrantless arrest was made. Quite the contrary: it reflects an assumption that thieves would routinely be searched when they were caught in the act and arrested.⁵³ It appears that these instances were not denoted “searches” because arrest was broadly defined to apply to any interference with a person’s liberty to go about his business.⁵⁴ Hence, it appears that a warrantless search was justified if, but only if, a lawful warrantless arrest could be made.⁵⁵

D. Criminal Arrest Warrants

Warrants were a far more important form of criminal-justice authority during the framing era than they are today. For example, James Wilson said in his 1790–1791 lectures that “[a] warrant is the first step usually taken for [the apprehension of a criminal].”⁵⁶ In some instances, lawful arrests or searches could be made only by warrant. For example, the general limitation of

WORKS OF JAMES WILSON, *supra* note 31, at 689–90 (“On an indictment for any crime under the degree of treason or felony, the process proper to be first awarded, at common law, is a *venire facias*, which, from the very name of it, is only in the nature of a summons to require the appearance of the party On an indictment for felony or treason, a *capias* [arrest warrant] is always the first process.”).

51. Davies, *Arrest*, *supra* note 3, at 345–51.

52. For example, Burn’s justice-of-the-peace manual has an entry for “Search Warrant” noting that a general warrant to search all suspected houses for felons or stolen goods is invalid. 4 BURN (1770 ed.), *supra* note 17, at 104. But the rest of Burn’s discussion recognizes only the specific search warrant for stolen goods, and the only form for a search warrant set out is for stolen goods. *Id.* at 105–07.

53. See CONDUCTOR GENERALIS, *supra* note 40, at 117 (extracting from an essay by London high constable Saunders Welch advising constables that “a thorough search of the [arrested] felon is of the utmost consequence to your own safety and . . . by this means he will be deprived of instruments of mischief, and evidence may probably be found on him sufficient to convict him . . .”).

54. For example, Blackstone, using “imprisonment” as a synonym for arrest, wrote that “[e]very confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets.” 3 BLACKSTONE, *supra* note 19, at 127.

55. The doctrine that a lawful warrantless search could be justified in circumstances which could not have justified a lawful warrantless arrest did not appear until the Prohibition cases of the 1920s. See *infra*, part V.

56. 2 WORKS OF JAMES WILSON, *supra* note 31, at 684. See also Davies, *Original Fourth*, *supra* note 3, at 641 n.256.

nonfelony warrantless arrests to ongoing breaches of the peace, described above, meant that a warrant was usually the only way to make a lawful arrest for a completed breach of the peace or other serious misdemeanor.

In addition, a criminal warrant was usually the only way to justify “breaking” a house (that is, entering a house by closed door)⁵⁷ to make an arrest or search; hence, breaking a house without a warrant was an actionable trespass.⁵⁸ Although it has been largely overlooked in modern commentaries, Coke had written that the requirement of a felony warrant for breaking a house was required by Magna Carta’s “law of the land” protection.⁵⁹ Later authorities continued to state the need for a criminal warrant to justify breaking a house, but disagreed as to whether a misdemeanor warrant, or only a felony warrant, could suffice.⁶⁰

Warrant authority was also important as a practical matter even when not strictly required to justify an arrest. In contrast to modern procedure, a warrantless framing-era peace officer usually had no greater arrest authority than that possessed by any private person.⁶¹ Thus, a warrant greatly enhanced the officer’s authority. For one thing, because it was clearly unlawful to resist a warrant arrest or search, the warrant conferred increased protection against violent resistance. Indeed, arrest warrants sometimes took the form of commanding a constable to accompany the private complainant and keep peace while the complainant made the arrest.⁶² Additionally, a warrant largely removed a constable’s risk of trespass liability if the arrestee was not ultimately convicted of the offense for which he was arrested. That was so because a

57. See 4 BLACKSTONE, *supra* note 19, at 226 (noting, in a discussion of burglary, that “lifting up the latch” of an outer door would constitute “breaking” a house).

58. See Davies, *Original Fourth*, *supra* note 3, at 642–50 (discussing the importance attached to the “Privilege of House” and the doctrine that “a man’s house is his castle”). The primary exceptions to the requirement of a warrant were that a house could be entered if a peace officer perceived that violence was then occurring inside, or if he was lawfully pursuing a fleeing affrayer or felon who ran into a house. See *id.* at 644. However, some authorities stated that a fleeing person could be pursued into a house only if he was known to be a felon (actually guilty) but not if he were only under a probable suspicion of being the felon. See *id.* at 645 n.269.

59. See 4 COKE, *supra* note 14, at 177 (stating that Magna Carta’s “law of the land” protection would be violated if a justice of the peace issued a warrant “upon surmises, for breaking the houses of any subjects to search for felons, or stoln goods”). See also Davies, *Correcting History*, *supra* note 3, at 62–64 (discussing the implications of Coke’s statement, and his similar statements in *Semayne’s Case*, 5 Coke Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604)).

The long-unappreciated point is that Coke’s linkage between the “law of the land” protection in Magna Carta and the requirement of a felony warrant to justify entering a house to arrest or search removes any doubt that the Framers understood that the requirement of a warrant for breaking a house was a fundamental principle of the common law.

60. Some authorities limited “breaking doors” of houses to felony arrest warrants. Davies, *Original Fourth*, *supra* note 3, at 645. However, other authorities indicated that doors could be broken to execute an arrest warrant based on an indictment for any crime (which would include serious misdemeanors). See, e.g., 2 HAWKINS, *supra* note 16, at 86.

61. See *supra* note 24.

62. See Davies, *Correcting History*, *supra* note 3, at 65 (discussing Coke’s concept of an arrest warrant); *id.* at 79 (discussing Hawkins’ concept of an arrest warrant).

constable who only executed an arrest warrant was “indemnified” (not immunized) by the justice of peace’s warrant.⁶³

1. Standard for Issuing an Arrest Warrant

The framing-era standard for issuing a felony or misdemeanor arrest warrant was essentially the same as the *ex ante* standard for a warrantless felony arrest: a justice of the peace was authorized to issue a warrant if he was satisfied that the complainant’s sworn testimony (1) established that a felony or misdemeanor had actually been committed in fact, and (2) also provided factual grounds constituting probable cause of suspicion as to the identity of the felon or misdemeanant. As Blackstone put it,

[I]t is fitting [for the justice] to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed.⁶⁴

The personal assessment of the justice of the peace regarding the fact of crime and the grounds of suspicion as to identity were important to the rationale for arrest warrants. Writing in the early seventeenth century, Coke had insisted that an arrest warrant that would justify breaking a house could be issued only after a grand jury had indicted the person to be arrested.⁶⁵ But Hale and later authorities disagreed, asserting that a justice of the peace had authority to issue an arrest warrant upon a sworn complaint.⁶⁶ According to Hale, it was proper for a justice of the peace to issue a warrant because “the justices . . . are made judges of the reasonableness of the suspicion, and when

63. See, e.g., 4 BLACKSTONE, *supra* note 19, at 288 (stating that “a lawful warrant will at all events indemnify the officer, who executes the same ministerially”); see also *infra* note 78 and accompanying text.

64. 4 BLACKSTONE, *supra* note 19, at 287 (citing 2 HALE, *supra* note 15, at 110) (emphasis in original). Blackstone distinguished between instances involving a “person accused” (when the complainant claimed actual knowledge of the identity of the felon) and “a person suspected” (when the complainant offered to show probable cause of suspicion of the identity of the felon):

[A] justice of peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet indicted . . . [H]e may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom it is prayed.

Id. (emphasis in original).

65. 4 COKE, *supra* note 14, at 177.

66. This was one aspect in which the law had undergone noticeable change since Coke’s time. Coke had asserted that no arrest warrant could be issued until a person had been indicted for felony. Hale and Hawkins disagreed as to the need for a prior indictment, and instead took the position that a justice of the peace could issue a felony arrest warrant if there was an accusation that felony had been committed in fact, and the identity of the felon was either known or there was reasonable cause of suspicion as to his identity. Davies, *Correcting History*, *supra* note 3, at 62–67, 76–81. Framing-era sources noted this conflict but clearly indicated that the position espoused by Hale and Hawkins had carried the day. See *id.* at 77.

they have examined the party accusing touching the reasons of his suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice's suspicion as well as theirs."⁶⁷

Hale did allow for some relaxation of the formality of an application for a felony arrest warrant: "It is convenient, tho not always necessary, to take an information upon oath of the person that desires the warrant, that a felony was committed, that he doth suspect or know J.S. to be the felon; and if suspected, then to set down the causes of his suspicion."⁶⁸ Because "convenient" meant "proper," "congruent," or "in conformance with the rule" in historical usage,⁶⁹ Hale's statement connoted that the formality of recording the grounds of suspicion should be observed unless the need for an immediate arrest of a suspected felon was too urgent to allow the delay that would involve.

Notably, Hale's statements regarding judicial assessment of the sufficiency of the grounds for an arrest warrant were widely restated in the framing-era justice-of-the-peace manuals,⁷⁰ and the limited evidence available regarding actual practice seems to confirm that a complainant seeking an arrest warrant was required to testify under oath to the fact of a crime and the grounds for probable cause as to the identity of the culprit prior to issuance of an arrest warrant.⁷¹

67. 2 HALE, *supra* note 15, at 79, 109–10.

68. 1 *id.* at 582. Common-law authorities often inserted initials (for example, "J.S.") in the quotation in the accompanying text to indicate the need to name a specific person.

Hale intended flexibility only with regard to the "set[ting] down" (writing up) of the complaint, but not the judicial assessment of the cause, because he also wrote, in the second volume of his treatise,

But that I may say it once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for [the justice] is in this case a competent judge of those circumstances, that may induce granting of a warrant to arrest.

2 *id.* at 110.

69. See 3 THE OXFORD ENGLISH DICTIONARY 861 (2d ed. 1989) (including among definitions for "convenient" the obsolete definitions "[a]ccordant, congruous, consonant (to)," "[s]uitable to the conditions or circumstances; befitting the case; appropriate, proper, due," and "[m]orally or ethically suitable or becoming; proper").

70. See, e.g., 4 BURN (1770 ed.), *supra* note 18, at 329 (citations to Hale's treatise omitted):

It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing

Lord Hale proves at large . . . that a justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted; and that though the original suspicion be not in himself, but in the party that prays his warrant.

For the justices are judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of his suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice's suspicion as well as theirs.

See also GREENLEAF'S ABRIDGEMENT, *supra* note 18, at 372 (same language); CONDUCTOR GENERALIS, *supra* note 40, at 441–42 (same language).

71. Although evidence of actual practice is scarce, at least one incident from the aftermath of the framing era indicates that a complainant's grounds of suspicion were expected to be fully aired prior to the issuance of an arrest warrant. During arguments in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), Chief Justice Marshall asked Attorney General Caesar Rodney if there would not have been an

Serjeant Hawkins stated essentially the same standard for issuing arrest warrants as Hale when he published his leading criminal-procedure treatise in 1721. Specifically, Hawkins wrote that a justice of the peace could justify issuing an arrest warrant “upon strong Grounds of Suspicion for a Felony or other Misdemeanor.”⁷² Notably, Hawkins also made one of the earliest attempts to define “probable cause of suspicion” as to the identity of the criminal when he wrote that a justice of the peace “cannot well be too tender in his Proceedings” involving arrest warrants, and could be punished “if he grant any such Warrant groundlessly and maliciously, without such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty.”⁷³ Hawkins’ “candid and impartial man” formulation—which was repeated in the colonial manuals⁷⁴—would shape judicial discussions of criminal probable cause for roughly the next two and a half centuries (though Hawkins’ “induce . . . to suspect the party to be guilty” would later be elevated to “induce . . . to believe the party to be guilty”).⁷⁵

2. The Indemnity Provided by a Criminal Arrest Warrant

Hawkins also identified the situations in which an issued warrant did or did not indemnify the constable who executed it. Specifically, he wrote that a constable could not justify executing an unparticularized general arrest warrant for unidentified persons⁷⁶ or a warrant for an offense outside of the issuing justice’s jurisdiction,⁷⁷ but that otherwise a constable could justify an arrest by warrant “whether any Felony were in Truth committed or not,” because it was appropriate that the issuing justice alone should be answerable for issuing a warrant in the absence of an actual crime.⁷⁸ Moreover, because the constable had no authority to question the judgment of a magistrate, Hawkins also indicated that the warrant need not restate the grounds for suspecting the arrestee.⁷⁹

opportunity for a defendant to cross-examine his accusers during a post-arrest felony committal proceeding. Rodney replied that a defendant would not necessarily have had that opportunity because the court could use, in place of a further examination of the complainant’s factual allegations, the complainant’s ex parte affidavit from the earlier proceeding at which the arrest warrant had been issued. *Id.* at 124. The Attorney General of the United States apparently thought there would be a record of the factual allegations upon which an arrest warrant had been issued.

72. 2 HAWKINS, *supra* note 16, at 84. Note that Hawkins’ reference to a warrant “for a Felony or Misdemeanor” was shorthand for the crime-in-fact requirement.

73. 2 *id.* at 84–85.

74. See, e.g., 4 BURN (1770 ed.), *supra* note 17, at 330; GREENLEAF’S ABRIDGMENT, *supra* note 18, at 373; CONDUCTOR GENERALIS, *supra* note 40, at 442; BURN’S ABRIDGEMENT, OR THE AMERICAN JUSTICE 418–19 (Eliphalet Ladd ed., Dover, N.H., 2d ed. 1792).

75. See *infra* notes 215–16 and accompanying text.

76. 2 HAWKINS, *supra* note 16, at 81–82.

77. *Id.* at 81.

78. *Id.* at 82.

79. Because a warrant was a command from a justice of the peace to a constable, and the constable had no authority to question the validity of the command in a particularized warrant, the warrant itself

Oddly, the framing-era authorities said little about the personal liability of the complainant who sought an arrest warrant in the case in which the arrestee was not convicted of the crime. The reason seems to be that it would have been difficult, as a practical matter, for an innocent arrestee to have won damages from the complainant when an arrest had been made by warrant, because they would have had to bring an action for malicious prosecution rather than false imprisonment, and—in Blackstone’s words—“any probable cause . . . is sufficient to justify the [complainant]” in an action for malicious prosecution.⁸⁰ The difficulty facing the plaintiff–arrestee, of course, would have been that a justice of the peace had already endorsed the existence of probable cause for the arrest when he issued the arrest warrant.

E. Criminal Search Warrants for Stolen Goods

The only kind of criminal search that is discussed in the framing-era authorities, and sometimes only in passing,⁸¹ is a search warrant for stolen property. It appears that this warrant had a narrower application than one might expect.

As noted above, the common-law authorities said virtually nothing about warrantless searches. The explanation for that silence seems to be partly that there was not much to search for (other than stolen property), and partly that it was assumed that an arrestee would routinely be searched for weapons or stolen goods whenever an arrest was made.⁸² There may have been a similar linkage when an arrest for theft was made by warrant in a house: once the warrant authorized entering the house, a search of the house may have been a routine part of the arrest that was made there, at least if the arrest was for theft.

Coke’s interpretation of Magna Carta’s “law of the land” provision supported the general understanding that a felony warrant was usually necessary to justify “breaking” a house to make an arrest.⁸³ But because the emphasis seems to have been on the need to justify the “breaking” and entry of

did not recite the grounds for suspecting the arrestee to be the felon. *See 2 id.* at 85 (stating that “it seems to be rather discretionary, than necessary to set [the grounds for suspecting] forth in any case”).

80. 3 BLACKSTONE, *supra* note 19, at 126–27. Blackstone’s discussion of the action for malicious prosecution was very brief and appears to have been somewhat merged with his discussion of “an action for conspiracy”—an action for malicious prosecution against two defendants who allegedly had acted in concert in causing the false prosecution of the arrestee–plaintiff. *See id.* Blackstone commented with regard to the action for conspiracy that a plaintiff would be required to produce a court record of his indictment and acquittal, but that “in prosecutions for felony” it was usual for the courts to deny the needed copy “where there is any, the least, probable cause to found such prosecution upon.” *Id.* Otherwise prosecutors “who had a tolerable ground of suspicion” would be inhibited from prosecuting. *Id.* It seems plausible that this attitude generally applied in malicious prosecution cases.

81. *See, e.g.*, 2 HAWKINS, *supra* note 16, at 81–82, 84 (mentioning search warrants for stolen goods only in the context of condemning unparticularized general warrants).

82. *See supra* notes 53–54 and accompanying text.

83. *See supra* note 59 and accompanying text (discussing Coke’s view of the need for a felony warrant to justify entering a house).

the house,⁸⁴ it is possible that a felony arrest warrant for theft might have also been understood to implicitly authorize a search for the stolen goods in the house in which the arrest was made. Oddly, although such searches must have occurred, the published authorities do not seem to have discussed this point.⁸⁵

Notably, the discussions of search warrants in the common-law authorities were only about the “search warrant for stolen goods” and seem to have been directed to a setting in which an arrest warrant for theft clearly could not have been used, namely, where the stolen property was believed to be in the possession of *someone not named as the thief*—that is, either someone other than the thief or someone whom the complainant lacked grounds to accuse of being the thief. Indeed, the warrant forms for a search warrant for stolen property set out in framing-era manuals recited that the felonious theft had been committed “by some person or persons unknown,” but that there was probable cause as to the location of the stolen goods.⁸⁶ Of course, in that situation there would not have been any basis for issuance of an arrest warrant. Instead, it appears that justices of the peace began to issue search warrants for stolen property as a way of permitting the victims of thefts to search houses where there were grounds to believe the stolen property was located.⁸⁷ This may

84. Like Coke, the framing-era authorities discussed the need for a criminal warrant only with regard to “houses,” but not with regard to other premises, carriages, or elsewhere. However, there was some ambiguity as to the meaning of “house,” which was sometimes used as simply a synonym for “building” during the eighteenth century. For example, John Adams’ 1789 Massachusetts warrant provision referred to a subject’s “houses” in the plural. Davies, *Correcting History*, *supra* note 3, at 115 n.362.

85. The only suggestion that has been identified in framing-era sources for the proposition that an arrest warrant would not also justify the search of a house is a 1763 letter by Charles Pratt. *See* Davies, *Original Fourth*, *supra* note 3, at 647 n.277 (describing Pratt’s views on search warrants). Pratt was the Chief Justice of the Court of Common Pleas and the judge in famous Wilkesite cases; he became Lord Camden during the course of those cases. *See id.* at 563 n.21 (describing Pratt’s role in the Wilkesite cases). But there does not seem to be any evidence that Pratt’s view was widely shared, or even widely known.

86. The forms for a search warrant for stolen property in framing-era justice manuals typically recited an allegation that specifically identified property had recently “by some person or persons unknown, been feloniously taken,” and that there was probable cause as to where the goods were located. *See, e.g.*, GREENLEAF’S ABRIDGEMENT, *supra* note 18, at 324 (form of a search warrant); CONDUCTOR GENERALIS, *supra* note 40, at 384 (same). This same language still appeared at least as late as the early nineteenth century. *See, e.g.*, 7 DANE, *supra* note 40, at 244–45 (1824). Although Dane used the heading of “search warrant,” he discussed only the search warrant for stolen goods. *Id.*

87. In 1765, Lord Camden described the issuance of search warrants for stolen property as a practice that had “crept into the law by imperceptible practice.” *Entick v. Carrington*, 11 State Trials (Francis Hargrave ed.) 313, 321, 19 How. St. Tr. 1029, 1067 (C.P. 1765). Camden’s discussion in *Entick* was also paraphrased in 1787 in LEACH’S HAWKINS:

His Lordship said, that warrants to search for stolen goods had crept into the law by imperceptible practice, that it is the only case of the kind to be met with, and that the law proceeds with great caution. For first, There must be a full charge upon oath of a theft committed. 2dly, The owner must swear that the goods are lodged in such a place. 3rdly, He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description. And lastly, the owner must abide the event at his peril; for if the goods are not found, He is a trespasser; and the officer being an innocent person will be always a ready and convenient witness against him.

have meant, however, that a search warrant for stolen property was viewed as involving primarily the property owner's personal interest in retrieving his property, rather than the public interest in identifying and punishing thieves. Moreover, because the warrant was aimed at the premises of a person who was not accused of crime, its use called for greater restraint than the typical felony arrest warrant.

1. The Standard for Issuing a Search Warrant for Stolen Property

The common-law authorities condemned "general warrants" to search "any place" suspected for stolen goods long before the famous prerevolutionary, colonial controversies over the use of general warrants for customs searches.⁸⁸ These authorities also consistently stated essentially the same two-prong standard for issuance of a search warrant for stolen property as that required to justify a criminal arrest warrant: a search warrant for stolen property could be issued "in case of a complaint, and oath made, of goods stolen [the felony-in-fact prong], and that the party suspects the goods are in such a house, and shews the cause of his suspicion [the probable-cause-of-suspicion prong]."⁸⁹ As in the case of an arrest warrant, issuance of a search warrant for stolen goods was characterized as a "judicial act" and thus required the magistrate's "examination of the fact."⁹⁰ But in contrast to felony arrest warrants, the authorities made no allowance for shortcutting the formality of the procedure for issuing a search warrant.⁹¹ Although a search warrant for stolen goods was directed to a constable, the complainant (the owner of the allegedly stolen property) was expected to attend the search to identify the stolen goods.⁹²

2 LEACH'S HAWKINS, *supra* note 16, at 135 n.6.

88. *See, e.g.*, 2 HAWKINS, *supra* note 16, at 82, 84; 1 HALE, *supra* note 15, at 580; 2 HALE, *supra* note 15, at 112, 150; CONDUCTOR GENERALIS, *supra* note 40, at 382–83.

89. *See, e.g.*, CONDUCTOR GENERALIS, *supra* note 40, at 383. This formulation tracked the one given by Hale: That search warrants for stolen goods "are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect [the stolen goods] are in such a house or place, and do shew his reasons of such suspicion." 2 HALE, *supra* note 15, at 150. Although Hawkins did not state the standard for issuing a search warrant for stolen property, beyond noting that it could not take the form of a general warrant, Thomas Leach added a discussion of search warrants for stolen goods (based on Lord Camden's statements in a recent case) in his 1787 edition of Hawkins' treatise. *See supra* note 87.

90. 2 HALE, *supra* note 15, at 150 (stating that a search warrant for stolen goods could only be "to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact").

91. As noted above, the authorities allowed some variation in the procedure for issuing a felony arrest warrant if there was an urgent need for an immediate arrest. *See supra* notes 68–69 and accompanying text (noting statements that it was "convenient" but not always necessary for the magistrate to record the complainant's sworn information in writing before issuing a felony arrest warrant).

92. 2 HALE, *supra* note 15, at 150.

2. The Liability Rule for a Warrant Search for Stolen Goods

As in the case of an arrest by warrant, an officer who only assisted in executing a particularized search warrant for stolen goods was indemnified against trespass liability.⁹³ But the complainant who sought the warrant was protected against liability for trespass damages *only if the goods were found*. If the property was not found as alleged, the search constituted a trespass and the complainant was liable for damages.⁹⁴ The likely explanation for this strict liability rule is that a search warrant for stolen goods served largely the complainant's (the theft victim's) own private interest. Moreover, it appears that if a peace officer acted as the complainant, he would also have been liable for an unsuccessful search in that role.⁹⁵ The probable-cause-of-suspicion prong of the search-warrant standard was thus relevant as a criterion only for the *issuance* of the warrant; the lawfulness of the search made under the warrant ultimately depended on whether the stolen property was actually found. Hence, even more than in the case of an arrest warrant, being the complainant for a search warrant for stolen goods was not to be taken lightly.

F. The Framers' Attempt to Preserve the Common-Law Arrest Standards in "Law of the Land" and "Due Process of Law" Provisions

The common-law arrest and search standards were absorbed as the law of the new American states when they declared their independence in 1776. However, the Framers in most of the new states were not content to leave it at that. Because Parliament had been the source of the prerevolutionary threats to common-law rights, the state Framers undertook to adopt constitutional declarations of rights that would prohibit the new state legislatures from relaxing the settled common-law standards, including those for arrests and searches.⁹⁶ They did not undertake to restate the standards for criminal arrests

93. 2 *id.* at 151 ("[T]he officer is excused . . . because he searcheth by warrant.").

94. 2 *id.* ("[As to the party that sought the warrant,] the breaking of the door [in execution of the search warrant] is *in eventu* lawful or unlawful, *viz.* lawful, if the goods are there; unlawful, if not there."). This point was reiterated by Lord Camden in 1765. See *Entick v. Carrington*, 2 Wils. 275, 291–92, 95 Eng. Rep. 807, 818 (C.P. 1765) ("[I]f the goods are not found there, [the complainant] is a trespasser; the officer in that case is a witness."). See also 2 LEACH'S HAWKINS, *supra* note 16, at 135 n.6 (paraphrasing Camden's ruling); CONDUCTOR GENERALIS, *supra* note 40, at 383–84 (quoting Hale). The trespass liability of the complainant for an unsuccessful search by warrant was still recognized in early nineteenth-century American manuals. See 7 DANE, *supra* note 40, at 244–45 n.*.

95. This was the rule in customs and excise searches, as discussed *infra* notes 139, 145 and accompanying text. In 1824 Nathan Dane included a discussion of a revenue officer's liability for an unsuccessful search under an excise warrant in his discussion of the liability of a complainant for an unsuccessful search for stolen property under a criminal search warrant. See 7 DANE, *supra* note 40, at 244–46 ("But suspicion does not always excuse the officer, especially when he informs.").

96. The original conception of the declarations and bills of rights differed from the modern conception in that the provisions were intended to constrain the power of the legislature, rather than to directly regulate the conduct of government officers. During the framing era, the understanding was that the common law regulated the officer. Moreover, the officer acted as the government only when he acted within the lawful authority of his office; he lost that official character and became merely a personal trespasser when he acted unlawfully. When an officer acted unlawfully, he was said to act "in

and searches themselves, though, because the common law already did that. Instead, they invoked the seemingly settled common-law standards by looking back to the earlier Cokean tradition of Magna Carta's "law of the land" protection. In particular, that provision forbade a person being "taken" or "imprisoned" except by "the law of the land"—the common law.

Arrests on the Crown's orders to enforce taxes of disputed legality had been a salient constitutional issue during the reign of Charles I in the early seventeenth century, and the House of Commons had responded by adopting the Petition of Right in 1628.⁹⁷ During the debate on the Petition, Sir Edward Coke argued that arbitrary arrests ordered by the Crown violated the "law of the land" protection set out in chapter twenty-nine of Magna Carta.⁹⁸ Shortly thereafter, Coke also set out the common-law standards for lawful arrests in his discourse on the contents of Magna Carta's "law of the land" chapter in his *Second Institute*—almost certainly the most famous of his writings.⁹⁹ In that discussion Coke also noted that an earlier English statute had used the phrase "due processe of law" in place of "the law of the land" as a more-precise label for common-law, pretrial, criminal-justice standards, including those for warrantless arrest.¹⁰⁰ Notably, from Coke's time to the framing-era, legal authorities used the term "due process of law" sparingly, and only as a label for the common-law requisites of pretrial criminal procedure.¹⁰¹ Thus, in historical

deceit" of the government. See 3 BLACKSTONE, *supra* note 19, at 255. Thus, there was no basis for applying the constitution to unlawful conduct by officers. Rather, the point of the constitutional provisions was to prevent the legislature from undermining the protections provided by common law; the theory was to preserve the common law and let the common law continue to control the officer. The modern understanding that unlawful acts by officers constitute a form of government action did not gain acceptance until roughly the beginning of the twentieth century. See Davies, *Original Fourth*, *supra* note 3, at 660–67 (chronicling the development of the modern doctrine of officer misconduct); see also *infra* note 243.

97. See Davies, *Correcting History*, *supra* note 3, at 46–47 (outlining the conflict between Parliament and Charles I leading to the Petition of Right).

98. Although the "law of the land" chapter of Magna Carta is sometimes identified in modern histories as chapter thirty-nine, that chapter was uniformly referred to as chapter twenty-nine in framing-era works. Davies, *Original Fourth*, *supra* note 3, at 671 n.332.

99. See Davies, *Correcting History*, *supra* note 3, at 43–49, 83–86 (discussing Coke's writings on the subject of Magna Carta).

100. See 2 COKE, *supra* note 14, at 50 (stating that the statute "37 E[dward I]. 3. cap. 8" renders "the true sense and exposition of [by the law of the land]" as "due proces[s] of law"). For a discussion of this passage, see Davies, *Correcting History*, *supra* note 3, at 50–52.

In historical usage, the term "process" usually referred to a written document that conferred authority for a judicial proceeding (for example, a warrant, indictment, or writ). See *id.* at 81 n.244. However, Coke asserted that "process" for arrest was not limited to "warrant in deed" ("deed" connoting a written warrant) but also extended to "warrant in law . . . without writ" (the legal authority for warrantless arrests recognized at common law). See *id.* at 53. Under the latter heading, Coke then proceeded to set out the common-law standards for *warrantless* arrests as aspects of "due process of law." See *id.* at 54–62. Interestingly, Coke did not set out the standards for arrest warrants in that chapter, but rather did so in his discussion of the office of the justice of the peace in the fourth volume of his *Institutes*. See 4 COKE, *supra* note 14, at 176–77.

101. For example, Blackstone referred to "due process of law" only twice in the four volumes of his *Commentaries*. Both instances were citations to an early statute that tracked chapter twenty-nine of

usage the term “*process*” in “due process” meant the legal authority to initiate a criminal prosecution; it was not a synonym for “procedure” (as we use it today). Rather, in framing-era sources, fair court procedure was referred to as “due *course* of law.”¹⁰²

Because framing-era Americans still learned law by reading Coke’s works, they were conversant with Coke’s then-famous discussion of Magna Carta’s “law of the land” provision.¹⁰³ Additionally, later commentators such as Blackstone also called attention to the implications that Magna Carta’s “law of the land” chapter held for arrest standards.¹⁰⁴ So when the American state Framers sought to preserve the somewhat complex common-law standards for arrest, they invoked those standards by adopting constitutional prohibitions against a person’s being “taken” unless according to “the law of the land.” John Adams updated that phrasing when he drafted the 1780 Massachusetts Declaration to say that no person was to be “arrested, imprisoned” or punished except by “the law of the land.”¹⁰⁵ Notably, the Framers of the initial state constitutions and declarations of rights included these arrest prohibitions more frequently than provisions that banned the use of general warrants.¹⁰⁶

To make the constraint against legislative relaxation of common-law standards even clearer, Alexander Hamilton initiated a shift from the “law of the land” label to the more-precise terminology, “due process of law,” when New York adopted a bill of rights in 1787.¹⁰⁷ In keeping with Coke’s treatment, a

Magna Carta by commanding that no person was to be held for a capital trial except by “due process of law.” Davies, *Correcting History*, *supra* note 3, at 82–83.

102. *Id.* at 81–82.

103. *Id.* at 83–86.

104. 1 BLACKSTONE, *supra* note 19, at 130–31 (“[Englishmen are entitled to] the personal liberty of individuals . . . [T]he language of the great charter [Magna Carta] is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion of petition to the king, or his council, unless it be by legal indictment, or the process of the common law.”).

105. See Davies, *Correcting History*, *supra* note 3, at 112–13 (discussing Adams’ role in drafting the Declaration). Adams placed this provision prior to a separate provision banning general warrants—the provision that first introduced the phrase “unreasonable searches and seizures.” See also Davies, *Original Fourth*, *supra* note 3, at 686–91 (explaining Adams’ choice of the phrase “unreasonable searches and seizures” in his ban against general warrants).

106. See Davies, *Correcting History*, *supra* note 3, at 93–127 (surveying the initial state constitutional provisions relating to arrest and warrant standards). When George Mason produced the initial draft of the 1776 Virginia declaration of rights (the first of the state declarations), he included an arrest provision “that no Man, except in times of actual Invasion or Insurrection, can be imprisoned upon Suspicion of Crimes against the State, unsupported by Legal Evidence.” Davies, *Correcting History*, *supra* note 3, at 93–94. But Mason declined to include a provision banning general warrants because he did not deem that to be sufficiently fundamental. Davies, *Original Fourth*, *supra* note 3, at 674.

107. Although the New York Constitution of 1777 had included a “law of the land” guarantee, radical elements of the New York legislature later asserted that, because a statute would be part of the “laws,” the clause did not prevent them from legislatively disenfranchising former Tories. Hamilton denounced this interpretation and quoted Coke to the effect that “law of the land” meant “due process of law,” and asserted that the latter term clearly indicated a common-law protection that could not be relaxed by legislation. The Hamiltonian faction then succeeded in enacting a 1787 bill of rights that,

provision in the New York bill expressly prohibited a person's being "arrested" unless by "due process of law."¹⁰⁸

James Madison, who was in New York City in 1789, and who had also recently collaborated with Hamilton in contributing essays for *The Federalist*,¹⁰⁹ followed Hamilton's shift when he authored the first draft for a federal bill of rights. Thus, Madison included the "due process of law" protection among the other requisites for the *initiation* of valid criminal prosecutions that he collected in the proto-Fifth Amendment.¹¹⁰ Indeed, Madison's proposed ordering for the criminal-procedure amendments, in which he placed the proto-Fifth Amendment first among the criminal-procedure provisions, shows that he adhered to the understanding that "due process of law" pertained to the requisites for the *initiation* of criminal proceedings, including arrest and indictment. Next in Madison's ordering came the proto-Eighth Amendment's ban against excessive bail, then the proto-Fourth Amendment's ban against use of general warrants, and finally the proto-Sixth Amendment's statement of criminal-trial rights.¹¹¹

Because the federal Congress was understood to possess only enumerated powers, rather than the plenary power of the state legislatures, it is unlikely that the federal Framers anticipated that the federal government would engage in general criminal-law enforcement. Hence, it is quite possible that they were less concerned with general criminal-justice protections than the state Framers had been. Even so, there is no reason to think the federal Framers meant to adopt any novel understanding of "due process of law" when they framed the Fifth Amendment in 1789.¹¹² (Our current conceptions of procedural and substantive "due process" are almost entirely the products of late-nineteenth- and twentieth-century Supreme Court innovations, but that is another story.)¹¹³

among other provisions, specifically barred arrests except according to "due process of law." Davies, *Correcting History*, *supra* note 3, at 121–27.

108. *Id.* at 124.

109. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison), NO.23 (Alexander Hamilton).

110. *See* Davies, *Correcting History*, *supra* note 3, at 144–51 (explaining how the provisions in Madison's proto-Fifth Amendment were not miscellaneous but all related to the requisites for the initiation of a valid criminal prosecution).

111. *Id.* at 140–42. The amendments were debated in the order in which Madison proposed them. No record exists to explain why a final committee on style reordered the amendments to the final order. *Id.* at 169–71.

112. *See id.* at 155–58 (discussing the Framers' understanding of the Fifth Amendment's language).

113. *See id.* at 197–200 (noting that the Supreme Court turned its back on the original criminal-procedure content of "due process of law" in *Hurtado v. California*, 110 U.S. 516 (1884), and then redefined the Due Process Clause of the Fourteenth Amendment to serve its campaign to protect businesses from regulation by state governments).

III

THE ADOPTION OF THE BARE-PROBABLE-CAUSE STANDARD FOR REVENUE
SEARCH WARRANTS IN THE FOURTH AMENDMENT

What, then, was the original understanding of the Fourth Amendment? Indeed, given that bare probable cause—that is, probable cause regarding *whether* a crime was committed—was *insufficient* to justify issuance of a criminal warrant, why did the Framers of the Fourth Amendment simply identify “probable cause” as the minimum standard for issuance of constitutional warrants? The most plausible answer is that the Fourth Amendment was actually a focused response to controversies regarding the legality of the use of general warrants for *revenue searches of houses*, and the one area of law where bare probable cause had emerged as the accepted standard by the framing era was for *revenue search warrants*.

A. The Prerevolutionary General-Warrant Grievance

The conventional history of the Fourth Amendment is correct insofar as it locates the impetus for the American constitutional provisions that set minimum standards for the issuance of warrants in prerevolutionary controversies regarding the legality of general warrants. There had been two distinct lines of general-warrant controversies. In one, which involved the English Wilksite cases of the early 1760s, the Secretary of State had issued general warrants ordering officers to search the houses of political opponents to discover any papers constituting evidence of seditious libel. In subsequent lawsuits for damages brought by John Wilkes and other victims of the searches, the English courts ruled that the general warrants were illegal and the searches were trespasses.¹¹⁴

In the other line of controversies, which was the more direct basis for the American colonial grievance against general warrants, Parliament had authorized commissioned customs officers to use a “writ of assistance” as authority to conduct customs searches of houses in the American colonies. As used in the American colonies, this writ was an extreme form of unparticularized, and thus “general” warrant. The term “general warrant” usually referred to a warrant that authorized a search for specific fugitives or specific stolen goods, but left to the judgment of the officer what places or houses to search. In contrast, a writ of assistance was issued to a customs officer when he was appointed, and it provided him with continuous authority to search any place or house for any kind of smuggled or prohibited goods.¹¹⁵

There were two episodes of controversy regarding the customs writ of assistance in America. In the first, which arose in Boston in 1761, James Otis

114. Davies, *Original Fourth*, *supra* note 3, at 562–65.

115. The writ of assistance may have been used in a more limited way for customs searches in England, but it is unclear whether Americans were familiar with that usage during the American controversies. *See infra* notes 138–39.

argued in the *Writs of Assistance Case* that the use of such writs was contrary to fundamental principles of law and especially the “Privilege of House.”¹¹⁶ The colonial supreme court, however, upheld the legality of the writ.¹¹⁷ The second, more widespread, and more important episode arose when Parliament reauthorized the use of the general writ of assistance for customs enforcement in the American colonies in the 1767 Townshend Duties Act—*after* the English courts had condemned the illegality of general warrants in the *Wilkesite* cases. Despite the new statutory authority, colonists challenged the legality of the general writ in a number of the colonial courts, and some of the judges refused to issue such writs on the ground that they were “discretionary” or “unconstitutional,” while others simply did not act on requests for issuance of the writs.¹¹⁸ Hence, with the possible exception of Massachusetts (where the 1761 *Writs of Assistance Case* was precedent for the legality of the writ), it appears that few searches under such writs were actually conducted. Perhaps for that reason, the colonial general-warrant grievance had been displaced by even more onerous grievances by the time of the Declaration of Independence. Nevertheless, the memory of the colonial grievance still prompted the Framers in a number of the new states to include a ban against issuance of unparticularized general warrants among the provisions of the state declarations of rights adopted between 1776 and 1784.¹¹⁹

Unsurprisingly, all of the early state provisions that addressed warrants required that they be particularized—that is, that they identify the place(s) to be searched and the person(s) to be arrested or thing(s) to be seized. But the early state provisions were not uniform with regard to the appropriate standard for assessing the justification for a search or arrest warrant. The initial warrant provision adopted by Virginia in 1776 comported with common-law criminal-warrant standards by requiring “evidence of a fact committed,” and North Carolina followed suit.¹²⁰ The cause standards set out in later state provisions, though, were not as specific. Maryland and Delaware required merely an “oath or affirmation” without specifically saying what such testimony had to show.¹²¹ Pennsylvania required “oaths or affirmations first made, affording a sufficient foundation for [the warrant],”¹²² and John Adams’ Massachusetts provision called for “the cause or foundation” for a warrant to “be . . . previously

116. See Davies, *Original Fourth*, *supra* note 3, at 643 (reciting John Adams’ notes of Otis’ argument during the *Writs of Assistance Case*); see also *id.* at 642–46.

117. *Id.* at 561, 689–91. For an extensive treatment, see M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978).

118. Davies, *Original Fourth*, *supra* note 3, at 566–67.

119. See *id.* at 674–86 (setting out the state warrant provisions that preceded the adoption of the Fourth Amendment); see also Davies, *Correcting History*, *supra* note 3, at 89–125 (discussing the inclusion of law of the land or due process of law provisions and warrant provisions in the state constitutions or declarations of rights that preceded the adoption of the Federal Bill of Rights).

120. Davies, *Correcting History*, *supra* note 3, at 100 (Virginia); *id.* at 103 n.319 (North Carolina).

121. *Id.* at 102 (Maryland); *id.* at 108 n.340 (Delaware).

122. *Id.* at 106.

supported by oath or affirmation.”¹²³ Notably, however, *none* of the state declarations used “probable cause,” and that was also the case with the proposals for a federal ban against general warrants made by several of the state ratifying conventions in 1787 and 1788.¹²⁴

Why this lack of specificity in the later provisions? The most likely explanation is that the Framers in the states that had substantial port cities (which included Pennsylvania and Massachusetts, but not Virginia or North Carolina)¹²⁵—and who thus would have been most concerned with facilitating customs collections—had grasped the need to leave sufficient room for the issuance of customs search warrants. Indeed, the need to allow room for customs searches may also explain why the Pennsylvania and Massachusetts warrant provisions also included statements that defined the scope of the protection against general warrants in terms of persons, houses, papers, and possessions¹²⁶—a formulation that is noteworthy for its implicit exclusion of ships, and, possibly, even warehouses.¹²⁷

Revenue searches differed from criminal searches in two important respects. First, because revenue was essential to the survival of the government, and thus an essential public good, revenue searches likely were regarded as being more

123. *Id.* at 114–15.

124. *See id.* at 131–36 (noting, for example, that Pennsylvania Anti-Federalists called for a ban against “warrants unsupported by evidence”; that Virginia called for a ban against warrants “lacking legal and sufficient cause”; and that New York called for a ban against warrants “without information upon Oath or Affirmation of sufficient cause”).

125. Davies, *Original Fourth*, *supra* note 3, at 681, n.369 (noting the importance of Philadelphia and Boston as ports of entry for goods from Britain and Europe).

126. *See id.* at 677 (Pennsylvania warrant provision); *id.* at 684 (Massachusetts warrant provision).

127. *Id.* at 679–83. This formulation of the scope of the right was in keeping with the usual understanding that dwelling houses enjoyed special protection at common law, but that ships did not. *Id.* at 605–08. In the years immediately following the adoption of their state bans against general warrants, both Pennsylvania and Massachusetts enacted revenue search statutes that required warrants for searches of dwelling houses but that allowed *warrantless* searches of commercial premises.

For example, section 10 of a 1780 Pennsylvania impost (customs) statute provided that customs officers had “full power and authority . . . to enter any ship or vessel, and into any house or other place where he shall have reason to suspect [uncustomed goods] shall be concealed, and therein to search for the same” and also provided that “in case of refusal or opposition” the customs officer could obtain a “writ of assistance” to break doors. However, under a proviso in the next section “no search of any dwelling shall be made in the manner aforesaid, until due cause of suspicion hath been shewn to the satisfaction of a [magistrate], as in the case of stolen goods.” (The standard for a search warrant for stolen goods is discussed *supra* notes 88–92 and accompanying text.) *See* Act for Impost on Goods, Wares and Merchandize imported into this State, §§ 10, 11, December 23, 1780.

A similar treatment appears in a 1783 Massachusetts “excise” statute which provided that when an informer gave sworn written information to a customs collector of “just cause to suspect” that goods had been improperly imported the officer was “authorized to enter . . . into the vessel or float, store, building or place (dwelling houses excepted) and there search for the said goods” but that when an informer had “just cause to suspect” that goods had been “put into any dwelling house” he could “give satisfactory information thereof on oath, to a [magistrate who] may, and is hereby authorized to issue his warrant . . . to enter such dwelling house, and there search for the said goods.” Act laying Duties of Impost and Excise on certain Goods, Wares and Merchandize therein described, and for repealing the several Laws heretofore made for that Purpose, July, 10, 1783. *See also* Davies, *Original Fourth*, *supra* note 3, at 681 n.370; *id.* at 682 n.372; *id.* at 683.

important than criminal searches, especially when the object of the latter was primarily the recovery of stolen property by the individual owner.¹²⁸ Second, revenue enforcement could not rely upon victim complaints to initiate prosecutions, as criminal justice did. Rather, revenue enforcement necessarily depended on officers discovering violations through their own initiative (which they were motivated to exercise by the promise of a share of the seized and forfeited goods).¹²⁹ Thus, the common-law criminal requirement of an accusation of crime committed “in fact” was too restrictive for revenue searches. Instead, the now-independent Americans looked back to English revenue law for revenue search-warrant standards, and that seems to have been the *unique setting* in which bare probable cause to suspect a violation had emerged as the accepted legal standard.

B. The Emergence of Bare Probable Cause to Suspect as the English Standard for Revenue Search Warrants

The concept of reasonable or probable cause was used in two quite different ways in eighteenth-century English revenue statutes. The earliest use seems to have been as a standard for a magistrate to issue a revenue search warrant to locate untaxed goods. In that setting, “reasonable cause” referred to the sufficiency of the factual grounds for suspecting that a revenue violation had occurred.¹³⁰ The other use, which appeared a little later, was that English customs statutes empowered judges to issue a “certificate of probable cause” to immunize a customs officer against damage lawsuits if the officer had made a *seizure* of goods that was determined to be invalid during the subsequent condemnation proceeding.¹³¹ Although both uses might appear to involve the

128. Jeremiah Gridley argued as much in the 1761 *Writs of Assistance Case* in Boston. See John Adams, *John Adams's "Abstract,"* reprinted in SMITH, *supra* note 117, at 548–50 (reciting that Gridley asked rhetorically if the collection of “the Revenue” to support the army and navy were not “infinitely more important than the imprisonment of Thieves, or even Murderers?”). Lord Mansfield made a similar statement in 1785. See *Cooper v. Boot*, 4 Doug. 339, 349, 99 Eng. Rep. 911, 916 (K.B. 1785) (quoting Mansfield as asserting that a revenue search warrant should be more readily available to a revenue officer than a search warrant for stolen goods should be to a private complainant because the former was “for the benefit of the public, and it is for their benefit that the parties may proceed safely on reasonable grounds”). Because this case report was not published until 1831, framing-era Americans would not have been familiar with Mansfield’s post-Independence statement. Davies, *Original Fourth*, *supra* note 3, at 561 n.19.

129. See Davies, *Original Fourth*, *supra* note 3, at 659 n.304 (describing the “office for profit” nature of customs positions in colonial America).

130. See, e.g., the statutes discussed *infra* notes 142–44 (authorizing issuance of excise search warrants).

131. At common law, a revenue officer who seized property found to not be in violation of the revenue laws (property that was not condemned and thus not forfeit) was subject to a trespass action for damages to be tried by a jury. Davies, *Original Fourth*, *supra* note 3, at 652 n.294. To protect the officer, and thus encourage more aggressive revenue enforcement, Parliament made a judicially issued certificate of “probable cause” a defense to a trespass suit for an unlawful revenue seizure. See *id.* at 653 n.295. This assessment was not made before a seizure (as would have been the case in assessing probable cause for issuance of a search warrant), but afterwards, when the legality of the seizure had been adjudicated and found invalid. Issuance of such a certificate had the effect of barring what

same conception of “probable cause” and thus to have both contributed to the inclusion of bare probable cause in the Fourth Amendment,¹³² that was not the case. A certificate of probable cause immunized a customs officer for an improper *seizure* of property¹³³ and could be issued when the officer was judged to have acted from an excusable mistake as to the *legal interpretation* of the customs regulations.¹³⁴ It does not appear, however, that a certificate of probable cause could have been issued to protect a customs officer from a trespass lawsuit for unlawfully *searching* for untaxed goods.¹³⁵ So the certificate of probable cause does not appear to be an aspect of the story of arrest or search authority.¹³⁶ Instead, the English statutory standards for issuance of

otherwise would have been a situation for a jury to assess liability and damages in the trial of the property owner’s lawsuit.

Parliament also authorized the vice-admiralty judges in the North American colonies to grant a certificate of probable cause as a defense against trespass suits for wrongful seizures in the 1764 Sugar Act, a provision that prompted significant colonial protests of this displacement of the traditional role of the jury. Because that certificate provision was also made applicable to other revenue seizures in the American colonies, it was also understood to apply to seizures for violations of other revenue statutes, including the hated 1765 Stamp Act. *See also infra* note 135.

132. *See Davies, Original Fourth, supra* note 3, at 652–53, 703 n.446 (describing the different uses of “probable cause” in historical statutes).

133. For example, the first federal customs statute, the 1789 Collections Act, provided for issuance of a certificate of probable cause at the end of a customs condemnation procedure if the seizure was ruled invalid but “it . . . appear[s] to the court before whom such [condemnation proceeding] shall be tried, that there was a reasonable cause of seizure.” *See Act of July 31, 1789, ch. 5, § 36, 1 Stat. 29, 47–48.*

134. *See, e.g., United States v. Riddle, 9 U.S. (5 Cranch) 311, 312–13 (1809)* (holding that a customs seizure of goods was invalid, “[b]ut as the construction of the law was liable to some question,” issuance of a certificate of probable cause was proper). Along the same lines, the customs controversies that preceded the American Revolution in which certificates of probable cause were issued, such as those regarding the seizures of ships belonging to the Charleston merchant Henry Laurens, involved hypertechnical interpretations of customs regulations rather than factual issues or searches for untaxed goods. *Davies, Original Fourth, supra* note 3, at 604–05.

Additionally, the term “probable cause” was sometimes used by framing-era legal authorities in settings that involved only legal assessments, but not factual assessments. For example, Blackstone wrote that the prerogative writs of certiorari, prohibition, and mandamus did not issue “without shewing some probable cause” why the issuance was appropriate. 3 BLACKSTONE, *supra* note 19, at 132. The reference to the writ of mandamus is significant because only legal, but not factual, issues could be raised in mandamus proceedings. *See id.* at 111 (noting that if any factual disputes arose in mandamus pleadings, the mandamus proceeding was ended and the petitioner had to instead file an action for damages for filing a false return, to be tried by a jury).

135. For example, there is no mention of a certificate of probable cause in English cases regarding the trespass liability of a revenue officer who conducted an unsuccessful search for untaxed goods. *See infra* notes 146–48 and accompanying text. Likewise, the certificate of probable cause provided for in the 1789 Collections Act was specifically for “reasonable cause of seizure,” but made no mention of a search. *See supra* note 133.

136. There were colonial controversies regarding the provisions for a certificate of probable cause in revenue statutes that applied to the colonies. For example, in 1766, George Mason (who would later draft the 1776 Virginia declaration of rights) attacked a statutory authorization for a vice-admiralty judge to issue a certificate of probable cause, and thus bar a jury trespass trial, in a letter to British merchants. Mason wrote that it was outrageous to give a judge who was a mere puppet of the customs ministry the power to arbitrarily immunize an unlawful seizure by a revenue officer “by only certifying that *in [the judge’s] Opinion* there was a *probable Cause of Complaint.*” Letter from George Mason to

revenue search warrants are the salient source of the bare-probable-cause warrant standard in the Fourth Amendment.

1. English Customs Search Authority

English revenue law set different standards for customs searches and excise searches. Customs duties were collected when goods were brought into England across its border, usually by ship. Probably because of the strong governmental authority to enforce the border, and because ships were not entitled to any privileged treatment at common law, English statutes simply gave “deput[ized]” customs officers standing authority to search ships entering English waters without requiring that they show, or even possess, grounds to suspect smuggling.¹³⁷ Additionally, English customs statutes authorized customs officers to make searches of places on land with a writ of assistance.¹³⁸ The principal check on the use of this form of search authority was that a customs officer who initiated a search under a writ on his own initiative, rather than on information from another person, was himself potentially liable for trespass damages to the owner of the premises if he did not find smuggled or prohibited goods.¹³⁹

2. English Excise Search Warrants

In contrast to customs collections, which were concentrated in port cities, English excise taxes were imposed on the production, sale, or consumption of a wide variety of widely used goods and products throughout the country

the Committee of Merchants of London (June 6, 1766), *reprinted in* 1 PAPERS OF GEORGE MASON 65, 67 (Robert A. Rutland ed., 1970).

137. *See, e.g.*, 2 BURN (1770 ed.), *supra* note 17, at 8 (paraphrasing 9 Geo. 2. c. 35. § 29 (1722): “Any officer of the customs or excise (producing his warrant or deputation, if required) may go on board any coasting vessel, and search for prohibited and uncustomed goods, and continue on board during the vessel’s stay within the limits of the port”); *id.* (1785 ed.) at 7 (same). Because search warrants were not provided for in English statutes of this period, it seems likely that the term “warrant” in this passage simply meant the officer’s “authority”; for example, modern English police refer to their identification as a “warrant card.”

138. Parliament conferred customs revenues on the crown at the Restoration in 1660, and shortly thereafter created a customs search warrant. *See* An Act to Prevent Frauds and Concealments of his Majesty’s Customs, 1660, 12 Car. 2, ch. 19. That search warrant provision was replaced with the writ of assistance two years later. *See* An Act to Prevent Frauds, 1662, 13 & 14 Car. 2., ch. 11, § 5, sched. 2); *see also* SMITH, *supra* note 117, at 41–50. The entry on “power to search” in the discussion of customs in the 1770 and 1785 editions of Burn’s justice of the peace manual mentions the “writ of assistance out of the exchequer.” 2 BURN (1770 ed.), *supra* note 17, at 6; 2 *id.* (1785 ed.) at 5.

There is evidence that searches conducted by revenue officers under a writ of assistance in England, unlike in the North American colonies, were often based, in practice, on information regarding a specific violation, though it does not appear that colonial Americans were aware of this during the colonial controversies. *See* SMITH, *supra* note 117, at 511–15 (providing an account of American confusion over the writs from contemporary letters).

139. *See, e.g.*, *Bruce v. Rawlins*, 3 Wils. 61, 95 Eng. Rep. 934 (C.P. 1770) (imposing trespass liability on a customs officer who, pursuant to a writ of assistance, made an unsuccessful search on his own initiative rather than on information from another person). Framing-era Americans likely were familiar with *Bruce* because it was first published in 1775. *Davies, Original Fourth, supra* note 3, at 652 n.294. Note, however, that this decision post-dated the American colonial controversies of the 1760s regarding the use of the writ of assistance for customs searches.

(including, for example, liquor, beer, ale, cider, coffee, tea, salt, soap, sugar, vinegar, linen, candles, and starch). Because these taxes often applied to small producers, excise enforcement exposed houses to revenue searches to a far greater degree than customs searches did. Perhaps for that reason, the statutory standards for excise searches distinguished between commercial premises and houses. The statutes often provided that commercial premises where taxed products were made or sold were to be “ent[e]red” (registered) at the local excise office and that excise officers could search those commercial premises without warrant.¹⁴⁰ In contrast, and in keeping with the special status accorded the house, the statutes provided for issuance of excise search warrants for searches in other places such as houses.¹⁴¹

Additionally, the statutory standards for issuing excise search warrants seem to have become more stringent during the early eighteenth century. An excise statute regarding various cloths, enacted in 1711, authorized the issuance of a search warrant on an oath by a credible informer that he had reason to suspect that untaxed cloth was concealed; but this statute did not explicitly require either that the informer set out the grounds of suspicion or that the magistrate assess the sufficiency of those grounds before issuing the warrant.¹⁴² However, beginning with the reign of George I, statutory excise-search-warrant provisions required that the officer state under oath the grounds for suspecting the location of concealed goods, and also provided that a magistrate was authorized to issue a “special” (specific) search warrant if the magistrate “shall judge it reasonable.”¹⁴³ Thus these statutes seem to have called for the magistrate to assess the officer’s showing of reasonable cause before granting a warrant.

140. See, e.g., 2 BURN (1770 ed.), *supra* note 17, at 34 (stating that with regard to ale or beer, any brewer had to give notice (register) with the local excise office and that an officer of excise was empowered to break the door of any brewhouse “where he shall have just suspicion” that the excise was being violated by illegal production).

141. For example, in 1763 William Pitt was decrying the danger that excise officers would enter private residences and violate the sanctity of the house to levy the tax on cider when he famously declared in Parliament that “[t]he poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter; all his force dares not cross the threshold of that ruined tenement.” Frank v. Maryland, 359 U.S. 360, 378–79 (Douglas, J., dissenting) (quoting 15 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND, 1753–1765 1307).

142. An excise statute pertaining to silk, linen, and other fabrics that was enacted during the reign of Queen Anne, simply provided that justices “may” issue a search warrant on an oath by a credible person that “he, she, or they have reason to suspect or believe” the whereabouts of untaxed goods, but did not explicitly require either that the person state the grounds of suspicion, or that the magistrate assess the sufficiency of the grounds. An Act for Laying Several Duties Upon All Sope and Paper, 10 Ann., c. 19, § 98 (1711).

143. For example, the search warrant provision in the 1765 excise statute for candles stated the following:

[I]n case any Officer . . . shall have *cause to suspect* that Soap or Candles . . . are privately making in any place . . . or that any Soap or Candles . . . are lodged or concealed . . . with Intent to defraud his Majesty of his Duty; then . . . upon oath made by such Officer before the Commissioners [of excise] . . . or before one or more Justice [of the peace] . . . *setting forth the Ground* of his [suspicion] . . . it shall and may be lawful for said Commissioner or . . . Justice . .

3. The English Liability Rule Regarding Unsuccessful Revenue Searches

The English rule at the time of American independence (when English common law was absorbed into American law) was that an excise search warrant did not automatically indemnify an excise officer for an unsuccessful search. Rather, in the 1773 Court of Common Pleas ruling in *Bostock v. Saunders*,¹⁴⁴ the judges equated the statutory standard of “reasonable cause” with “probable cause” and ruled that an officer who obtained a search warrant on his own initiative was liable for trespass damages of £100 when he made an unsuccessful search of a house for untaxed goods, and did not show “probable cause or ground of suspicion” for the search to the satisfaction of the jury in the subsequent trespass action.¹⁴⁵ William Blackstone, who was among the judges,

. . . if he or they shall judge it reasonable, by Special Warrant . . . to authorize and empower such Officer . . . to enter into all and every such Place [suspected] . . . and to seize and carry away all such Soap or Candles . . .

Customs and Exise Act, 5 Geo. 3, c. 43, § 20 (1765) (emphasis added). Similar provisions stating an explicit requirement that the grounds of suspicion be set out, and that the magistrate find the grounds “reasonable” before issuing an excise search warrant appeared in excise statutes as early as the reign of George I. *See, e.g.*, 10 Geo. 1, c. 10, § 13 (1723) (coffee, tea, chocolate); 11 Geo. 1, c. 30, § 2 (1724) (rum and spirits); 23 Geo. 2, c. 21, § 34 (1750) (soap, candles, and starch).

144. There are two reports of the 1773 decision. The earliest was *Bostock v. Saunders*, 2 Wils. (1st ed., Part 3, titled “Reports of Cases Argued and Adjudged in the Court of Common Pleas,” 1775), reprinted 2 *id.* (2d ed. 1784) 434, reprinted 3 *id.* (3rd ed. 1799) 434, 95 Eng. Rep. 1141. Because the pagination is consistent in all three editions, I cite only the most readily available third edition in subsequent notes. The other report, published in 1781, was by William Blackstone, who was one of the judges in the case. *Bostock v. Saunders*, 2 Bl. 912, 96 Eng. Rep. 539. Blackstone’s report was also paraphrased in some detail in the entry on excise in the 1785 edition of Burn’s manual. *See* 2 BURN (1785 ed.), *supra* note 17, at 69–71. As a result, *Bostock* was readily accessible by Americans during the framing era.

145. *Bostock*, 3 Wils. (3d ed. 1799) at 440–41, 95 Eng. Rep. at 1144–45 (opinion of Chief Justice de Grey). *See also id.* at 441, 95 Eng. Rep. at 1145 (opinion of Justice Gould that the officer could not justify under the warrant but, though no goods were found, it might have been justified if he showed “a probable cause” for the search); *id.* at 442, 95 Eng. Rep. at 1146 (opinion of Justice Nares that the officer was required to prove “probable cause or ground of suspicion” for the search). However, the term “probable cause” does not appear in the report of the judges’ views in the other case report of *Bostock* by Blackstone. *See* 2 Bl. at 913–16, 96 Eng. Rep. at 539–40.

There was uncertainty as to whether the commissioners of excise had actually assessed the grounds for the excise search warrant, issued under 10 Geo. 1, c. 10, § 13 (1723) (discussed *supra* note 143). Plaintiff’s counsel asserted that the warrant had been issued merely on the officer’s conclusory claim of probable cause. *See* 3 Wils. at 436, 95 Eng. Rep. at 1142. Perhaps to deflect future claims against the commissioners, Chief Justice de Grey asserted that under this statutory provision “the commissioners were bound to grant the warrant on oath of [the officer].” 3 *id.* at 440, 95 Eng. Rep. at 1145. In contrast, Justices Gould and Blackstone suggested that the commissioners might be liable if they issued a warrant without an adequate showing of cause, but declined to actually rule on that point. 3 *id.* at 441, 95 Eng. Rep. at 1145–46. Justice Nares stated the commissioners had “a discretionary power to grant such a warrant.” 3 *id.* at 442, 95 Eng. Rep. at 1146. Notwithstanding these differences, the justices all agreed that an officer who initiated an excise search warrant was liable for trespass damages if the search was unsuccessful and he failed to prove adequate cause to the jury. Chief Justice de Grey analogized an officer-informer’s liability to that of the complainant for an unsuccessful search under a search warrant for stolen goods. 3 *id.* at 440, 95 Eng. Rep. at 1145.

Bostock’s liability rule was overruled in 1785 by the Court of King’s Bench, which instead held that an excise officer who had failed to find untaxed goods while executing a warrant obtained on his own oath was nevertheless protected against trespass liability. *See Cooper v. Booth*, 3 Esp. 135, 143–46, 170 Eng.

gave the opinion that, although “the law reposes a confidence that [magistrates] will not wantonly authorize the officers to enter the houses of the subject, . . . still, if the suspicion, tho’ plausible, appears to be ill founded; the officer, who, by a false and mistaken suggestion, hath obtained such licence from the commissioners, shall personally answer for the injury.”¹⁴⁶ Apparently, a “plausible” suspicion was not enough to justify the unsuccessful warrant search.

C. The American Adoption of Bare Probable Cause as the Standard for Revenue Search Warrants

The American political elite seem to have viewed revenue collections in a new light when the revenues were funding American governments rather than that in London, especially because the huge debt incurred during the Revolutionary War presented a pressing need to obtain revenue for the new national government. However, the need for effective revenue collection was counterbalanced by the memory of the colonial general warrant grievance. To accommodate both concerns, Americans seem to have looked to the recent English excise statutes as a workable compromise—that is, they accepted the use of a warrant to authorize a search of a house if, but only if a magistrate concluded that an excise officer had shown “reasonable” or “probable cause” of an excise violation.

Although this bare-probable-cause standard was laxer than the common-law crime-in-fact standard for a criminal warrant, the magistrate’s assessment nevertheless offered far more protection against arbitrary revenue searches than the general writ or general warrant had. In particular, a revenue search warrant based on a judicial assessment of bare probable cause did not bestow discretion on the revenue officer himself—but neither would it stifle revenue enforcement the way the crime-in-fact requirement for a criminal warrant would have. In addition, a revenue warrant did not immunize the officer who obtained it; rather, American law seems to have absorbed the ruling in *Bostock* that a revenue officer who conducted an unsuccessful search under a revenue search warrant was liable for trespass damages if he could not show “probable cause” for the search to the satisfaction of a jury.¹⁴⁷

Rep. 564, 567–68 (K.B. 1785). However, it is highly unlikely that Americans were familiar with *Cooper* when the Fourth Amendment was framed or ratified because this case report was not published prior to 1801, Davies, *Original Fourth*, *supra* note 3, at 561 n.19, and the only other report of the case, *Cooper v. Booth*, 4 Dougl. 339, 99 Eng. Rep. 911 (K.B. 1785), was not published until 1831. Thus, framing-era Americans would have been familiar only with the ruling in *Bostock*. Indeed, *Cooper* was not even well known in England at the time of the framing of the American Bill of Rights because the 1797 edition of Burn’s manual still set out the same discussion of *Bostock* as had appeared in the earlier 1785 edition, without mentioning *Cooper*. See 2 BURN (1785 ed.), *supra* note 17, at 69–71; 2 *id.* (1797 ed.) at 91–93.

146. *Bostock*, 2 Bl. at 915–16, 96 Eng. Rep. at 540 (opinion of Blackstone, J.); see also 2 BURN (1785 ed.), *supra* note 17, at 71 (paraphrasing opinion of Blackstone, J., as reported in *Bostock*, 2 Bl. at 915–16, 96 Eng. Rep. at 540).

147. See 7 DANE, *supra* note 40, at 244–46 (citing the reports of *Bostock* as authority that “suspicion does not always excuse the officer [executing a search warrant], especially when he informs” and that

The appeal of this compromise standard for revenue warrants is evident in American legislation adopted in the aftermath of the Revolutionary War. Shortly after the end of the war, there was an attempt to create customs revenue for the new national government. In 1786, Pennsylvania enacted a statute that accepted the national scheme but with the proviso that its acceptance

shall not be construed . . . to enable any officer or other person to break open any dwelling house without *probable cause* for so doing be shewn on oath, or solemn affirmation, to some Justice of the Supreme Court or to some Justice of the Peace, and his warrant, directed to a Peace Officer, first obtained.¹⁴⁸

Note that the requirement that probable cause “be *shewn* on oath” would seem to require the officer to set out the factual grounds for probable cause.

Controversy over revenue searches of houses was reignited during the ratification debates of 1787–1788. Anti-Federalists who opposed ratification of the new constitution frequently warned that the new federal government would exact ruinous taxes, and they embellished those alarms by invoking the memory of the prerevolutionary general-warrant grievance.¹⁴⁹ In particular, they warned that the new federal Congress would be so eager to collect taxes—especially excise taxes, which would be collected throughout the country—that it would authorize the use of general warrants for revenue searches and thereby expose every house to invasion by “excisemen.” Notably, the fears about search authority expressed in the debates were almost exclusively about *revenue searches of houses*—especially *excise searches* of houses under general warrants.¹⁵⁰

In particular, the agitation regarding the potential for federal general excise search warrants does not seem to have extended to *criminal* arrest or search warrants. The two areas of law were quite distinct, and revenue violations generally did not result in criminal prosecutions. Instead, the usual sanction for a violation of the revenue law was the seizure of the untaxed goods which were then declared forfeit in a civil proceeding. Indeed, there were so few expressions of concern about the potential for general criminal warrants during the 1787 and 1788 debates that it could not have been more than a marginal aspect of the agitation that prompted the adoption of the Fourth Amendment.¹⁵¹

“where an excise officer informed and got a search-warrant to search for excised goods in A’s house and found none in it[,] [t]he court held, the officer was liable in an action of trespass, and that on the trial he must show the grounds of his suspicion,” and that “the same construction ought to be given of our [American] impost and excise laws in like cases”).

148. Session Laws of Pennsylvania, Act of April 8, 1786, ch. 30, § 3 (emphasis added).

149. Davies, *Original Fourth*, *supra* note 3, at 609–10, 721–22.

150. *Id.* at 609–11.

151. The two expressions of concern about criminal general warrants that have been identified are a statement by Patrick Henry during the Virginia ratification convention and another by Abraham Holmes during the Massachusetts convention. *See id.* at 609 n.162. When Henry lamented the absence of a federal ban against general warrants, he expressed a concern that, if a person were to be arrested under such a general warrant, it might occur “many hundreds of miles from the judges” and thus it would be more cumbersome for the arrested person to obtain a writ of habeas corpus in America than

D. The Bare-Probable-Cause Standard in the Fourth Amendment

To quiet the fears that the new national government would authorize the use of general warrants for revenue searches, the First Congress included a ban against issuance of general warrants among the provisions of the Bill of Rights. The narrow focus of the provision that we know as the Fourth Amendment is quite evident if one considers the actual legislative history of the text.

1. Madison's Initial Draft

James Madison, who had experience in drafting revenue statutes, was undoubtedly familiar with both the English revenue statutes and the 1786 Pennsylvania statute when he drafted the proto-Fourth Amendment as part of his larger proposal for a federal bill of rights.¹⁵² Unsurprisingly, he adopted the bare-probable-cause standard when he proposed the proto-Fourth Amendment:

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.¹⁵³

Perhaps because there was general recognition of the importance of revenue enforcement,¹⁵⁴ it does not appear that Madison's choice of the bare-probable-cause standard prompted any debate or controversy. The committee that initially reviewed Madison's draft accepted the substance of his proto-Fourth Amendment and made only one change that was more than stylistic; specifically, the committee narrowed the scope of the protection by changing Madison's "other property" to "effects"¹⁵⁵—a term that appears to have been

would be the situation in England. (Habeas corpus could be issued only by high court judges at that time.) Interestingly, Henry's apparent assumption that a writ of habeas corpus would provide a remedy for the arrest implied that he thought that a general arrest warrant would be deemed to be illegal once it could be brought to the attention of "the judges." See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 588 (Jonathan Elliot ed., 2d ed. 1838). Holmes argued that the new federal Congress should be prohibited, like the Massachusetts legislature already was, from "authoriz[ing] judicial authority to issue a[n arrest] warrant against a man for a crime, unless his being guilty of the crime was supported by oath or affirmation, prior to the warrant being granted." See 2 *id.* at 111–12.

152. See Davies, *Original Fourth*, *supra* note 3, at 703 (noting Madison's authorship of a Virginia customs statute).

153. *Id.* at 697.

154. The concern that the Bill of Rights not impede revenue collection may also account for the inclusion of the limitation "in any criminal case" in the self-accusation clause of the proto-Fifth Amendment. *Id.* at 705 n.450; Davies, *Original Fifth Amendment*, *supra* note 4, at 1015–17 (noting that the proponent of that addition was the primary drafter of the 1789 Collections Act and speculating that he was concerned the self-accusation provision not apply to the oaths involved in customs regulations).

155. The committee proposal was,

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

understood to refer primarily to moveable property of the sort found in houses, such as furniture, but could also include a merchant's goods.¹⁵⁶ Of course, Madison's single-clause format, which the committee did not alter, was clearly focused only on banning general warrants.¹⁵⁷ Indeed, his use of the collective term "the people" probably also reflected the focused ban against general warrants because such warrants, being unparticularized, threatened the security of the entire community.¹⁵⁸

2. The Final Change that Produced the Two-Clause Text

The only other change made to Madison's single-clause text was a last-minute amendment during the final House debate that substituted "and no warrant shall issue" in place of Madison's "by warrants issuing." That change had the effect of altering Madison's single-clause format to a two-clause provision,¹⁵⁹ and adherents of the conventional account of Fourth Amendment history—although conceding that Madison's single-clause draft had been aimed only at banning general warrants¹⁶⁰—claim that this final change was made *for the purpose* of creating a broad "reasonableness" standard.¹⁶¹ However, that is pure myth.

See, e.g., Davies, *Correcting History*, *supra* note 3, at 166 n.521. The bracketed phrase, "against unreasonable searches and seizures," was actually omitted from the committee report—apparently by accident—but was reinserted at the beginning of the House debate on the provision. *Id.*

156. *See* Davies, *Original Fourth*, *supra* note 3, at 706–11 (discussing changes from "possessions" to "other property" to "effects" in the formulations of the scope of the ban against general warrants); *id.* at 708 nn.461–62 (discussing the use of the term "effects" in framing-era legal sources). *See also, e.g.,* 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "effect" as "8. In the plural, *effects* are goods; moveables; personal estate. The people escaped from the town with their *effects*."); Henry Laurens, Extracts from the Proceedings of the Court of Vice-Admiralty (Pamphlet, Charleston, 1769), *reprinted in* TRACTS OF THE AMERICAN REVOLUTION 1763–1776 206 (Merrill Jensen ed. 1967) (stating that because of oppressive customs regulations, merchants "will be induced to draw their effects out of trade as much as possible").

157. Madison's focus on banning general warrants in the proto-Fourth Amendment was also evident from the fact that he described that provision as a ban against "general warrants" in his speech introducing his proposals for a Bill of Rights in the House. *See* Davies, *Original Fourth*, *supra* note 3, at 699 n.435 (listing contemporary sources providing evidence for Madison's intent). Madison's innovation in using a single-clause format for the ban against general warrants appears to simply reflect his stylistic dislike of the right-therefore-rule formulation of the earlier state provisions. *Id.* at 697–99.

158. *See* Davies, *Correcting History*, *supra* note 3, at 161–64 (arguing that Madison's choice of individual or collective terminology when stating various rights reflected the nature of the right under discussion, and particularly noting the collective nature of the "right of the people" preserved in the Assembly and Petition Clause of the First Amendment, the Second Amendment, and the Fourth Amendment, as contrasted to the individual formulations of the Third Amendment, Fifth Amendment, and Sixth Amendment).

159. Davies, *Original Fourth*, *supra* note 3, at 716–19.

160. Nearly all of the conventional commentators have conceded that Madison's draft had clearly been aimed only at banning too-loose warrants. *See id.* at 699 n.434 (listing sources).

161. *See id.* at 568–70 (discussing the formulation of the conventional account and noting the numerous commentaries and opinions that have cited and followed that formulation). *See also infra* note 257 and accompanying text (discussing the invention of the conventional history in a 1937 monograph publishing a 1934 Ph.D. dissertation).

The only recorded objection to the single-clause draft was that it was merely “declaratory,” and all the final change to “and no warrant shall issue” actually did was to insert the explicit command that had been included in all of the earlier state bans against general warrants—namely, that a noncomplying warrant “ought not be granted.”¹⁶² Thus, although the last-minute change did produce a two-clause text, it was merely a by-product of the change, not its purpose.¹⁶³ There is not so much as a scintilla of a suggestion in the legislative history that any member of the First Congress thought that the change created a novel “reasonableness” standard for all federal searches.¹⁶⁴ Likewise, there is no indication that anyone interpreted the Fourth Amendment that way either in the immediate aftermath of the framing or during the following century.¹⁶⁵ Contrary to the conventional history, there is not a shred of historical support for the modern myth that the Framers intended for the Fourth Amendment to create any overall “reasonableness” standard for assessing all government intrusions.¹⁶⁶

E. The Bare-Probable-Cause Standard in Early Revenue Search-Warrant Provisions

The record of the first several Congresses confirms the degree to which the federal Framers were concerned with revenue searches rather than criminal searches, but it also suggests that they may have had different attitudes toward customs and excise searches because the latter posed the greater danger to the security of houses. The first customs statute, the 1789 Collections Act (enacted shortly before the First Congress adopted the Bill of Rights), set different standards for customs searches of ships and places on land. With regard to

162. See Davies, *Original Fourth*, *supra* note 3, at 719–22 (discussing the objection to the declaratory character of “by warrants issuing”). Comparable commands had been included in all of the previous state warrant provisions as well as in the proposals for a ban against general warrants made by state ratification conventions. *Id.*

163. Davies, *Correcting History*, *supra* note 3, at 32–38, 166–69.

164. Because there is no record of any debate on the motion to substitute “and no warrant shall issue,” it does not appear that anyone present thought the change did anything novel. The conventional history is simply implausible when it asserts that a change as novel and fundamental as the creation of an overarching “reasonableness” standard for all government searches could have been made without prompting debate.

165. See Davies, *Original Fourth*, *supra* note 3, at 611–19 (noting that in the aftermath of the adoption of the Bill of Rights neither federal nor state cases attributed a broad “reasonableness” standard to the Fourth Amendment or to the state warrant provisions that also used the phrase “unreasonable searches and seizures,” and that early constitutional commentators such as Justice Joseph Story also did not mention any “reasonableness” standard when discussing the Fourth Amendment, but simply treated that amendment as having banned the use of general warrants).

166. Because of the understanding of the division of power between the federal and state governments in 1789, it is implausible that the federal Framers anticipated that the federal government would be as generally involved in criminal law enforcement as the states. Hence, it is likely the federal Framers were thinking primarily about customs searches rather than criminal warrants when they adopted the text of the Fourth Amendment (especially since they had previously approved the Fifth Amendment’s provision that no person be denied of life, liberty, or property—the three forms of criminal punishments—except by “due process of law”).

ships, customs officers were authorized to make a warrantless search of “any ship or vessel, in which they shall have reason to suspect any goods, wares, or merchandise subject to duty shall be concealed.”¹⁶⁷ But the statute recognized the need for a search warrant for places on land and provided as follows:

If [the officer] shall have cause to suspect a concealment [of uncustomed goods], in any particular dwelling-house, store, building, or other place, [he] shall, upon application on oath or affirmation to any justice of the peace, be entitled to a warrant to enter such house, store or other place (in the day time only) and there to search for such goods¹⁶⁸

It is unclear whether this provision was understood to require the officer to set out the factual grounds for his suspicion or merely to swear, in a conclusory fashion, that he possessed “cause to suspect” the location of smuggled goods.¹⁶⁹ If the statute was understood to require merely the latter, that understanding likely would have rested on a continuing acceptance of the doctrine that a revenue officer was liable for damages in a subsequent trespass action if he obtained and executed a revenue search warrant but found no untaxed goods and later could not prove adequate cause for the search to the satisfaction of a jury.¹⁷⁰

The provisions of the 1791 Hamilton Excise Act, which applied to distilled liquor, set different search standards for commercial premises and houses. Like the English excise statutes, it required that distilleries be registered with the excise office and provided that excise officers could inspect those commercial premises at will during the daytime.¹⁷¹ However, and perhaps because of public fears regarding widespread excise searches of houses,¹⁷² the excise-search provision regarding houses not only required use of a search warrant, but also provided that the “special warrant or warrants” could be issued only “upon reasonable cause of suspicion, to be made out to the satisfaction [of the issuing judge or justice of the peace].”¹⁷³ Thus, like the later English excise statutes, the 1791 Act explicitly called for judicial assessment of the adequacy of the officer’s showing of “reasonable suspicion.”

167. Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43.

168. *Id.*

169. See Davies, *Original Fourth*, *supra* note 3, at 711 n.470 (discussing differing interpretations of the search warrant provision). Unfortunately, there is a gap in the legislative record regarding the search-warrant provision. *Id.*

170. See *supra* note 145 (discussing the 1773 English ruling in *Bostock*); see also *supra* note 147 (discussing the applicability of the *Bostock* ruling to American customs searches).

The 1789 Collections Act did not prohibit trespass actions against an officer who obtained a search warrant: instead, it anticipated that trespass actions could be brought against the officer who initiated a search warrant but extended some indirect protection to customs officers, such as by providing for double costs to be awarded against a plaintiff who unsuccessfully sued a customs officer regarding a seizure. See Act of July 31, 1789, ch. 5, § 27, 1 Stat. 29, 43–44.

171. Act of Mar. 3, 1791, ch. 15, §§ 25, 26, 29, 1 Stat. 199, 205–07.

172. See Davies, *Original Fourth*, *supra* note 3, at 712 n.471 (discussing Congressional opposition to the Act).

173. Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. at 207. In this provision, “special” was used as a synonym for “specific”; thus, a “special warrant” meant a particularized warrant.

In contrast to these revenue search provisions, the early Congresses did not adopt any statutory provisions regarding criminal arrests or searches. Rather, the 1789 Judiciary Act implicitly adopted existing state common-law arrest-warrant and search-warrant standards when it directed federal judges and marshals to use the “usual mode of process” in the state in which a federal court sat.¹⁷⁴ Indeed, the Congress never addressed the warrantless arrest authority of federal officers until 1935.¹⁷⁵ Thus, because the early Congresses never attempted to apply the bare-probable-cause standard to criminal arrests or searches, it is implausible that the use of that standard in the Fourth Amendment was meant to do anything more than set a *minimum* standard that would accommodate federal revenue search warrants.¹⁷⁶

IV

THE POST-FRAMING ADOPTION OF BARE PROBABLE CAUSE FOR WARRANTLESS ARRESTS AND THE INVENTION OF INVESTIGATORY CRIMINAL PROCEDURE

How, then, did bare probable cause come to be viewed as the general standard for criminal arrests and searches? The answer is that things did not develop as the Framers expected. The Cokean tradition of “due process of law” was lost (or rejected) during the nineteenth century, and the law of arrest was essentially deconstitutionalized. During this hiatus, state judges (not the legislatures, which the Framers had feared) enlarged the warrantless arrest authority of police officers to such a degree that the government gained

174. See Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (providing authority for any judge or justice of the peace to order arrest of a violator of federal law “agreeably to the usual mode of process” of the state). As noted above, “process” still referred to the form of authority for an arrest or search and would have included arrest warrants or search warrants. Of course, because the usual mode of process for a warrant or arrest in a state would have had to comply with the state constitutional standard, this approach would seem to have indirectly required that federal arrests and searches comply with the state “law of the land” or “due process of law” protections regarding criminal arrests.

175. See *infra* note 263 and accompanying text. A 1792 statute did provide that the federal “marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states.” Act of May 2, 1792, ch. 18, § 9, 1 Stat. 264, 265. Several judicial opinions and commentaries have misinterpreted this provision as though its purpose were to confer warrantless arrest authority on federal marshals. However, that was not the case. Indeed, as of 1792 state sheriffs had no special warrantless arrest authority beyond that possessed by any private person. See *supra* note 24. Instead, the 1792 provision was actually part of a “Militia Bill” and its apparent purpose was to authorize federal marshals to raise the *posse committatus* of the county to put down a riot or insurrection if the local sheriff failed or refused to do so. That concern seems to have been based on fears of the potential for armed resistance to the 1791 excise (as actually occurred during the Whiskey Rebellion). For a more detailed discussion of this statute and its misinterpretation, see Davies, *Correcting History*, *supra* note 3, at 157 n.491; Davies, *Arrest*, *supra* note 3, at 355–56; Davies, *Original Fourth*, *supra* note 3, at 611 n.171.

176. Perhaps because the bare-probable-cause standard was associated with revenue warrants rather than criminal warrants, state warrant provisions adopted after the framing of the bill of rights did not always copy the Fourth Amendment’s “probable cause” standard; instead, Tennessee and Illinois still followed the earlier Virginia formulation of “evidence of a fact committed,” while Ohio adopted the oxymoronic standard of “probable evidence of the fact committed.” Davies, *Original Fourth*, *supra* note 3, at 704 n.449.

drastically expanded investigatory powers. The result was that criminal procedure was fundamentally transformed.

A. The Initial Persistence of Common-Law Arrest Standards in the Aftermath of the Framing Era

The common-law arrest standards described in part II were still evident in the immediate aftermath of the adoption of the Bill of Rights. For example, when James Wilson gave his 1790–1791 lectures in law in Philadelphia, he still included the felony-in-fact criterion for a warrantless arrest:

It is a general rule, that, at any time, and in any place, every private person is justified in arresting *a traitor or felon*; and, *if a treason or felony has been committed*, he is justified in arresting even an innocent person, upon his reasonable suspicion that by such person it has been committed.¹⁷⁷

This same rule was also endorsed two decades later in *Wakely v. Hart*, a widely cited Pennsylvania arrest case that arose from a warrantless arrest for theft.¹⁷⁸ The court stated that “even when there is only probable cause of suspicion, a *private person may* without warrant *at his peril* make an arrest [but] nothing short of proving the felony will justify the arrest.”¹⁷⁹ Because there was no proof of a theft in fact, the court upheld a trespass judgment against a high constable who had assisted in making the arrest,¹⁸⁰ and thus followed the framing-era rule that a peace officer possessed no greater felony warrantless-arrest authority than a private person.¹⁸¹ The fundamental requirement of a felony in fact was still noted when Nathan Dane surveyed American arrest law in 1824.¹⁸² Additionally, on the few occasions when state courts referred to constitutional provisions in discussions of arrest standards during this period, they still looked to the “law of the land” and “due process of law” provisions, rather than to the state provisions banning general warrants.¹⁸³

177. 2 THE WORKS OF JAMES WILSON, *supra* note 31, at 685 (emphasis added). Note that Wilson’s reference to the arrest of “a traitor or felon” reflected the actual guilt justification of a warrantless felony arrest, while his qualification of “if a treason or felony has been committed” reflected the felony-in-fact prong of the “on suspicion” justification.

178. 6 Pa. 315 (1814).

179. *Id.* at 318.

180. *Id.* at 318–19.

181. *See supra* note 24.

182. 5 DANE, *supra* note 40, at 588 (1824) (summarizing the 1796 trespass and false imprisonment ruling of the Massachusetts Supreme Judicial Court in *Gale v. Hoyt* as “to justify one man’s arresting another, without *warrant or legal process*, there must be, 1. Proof that *a felony has been committed*: and 2. A *reasonable cause to suspect the person arrested, has committed the felony*”).

183. For example, when the New Hampshire Supreme Court assessed the constitutionality of a statute that provided arrest authority for the offense of unnecessarily travelling on the Sabbath, the judges looked to the state “law of the land” provision—which they described as “a literal translation from *Magna Carta c. 29*” and characterized it as a “due process of law” provision—rather than to the state general warrant provision, which, like that of Massachusetts, referred to a right against “unreasonable searches and seizures.” *See Mayo v. Wilson*, 1 N.H. 53, 55, 60 (1817). But the court in *Mayo*, after stating the common-law standards, nevertheless ignored those standards and approved a novel statutory grant of arrest authority as being within the legislative power. *Id.* at 57–59; *see also* Davies, *Correcting History*, *supra* note 3, at 120–21 (summarizing the court’s ruling in *Mayo*). For later

But all of that was about to change. For one thing, legal education changed during the early nineteenth century as American lawyers put aside Coke's *Institutes* and instead read Blackstone's *Commentaries*—although the latter gave only a superficial treatment of criminal procedure and arrest law.¹⁸⁴ For another, in the absence of an American legal-publishing industry, the American bench and bar remained reliant upon English treatises and cases under the rubric of a shared “common law”¹⁸⁵—and English judges were about to drastically depart from the prior common law of arrest.

B. The Invention and Importation of Bare Probable Cause as the Standard for Warrantless Felony Arrests

Starting in 1780—after American independence—English judges responded to increasing urban crime and disorder by altering criminal-procedure standards in ways that facilitated arrests and evidence gathering.¹⁸⁶ Of particular importance for the present discussion, they drastically enlarged the warrantless felony-arrest authority of peace officers, but not of private persons. This enlargement occurred in two steps: First, the judges differentiated the powers of a peace officer from that of a private person by allowing the officer to arrest on a “charge” of felony made by someone else, even if no felony had actually been committed. Second, they jettisoned the felony-in-fact requirement completely by allowing a peace officer (but not a private person) to make a warrantless arrest so long as he had probable cause that a felony *might* have been committed.¹⁸⁷

traces of the original understanding of “due process of law,” see, for example, *In re Powers*, 25 Vt. 261, 261 n.1 (1853) (“Except in cases of reasonable belief of treason, or felony, or breach of the peace, committed in the presence of an officer, there is no due process of law without warrant issued by a court or magistrate”); *infra* note 260.

184. See Davies, *Correcting History*, *supra* note 3, at 173–74 (noting that Blackstone's *Commentaries* were intended to serve as an *introduction* to the study of law).

185. In the aftermath of independence, some states passed statutes prohibiting citations of English cases decided after July 4, 1776. See Davies, *Correcting History*, *supra* note 3, at 186 n.586 (speculating that *Wakely* did not discuss *Samuel* for this reason). However, that prohibition was short-lived.

186. One of the judges' innovations had offsetting implications. Specifically, English judges announced a more restrictive standard for admitting confessions obtained by complainant–prosecutors by ruling that “a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it, and therefore it is rejected.” *King v. Warrickshall*, 1 Leach 263, 263–64, 168 Eng. Rep. 234, 235 (Old Bailey 1783). But the judges ruled in the same case that, although induced confessions were inadmissible, the complainant–prosecutors were permitted to exploit the information obtained during such inadmissible confessions to discover the location of stolen property, and the property itself was admissible as evidence. See *id.* The latter aspect of the ruling likely was of at least as much practical importance for obtaining convictions as the former. See Davies, *Original Fifth Amendment*, *supra* note 4, at 1021–24 (comparing the two aspects of the *Warrickshall* ruling).

187. See Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936); see also Davies, *Original Fourth*, *supra* note 3, at 628 n.214.

1. The English “On Charge” Justification for a Warrantless Felony Arrest

The first change was made in the 1780 ruling of the King’s Bench in *Samuel v. Payne*.¹⁸⁸ Hall, a private person, had accused Samuel of stealing laces (a felony) and Constable Payne had assisted Hall in making a warrantless arrest of Samuel. However, the prosecution was dismissed for lack of proof that a felony had actually been committed (apparently the laces were never recovered). Samuel then sued both Hall and Constable Payne for trespass damages. Lord Mansfield, chief justice of the King’s Bench, presided at the trespass trial and instructed the jury that Constable Payne did not enjoy any special protection from trespass liability.¹⁸⁹ The jury then found both Hall and Constable Payne liable for trespass.¹⁹⁰ Constable Payne then moved for a new trial before the full bench of the King’s Bench, and the judges (including Mansfield) then ruled that the prior rule was “inconvenient” (inappropriate) and that only the person who made the false charge of felony, but not the peace officer who assisted, should be liable for the trespass resulting from the unlawful warrantless felony arrest.¹⁹¹ On retrial, Hall, the accuser, was again found liable, but Constable Payne was not.¹⁹² Thereafter, officers enjoyed a degree of warrantless-arrest authority—the “on charge” justification—a private person did not.

The *Samuel* ruling was soon discussed in some American sources, but American courts did not immediately follow it. For example, it was not mentioned when the Pennsylvania Supreme Court addressed the justification for a warrantless felony arrest in 1814¹⁹³ (possibly because of a state statute that prohibited citation of English cases decided after 1776).¹⁹⁴ Indeed, as late as 1824 Nathan Dane discussed *Samuel* in his *Digest of American Law* with the cautionary introduction, “[i]f this case be law.”¹⁹⁵ A New York court nonetheless

188. 1 Doug. 359, 360, 99 Eng. Rep. 230, 231 (K.B. 1780) (report first published 1782); see also Davies, *Correcting History*, *supra* note 3, at 184–85 (discussing the case).

189. See also CONDUCTOR GENERALIS, *supra* note 40, at 109, 116–17 (extracting an essay by Saunders Welch, a high constable of London, advising constables that if they arrest on the report of a felony by another person, based on the other person’s knowledge, they should require the other person to attend the arrest, and further advising that “in all cases of [arrest on] suspicion, not from your own knowledge, the safest way is to refer the parties to a justice of the peace, and act on his warrant”).

190. *Samuel*, 1 Doug. at 359–60, 99 Eng. Rep. at 230–31.

191. *Id.* Five years later, Mansfield summed up the post-*Samuel* rule of warrantless felony arrest by saying “[w]hen a felony has been committed, any person may arrest on reasonable suspicion. When no felony has been committed, an officer may arrest on a charge.” *Cooper v. Boot*, 4 Doug. 339, 343, 99 Eng. Rep. 911, 913 (K.B. 1785). However, this report of *Cooper* was not published until 1831. Davies, *Original Fourth*, *supra* note 3, at 561 n.19.

192. *Samuel*, 1 Doug. at 360 n.8, 99 Eng. Rep. at 231 n.8.

193. See, e.g., the 1814 Pennsylvania *Wakely* decision, discussed *supra* notes 179–82 and accompanying text.

194. See *supra* note 185.

195. 3 DANE, *supra* note 40, at 72 (volume published 1824). Dane actually overstated *Samuel* when he wrote, “If this case be law, it settles the long agitated point, and proves a peace officer may arrest on a reasonable suspicion of felony without a warrant, though no felony has been committed.” *Id.* *Samuel* actually did not go that far; rather it relieved the officer of trespass liability only if the officer arrested on a charge of felony made by another person.

imported *Samuel's* “on charge” justification in 1829,¹⁹⁶ and thereafter American jurisdictions generally accepted the on-charge justification for a warrantless felony arrest by a peace officer.¹⁹⁷

2. The Bare-Probable-Cause Justification for Warrantless Felony Arrests

English judges made the second and more-fundamental innovation when they eliminated the felony-in-fact requirement for a lawful warrantless arrest by a peace officer in the 1827 ruling *Beckwith v. Philby*.¹⁹⁸ Philby, a constable, suspected from circumstances and comments (but not “charges”) made by others that Beckwith had stolen a horse; so he arrested Beckwith. It turned out, however, that the horse was not stolen, so no felony had actually been committed. Beckwith then sued Philby for trespass damages for false arrest because the arrest was plainly unlawful under common-law doctrine. But Chief Justice Tenterden ruled that an officer could make a lawful felony arrest if there were reasonable grounds to suspect a felony had been committed, even if none had.¹⁹⁹ Notably, Tenterden’s *Beckwith* opinion did not admit its innovation (as *Samuel* had) but instead pretended to simply be applying existing law.²⁰⁰ Later English commentators then embellished that judicial falsehood.²⁰¹

In a real sense, *Beckwith's* adoption of the bare-probable-cause standard for warrantless felony arrests marks the birth of modern investigatory criminal procedure. The new rule allowed an officer to draw inferences regarding a possible felony from hearsay accounts provided by persons who were unable or unwilling to act as a named complainant. Indeed, a complainant alleging personal knowledge of a felony was no longer needed. Instead, the peace officer could arrest on his own judgment and initiative, and enjoyed considerable latitude for making erroneous arrests. This new investigatory power undoubtedly facilitated the development of modern policing when the first English police department, the London “Bobbies,” was formed two years after *Beckwith* was decided.²⁰²

196. The earliest American reported decision to adopt the *Samuel* rule seems to have been *Holley v. Mix*, 3 Wend. 350, 353 (N.Y. 1829).

197. Davies, *Original Fourth*, *supra* note 3, at 636.

198. 6 B. & C. 635, 108 Eng. Rep. 585 (K.B. 1827).

199. *Id.* at 638–39, 108 Eng. Rep. at 586. A similar ruling was announced two years later in *Davis v. Russell*, 5 Bing. 354, 362–68, 130 Eng. Rep. 1098, 1102–04 (C.C. 1829).

200. *Beckwith* cited *Samuel's* “on charge” rule as though it were the same as probable cause of a crime, which it was not. *Beckwith*, 6 B. & C. at 636, 638–96, 108 Eng. Rep. at 585, 586.

201. See, e.g., 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883) (attributing the probable-cause standard to Hale’s treatise, but not giving any specific page cite for that claim); see also Hall, *supra* note 187, at 567 (criticizing Stephen’s claim).

202. See, e.g., 4 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 158–207 (1968) (discussing the creation of the London police department in 1829).

3. The American Importation of the Bare-Probable-Cause Standard for Warrantless Felony Arrests

American state judges, who also appear to have become concerned with increasing disorder and property crime, began to import the new English bare-probable-cause standard for warrantless felony arrests around the middle of the nineteenth century. The earliest American reported case to endorse bare probable cause appears to have been the 1844 Pennsylvania decision *Russell v. Shuster*.²⁰³ Massachusetts followed in 1850,²⁰⁴ and most other American jurisdictions had done likewise by the end of the nineteenth century.²⁰⁵ Thus, Chief Justice Taft could correctly describe the bare-probable-cause standard as the “usual rule” for warrantless felony arrests in his 1925 majority opinion in *Carroll v. United States*.²⁰⁶ Like the English judges who decided *Beckwith*, the American judges who imported the bare-probable-cause standard pretended to be merely applying prior common law while actually ignoring the earlier felony-in-fact requirement.²⁰⁷ Notably, none of those judges mentioned either the Fourth Amendment or any of the state provisions that tracked the Fourth Amendment’s probable cause standard for warrants. Rather, bare probable cause was simply imported as part of what the judges described as the “common law” of arrest.

The importation of the bare-probable-cause standard for warrantless felony arrests provoked some resistance. A North Carolina judge opined in 1856 that the new standard “go[es] very far in the justification of officers, who apprehend suspected persons without warrants . . . farther than is compatible with that

203. 8 Watts & Serg. 308, 309 (Pa. 1844) (reporting that Chief Justice Gibson recited that “[a] constable may justify an arrest for reasonable cause of suspicion alone; and in this respect he stands on more favorable ground than a private person, who must show, in addition to such cause, that a felony was actually committed”). For a brief discussion of the case, see Davies, *Correcting History*, *supra* note 3, at 188 n.593.

204. *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 284 (1850) (reciting that “[p]eace-officers without warrant may arrest suspected felons,” and citing *Samuel* and *Beckwith* while falsely claiming that the 1814 Pennsylvania ruling in *Wakely* “is to the same effect”). *Wakely* is discussed *supra* notes 179–82 and accompanying text.

205. Later in the nineteenth century state legislatures often included the bare-probable-cause standard for warrantless felony arrests in state arrest statutes. *See, e.g.*, *Bad Elk v. United States*, 177 U.S. 529, 535–36 (1900) (describing a state statute that included the “on charge” and “probable cause” justifications for felony arrest as a codification of “common law”). However, some states have never bothered to formally enact the bare-probable-cause standard. *See, e.g.*, TENN. CODE ANN. § 40-7-103 (2010) (stating grounds for arrest by officer without warrant but including the felony-in-fact requirement and omitting the bare-probable-cause-standard itself).

206. 267 U.S. 132, 156 (1925) (“The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . .”).

207. For example, in 1844 the Pennsylvania court did not mention that it was effectively overruling its own earlier 1814 decision in *Wakely* (discussed *supra* notes 179–82 and accompanying text) when it adopted the *Beckwith* probable cause justification. *Russell*, 8 Watts. & Serg. at 309 (citing no prior authorities regarding the felony arrest standard although counsel had cited *Wakely*). Likewise, when the Massachusetts court adopted the novel *Beckwith* probable-cause justification in 1850, it incorrectly cited the 1780 English ruling in *Samuel* and the 1814 Pennsylvania ruling in *Wakely* as being “to the same effect”—which neither was. *Rohan*, 59 Mass. at 284.

personal liberty, of which English jurists are so fond of boasting.”²⁰⁸ New York reinstated the felony-in-fact requirement by statute, and still required proof of a felony in fact to justify a warrantless felony arrest as late as 1939.²⁰⁹ Similarly, Congress initially included a felony-in-fact requirement when it finally got around to enacting statutory warrantless arrest authority for FBI officers in 1935, but then dropped that requirement in 1948.²¹⁰

C. Defining “Probable Cause”

Of course, the definition of “probable cause” took on additional significance when it became the stand-alone standard for criminal arrests. The federal courts had had several occasions to define probable cause during the decades that immediately followed the adoption of the Bill of Rights. The earliest Supreme Court discussion of probable cause seems to have occurred in the 1807 ruling in *Ex parte Bollman*.²¹¹ In that habeas corpus proceeding, the Marshall Court ruled that an arrest warrant for treason lacked the probable cause required by the Fourth Amendment because no evidence had been offered to show “unequivocally” that the arrestees had actually engaged in levying war against the United States.²¹² Thus, *Bollman* seems to have construed probable cause for a criminal arrest warrant to require factual accusations that amounted to a *prima facie* showing of guilt.

A few years later in 1811, Justice Bushrod Washington had occasion to define the probable cause required to support an arrest by warrant while presiding in a malicious prosecution case, *Munns v. De Nemours*.²¹³ The defendants had obtained an arrest warrant and indictment of Munns for theft of a brass pounder used in producing gunpowder. Although it appeared that the pounder had been stolen by another man who had recently been in Munns’ company, the jury in a Delaware state criminal trial acquitted Munns of the theft. Munns then sued for malicious prosecution, and the defendants removed the case to the federal circuit court under diversity jurisdiction. While presiding at the civil trial, Washington charged the jury that probable cause was a defense to liability even if the defendants had acted with malice.

208. *Brockway v. Crawford*, 48 N.C. (3 Jones) 433, 439–40 (1856) (Battle, J., dissenting) (specifically criticizing the English rulings in *Samuel* and *Beckwith*).

209. *See Morgan v. N.Y. Cent. R.R. Co.*, 9 N.Y.S.2d 339, 341 (N.Y. App. Div. 1939) (interpreting state statute to permit police to arrest without warrant only when a felony has in fact been committed).

210. Davies, *Correcting History*, *supra* note 3, at 210–12.

211. 8 U.S. (4 Cranch) 75, 126–37 (1807). In an earlier proceeding in the same matter in the Circuit Court for the District of Columbia, Chief Judge Cranch had also opined that the issuance of the arrest warrant in the case was inconsistent with the Fourth Amendment. *See United States v. Bollman*, 24 F. Cas. 1189, 1190, 1192–93 (C.C.D.C. 1807) (No. 14,622) (still identifying the Fourth Amendment as the “sixth article of the amendments”).

212. *Bollman*, 8 U.S. (4 Cranch) at 110. Note that the Treason Clause in Article III explicitly makes taking up arms an element of treason. U.S. CONST. art. III, § 3.

213. 17 Fed. Cas. 993 (C.C.D. Pa. 1811) (No. 9926).

Washington further charged that “probable cause” meant “a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant [justify] a cautious man in the belief, that the person accused is guilty of the offense with which he is charged.”²¹⁴ Washington’s formulation of probable cause appears to have drawn upon Hawkins’ earlier “candid and impartial man” formulation,²¹⁵ but Washington’s definition added “belief, that the person accused is guilty” to Hawkins’s strong “suspicion” as though the two concepts were equivalent—notwithstanding that “belief” set a higher threshold than “suspicion.”²¹⁶ Washington then advised the jury that in the circumstances of this case (in which an arrest warrant had issued and a grand jury had indicted), the defendants did have probable cause, and the jury found for the defendants.²¹⁷

However, the federal courts treated probable cause differently in noncriminal customs proceedings. In particular, the Marshall Court in 1813 gave a shorter and more relaxed definition of “probable cause” in the context of customs enforcement in *Locke v. United States*.²¹⁸ Under the federal customs statutes, if a prosecuting customs officer showed probable cause that a customs violation had been committed—even though he could not specify when or how it had been done—the burden of proof shifted to the claimant, who opposed the condemnation of a ship or goods, to prove that customs requirements had been complied with.²¹⁹ In the course of upholding the shifting of the burden of proof on the condemnation at issue, Chief Justice Marshall wrote that “in all cases of [customs] seizure [probable cause] has a fixed and well known meaning. It imports a seizure made under circumstances which warrant suspicion.”²²⁰ Yet Marshall did not suggest that this definition applied to criminal warrants, and notably, in another customs case during the same term, Attorney General

214. *Id.* at 995. The verb “to warrant . . . a belief” is a synonym for “to justify a belief” or “to authorize a belief”; it was not a reference to a judicial arrest or search warrant.

215. See *supra* text accompanying note 73. Of course, Washington did not include any citations to authority in the jury charge in *Munns*. The likelihood that Washington consulted Hawkins’ treatise is nonetheless supported by Washington’s doubt about whether it was necessary, for the justification of the execution of an arrest warrant, that a theft had actually been committed. Compare *Munns*, 17 Fed Cas. at 996, with Hawkins’ view, discussed *supra* text accompanying note 72.

216. In his 1828 dictionary, Noah Webster, who was a contemporary of the American framing era, defined “believe” as “to be persuaded of the truth of something upon the declaration of another, or upon evidence” and as “[t]o have a firm persuasion of anything.” 1 WEBSTER, *supra* note 156 (pages unnumbered). In contrast, he defined “suspect” as “to imagine or have a slight opinion that something exists, but without proof and often upon weak evidence or no evidence at all,” and gave essentially the same definition for “suspicion.” 2 *id.* He also defined “probable” as meaning “[l]ikely; having more evidence than the contrary, or evidence which inclines the mind to belief, but leaves some room for doubt.” 2 *id.* Given these definitions, the older phrasing of “probable cause to suspect” was something of an oxymoron; “probable cause to believe” was more congruent.

217. *Munns*, 17 Fed Cas. at 997. Washington also stated that it was for the jury to determine the truth of the circumstances on which probable cause was allegedly based, but that it was for the court to determine whether those circumstances constituted probable cause. *Id.* at 995.

218. 11 U.S. (7 Cranch) 339 (1813).

219. *Id.* at 348.

220. *Id.*

Pinkney argued that customs procedure should be more relaxed than criminal procedure.²²¹ Likewise, Justice Washington's joining in the seemingly weaker statement of probable cause in the *Locke* ruling without comment also seems to confirm that "probable cause" carried a looser meaning in the customs seizure context than in the criminal arrest context he had addressed in *Munns*.

Justice Washington's definition of probable cause in *Munns* was widely cited in later false-imprisonment or malicious-prosecution cases that arose from criminal proceedings.²²² However, later cases sometimes offered slight variations regarding the "suspicion" and "belief" thresholds for probable cause,²²³ and a few state courts vacillated between defining probable cause as information that supported a reasonable *suspicion* that the arrestee had committed a felony or as a reasonable *belief* that the arrestee had committed a felony.²²⁴ It may be significant, though, that, even under the criterion of a strong suspicion or belief in guilt, appellate courts reviewing malicious prosecution jury verdicts tended to rule that the facts in the cases satisfied that standard.²²⁵

Justice Hunt's 1878 opinion for the Supreme Court in *Stacey v. Emery*²²⁶ also endorsed Washington's *Munns* definition of probable cause in the course of discussing grounds for a certificate of probable cause in customs proceedings. Hunt stated that the threshold for probable cause was met "[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and

221. See *The Schooner Jane v. United States*, 11 U.S. (7 Cranch) 363, 363 (1813) (recording comments from Attorney General Pinkney that "[i]f these [condemnation] cases are to be likened to criminal prosecutions, and if the same strictness be required, it will be impossible to execute the laws [regulating imports].").

222. See, e.g., *Cabiness v. Martin*, 14 N.C. (3 Dev.) 454, 455–56 (1832); *Foshay v. Ferguson*, 2 Den. 617, 619 (1846).

223. A slight variation appeared in *Bacon v. Towne*, 58 Mass. (4 Cush.) 217, 238–39 (1849) ("Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person accused is guilty."). See also *Eastman v. Keasor*, 44 N.H. 518, 520 (1863) (following *Bacon* and attributing the definition in that case to Chief Justice Shaw of the Massachusetts Supreme Judicial Court).

There were other formulations. See *Burt v. Smith*, 73 N.E. 495, 496 (N.Y. 1905) ("Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of."); *Runo v. Williams*, 122 P. 1082, 1085 (Cal. 1912) ("Probable cause is, in effect, the concurrence of the belief of guilt with the existence of facts and circumstances reasonably warranting the belief.").

224. See *Davies, Arrest*, *supra* note 3, at 380 n.480 (discussing the different standards).

225. See, e.g., *Ulmer v. Leland*, 1 Me. 135, 138 (1820) (overturning jury verdict for plaintiff in malicious prosecution action while noting the "liberality of construction on the question of probable cause, in favor of the prosecutor . . ."); *Swaim v. Stafford*, 25 N.C. 289, 293 (1843) (overturning jury verdict for plaintiff in malicious prosecution action while concluding that "[a]ll these facts and circumstances, as it seems to us, were sufficiently strong to induce the defendant to believe that the plaintiff was guilty, and in law amounted to a probable cause . . ."); *Foshay v. Ferguson*, 2 Denio 617, 620–21 (N.Y. Sup. Ct. 1846) (permitting new trial in malicious prosecution action after verdict for plaintiff while stating that "the verdict was clearly wrong"); *Bacon v. Towne*, 58 Mass. 217, 238–42 (1849) (setting aside verdict for plaintiff in malicious prosecution action because trial judge did not properly instruct the jury as to the facts that might prove probable cause).

226. 97 U.S. 642 (1878).

caution in believing that the offense has been committed.”²²⁷ Thus, *Stacey* effectively applied the criminal definition of probable cause to customs proceedings, as well, and ended the distinction that seemed to have been recognized in *Locke*. The *Stacey* definition then became the formulation that federal courts generally used on later occasions,²²⁸ including the Supreme Court’s 1925 ruling in *Carroll v. United States*²²⁹ and the 1949 ruling in *Brinegar v. United States*.²³⁰

D. How the Post-Framing Adoption of the Bare-Probable-Cause Standard for Warrantless Felony Arrests Transformed Criminal Procedure

No matter how bare probable cause was defined, the adoption of that standard facilitated a drastic expansion of government arrest and search authority. Indeed, it is hardly a coincidence that the adoption of this relaxed standard more or less coincided with the appearance of urban police departments.²³¹

Common-law accusatory procedure had been dependent on a private complainant’s willingness to denounce a crime that had actually been committed. As a result, government officers had been allowed little room to initiate criminal prosecutions themselves. Indeed, the requirement of a named complainant alleging personal knowledge of the crime, coupled with the risks that attended that role, had constituted the principal protection that the common law offered against arbitrary warrantless arrest. However, adoption of the bare-probable-cause warrantless felony-arrest standard destroyed that protection by allowing government officers to initiate criminal prosecutions by “ferreting out criminal activity” on their own assessment of the circumstances.²³² As a result, the bare-probable-cause standard substantially enlarged the room for police officers to justify mistaken arrests of innocent persons. Moreover, although the bare-probable-cause standard directly justified only warrantless arrests for felony offenses, it carried far broader practical implications for

227. *Id.* at 645.

228. *See, e.g., Green v. United States*, 289 F. 236, 238 (8th Cir. 1923) (“Probable cause which will justify an arrest is reasonable grounds of *suspicion*, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his *belief that the person accused is guilty* of the offense of which he is *suspected*.”) (emphasis added); *United States v. Snyder*, 278 F. 650, 658 (N.D. W. Va. 1922) (same).

229. 267 U.S. 132, 161, 162 (1925) (quoting the definition of probable cause in *Stacey* and then slightly revising that in the context of the specific issue in the case by stating that the officers’ search was justified because “the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that [illegal liquor was in the car]”).

230. 338 U.S. 160, 175–76 (1949).

231. *See, e.g., JAMES P. HALL, PEACEKEEPING IN AMERICA: A DEVELOPMENTAL STUDY OF AMERICAN LAW ENFORCEMENT* 86 (1975) (noting that the transition from urban nightwatches to police departments occurred in New York City in 1844, in Chicago in 1851, in New Orleans and Cincinnati in 1852, in Boston and Philadelphia in 1854).

232. The famous “ferreting” phrase is Justice Jackson’s. *See Johnson v. United States*, 333 U.S. 10, 14 (1949).

criminal procedure. One implication was that the relaxed standard for warrantless felony arrests increased the opportunities for police to make warrantless searches—and thus discover evidence of additional crimes.

The adoption of bare probable cause as the standard for warrantless felony arrests also seems to have spilled over and affected arrest warrant standards in several ways. For one thing, the common-law requirement of an allegation of crime-in-fact for issuance of an arrest or search warrant seems to have disappeared soon after the adoption of bare probable cause as a warrantless arrest standard.²³³ Likewise, allowing the use of hearsay information that would have been inadmissible at trial to support a finding of probable cause for a warrantless felony arrest seems to have led to allowing hearsay to support the issuance of an arrest warrant as well.²³⁴ The rationale for these relaxations of warrant standards likely was that it made no sense to require an officer to present more or better information to obtain a felony arrest warrant than he would need to justify a warrantless felony arrest.²³⁵ That change, in turn, eventually led to allowing “confidential informants”—who play a prominent role in modern police investigations—whose identity is never disclosed to the defendant, or even to the issuing magistrate or reviewing court.²³⁶ Likewise, the oath requirement came to mean little more than that a police affiant swore to having received unsworn hearsay information from someone else.

Of course, the expansion of the warrantless arrest authority of the officer also ultimately led to an overall decline of warrant usage. That in turn meant that magistrates ceased to actively supervise police decisions as to whether to make searches or arrests and instead merely assessed such actions after they occurred. The shift to police-initiated arrests also appears to have opened the

233. The requirement of an accusation of a felony in fact for issuance of an arrest warrant may have disappeared virtually contemporaneously with the adoption of the bare-probable-cause standard for warrantless felony arrests. For example, an 1853 treatise published in New York stated that a magistrate could issue an arrest warrant “[i]f in reference to the creditability of the complainant, and to all matters stated by him, there are, according to the understanding of the magistrate, reasonable grounds for supposing the accused to be guilty” and that, with regard to “the amount of evidence” required “in order to authorize the magistrate to grant his warrant, no very definite rule has been or can be laid down,” but “[i]t is sufficient if the testimony shows a probable case of guilt.” 1 A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE 30 n.1 (Thomas W. Waterman ed., Albany N.Y., Gould, Banks & Co. 1853).

234. In 1932 the Supreme Court still stated that “[a] search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury”—a standard that would seem to preclude use of hearsay. *Grau v. United States*, 287 U.S. 124, 128 (1932). However, the Court subsequently described *Grau*’s statement as an anomaly in *Brinegar v. United States*, 338 U.S. 160, 174 n.13 (1949).

235. *Cf. Jones v. United States*, 362 U.S. 257, 269–70 (1960) (noting that it would be “incongruous” to apply a higher standard for probable cause to support an arrest warrant than that which would suffice for a warrantless arrest).

236. Early cases that permitted probable cause for an arrest to be based on informant hearsay tended to require that the informant be identified, notwithstanding the general “informant’s privilege” recognized in the law of evidence. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 769 n.9 (John T. McNaughton ed., 1961) (citing cases).

way for police interrogation of suspects.²³⁷ Hence, it is not too much to say that the adoption of the bare-probable-cause standard for warrantless felony arrests transformed criminal procedure.²³⁸

V

THE INVENTION OF FOURTH AMENDMENT REASONABLENESS AND THE ADOPTION OF BARE PROBABLE CAUSE AS A WARRANTLESS SEARCH STANDARD

The Supreme Court formulated modern Fourth Amendment doctrine during the early decades of the twentieth century. The seminal ruling was the 1914 decision in *Weeks v. United States*.²³⁹ In that case, the Supreme Court innovated in several ways: (1) it ruled that the Fourth Amendment applied to the conduct of a federal officer as well as to the courts and Congress;²⁴⁰ (2) in ruling that a warrantless search of a house by a federal marshal violated the Fourth Amendment, it read the common-law requirement of a warrant for a house search into the Fourth Amendment itself;²⁴¹ and (3) it created the search-and-seizure exclusionary rule when it held (in an echo of *Marbury v. Madison*)²⁴² that a federal court did not possess authority to admit evidence that government officers had obtained in violation of the Constitution.²⁴³ Although *Weeks* and the cases that immediately followed it actually applied the Fourth Amendment only to searches of houses or offices, usually for papers,²⁴⁴ the onset of Prohibition in 1920 soon presented new search issues.

237. See Davies, *Original Fifth Amendment*, *supra* note 4, at 1030–32 (discussing the effects of the shift to investigatory criminal procedure).

238. For a discussion of the emergence of modern policing during the nineteenth century, see Wesley M. Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447 (2010).

239. 232 U.S. 383 (1914).

240. Davies, *Original Fourth*, *supra* note 3, at 729–30.

241. *Id.* at 730.

242. 5 U.S. (1 Cranch) 137, 180 (1803) (holding that federal courts lack constitutional authority to apply an unconstitutional statute because “a law repugnant to the constitution is void; and . . . courts, as well as other departments, are bound by that instrument”).

243. See Davies, *Original Fourth*, *supra* note 3, at 730, n.521. The exclusionary rule did not appear “late,” as its critics sometimes claim; rather, the rule was created roughly contemporaneously with the appearance of the modern conception that unlawful conduct by officers constitutes a form of government action. Thomas Y. Davies, *An Account of Mapp v. Ohio That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 622–25 (2007) [hereinafter Davies, Mapp]; see also *supra* note 96. Cf. Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1852–62 (2002).

244. *E.g.*, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (unlawful seizure of business records from office); *Gouled v. United States*, 255 U.S. 298 (1921) (warrantless seizure of paper from office); *Amos v. United States*, 255 U.S. 313 (1921) (warrantless entry of house).

A. The Invention of Warrantless Searches (Beyond Those Incident to Arrest)
in *Carroll v. United States*

Enforcement of Prohibition necessarily required searches for illegal liquor, including searches of automobiles transporting illegal liquor. Because it was not feasible for police to obtain warrants to search automobiles, the federal courts were confronted with whether the Fourth Amendment permitted warrantless searches of automobiles. Although the Supreme Court had acknowledged the continuing validity of the common-law search-incident-to-arrest doctrine in dicta in *Weeks*,²⁴⁵ there was a doctrinal obstacle that prevented use of the search-incident-to-arrest doctrine. The difficulty was that Prohibition violations were often *misdemeanors*.²⁴⁶ But under common-law or statutory standards it was still the rule that bare probable cause could justify a warrantless arrest only for a *felony*; a warrantless misdemeanor arrest was lawful only when the misdemeanor was actually being committed “in the view of” or “presence of” the arresting officer—a standard understood to mean that the officer had to actually observe the offense being committed.²⁴⁷ Because the illegal liquor being transported in a vehicle was rarely in plain view, neither a warrantless arrest nor a search incident to such an arrest could usually be justified.

However, because investigatory searches were plainly necessary if police were to enforce Prohibition offenses, the lower federal courts showed considerable creativity in upholding warrantless automobile searches.²⁴⁸ Their most notable response was to begin to construe the right against “unreasonable searches and seizures” set out in the first clause of the Fourth Amendment as though it created a free-standing “reasonableness” standard for assessing government searches. These courts then announced, without citing precedent, that the Fourth Amendment did not forbid all warrantless searches; rather, it forbade only “*unreasonable*” warrantless searches, and a warrantless search was reasonable and constitutional so long as the officers had bare probable cause

245. See 232 U.S. 383, 392 (indicating that the Court was not disapproving “an assertion of the right on the part of the Government . . . to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime . . . [n]or is it the case of burglar’s tools or other proofs of guilt found upon his arrest within the control of the accused”).

However, the new exclusionary rule exerted an indirect effect on arrest law. As a practical matter, the legality of an arrest mattered primarily to assess the constitutionality of the search that accompanied it. But because the constitutionality of searches was tested in motions to suppress evidence decided prior to trial, the old *ex post*, actual-guilt justification (discussed *supra* notes 35–36 and accompanying text), which depended on a conviction at trial, became irrelevant.

246. The National Prohibition Act defined first or second offenses as misdemeanors, third offenses as felonies. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

247. See *id.* at 157 (noting that “the [misdemeanor] is not committed in [the officer’s] presence unless he can by his senses detect that the liquor is being transported”).

248. See, e.g., *United States v. Fenton*, 268 F. 221, 222–23 (D. Mont. 1920) (ruling that the United States was “vested with the right of property and possession” in illegal liquor, and thus was entitled to seize it); *United States v. Bateman*, 278 F. 231, 235 (S.D. Cal. 1922) (“[I]t is not unreasonable for a prohibition enforcement officer to stop automobiles upon the public highway and search them for intoxicating liquors without a warrant, and the finding of liquor justifies the search.”).

that a violation was occurring.²⁴⁹ The Supreme Court adopted this novel construction of the Fourth Amendment in 1925 in *Carroll v. United States* when it held that bare probable cause sufficed for a constitutional warrantless search of an automobile (even though it could not justify a warrantless arrest).²⁵⁰

Two features of Chief Justice Taft's *Carroll* opinion are noteworthy here. One is that it reiterated the traditional formulation—previously articulated in *Munns* and *Stacey*—that probable cause was met if “the facts and circumstances within [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant [that is, to justify] a man of reasonable caution in the belief that [an offense has been or is being committed].”²⁵¹ But there was arguably a gap between that verbiage and the substance of the definition; as Justice McReynolds pithily pointed out in dissent, the facts in *Carroll* were such that the majority had effectively ruled there was probable cause to search a car merely “because a man once agreed to deliver whisky, but did not . . . [and] thereafter he venture[d] to drive an automobile on the road to Detroit.”²⁵²

The other noteworthy feature of Taft's opinion was the purportedly originalist justification he offered to support *Carroll*'s claim that warrantless searches of vehicles were “reasonable” and thus constitutional, so long as the officer had probable cause. Specifically, Taft noted in the 1789 Collections Act the First Congress had authorized customs officers to make warrantless searches of ships if the officer had “reason to suspect” a customs violation.²⁵³ But this claim was merely an instance of judicial-chambers historical fiction.²⁵⁴ The Framers would have understood that ships were not included among the “houses, papers, and effects” protected by the Fourth Amendment; indeed, that formula likely was included precisely to exclude ships.²⁵⁵ Thus, the Framers would not have thought that the Fourth Amendment had any bearing on customs searches of ships—or vice versa. Indeed, although the Supreme Court had decided numerous ship-seizure cases between 1789 and 1925, none had ever so much as mentioned the Fourth Amendment.²⁵⁶

249. See, e.g., *United States v. Snyder*, 278 F. 650, 658 (N.D.W. Va. 1922) (Fourth Amendment prohibits unreasonable searches, not warrantless searches); *Lambert v. United States*, 282 F. 413, 416–17 (9th Cir. 1922) (Fourth Amendment prohibits “all unreasonable searches” and what is unreasonable must necessarily be determined according to the facts and circumstances); *United States v. McBride*, 287 F. 214, 216 (S.D. Ala. 1922) (Fourth Amendment prohibits only unreasonable search, not warrantless search); *Green v. United States*, 289 F. 236, 238 (8th Cir. 1923) (same).

250. 267 U.S. 132, 146 (1925).

251. *Carroll*, 267 U.S. at 162. This definition was repeated with minor changes in *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949), and is now usually cited to *Brinegar* rather than *Carroll*.

252. 267 U.S. at 174.

253. *Id.* at 150 (citing 1789 Collections Act, 1 Stat. 29, 43).

254. This historical claim seems to have been composed by Taft; it does not appear in the briefs filed in *Carroll*.

255. See *supra* notes 126–27 and accompanying text.

256. Davies, *Original Fourth*, *supra* note 3, at 607–08.

Carroll's endorsement of reading the first clause of the Fourth Amendment as a free-standing Reasonableness Clause was also the likely catalyst for the fabrication of the academic version of conventional Fourth Amendment history. In a dissertation published as a monograph in 1937, political scientist Nelson B. Lasson asserted that the last-minute change during the House debate in which Madison's "by warrants issuing" had been replaced with "and no warrant shall issue"—the change that had created the final two-clause text—had been made for the purpose of creating an overarching "reasonableness" standard for all government searches.²⁵⁷ Although there was not a shred of evidence for that fanciful claim,²⁵⁸ it dovetailed so nicely with the Supreme Court's own textual creativity that it became the cornerstone for the conventional account of Fourth Amendment history.²⁵⁹

B. Probable Cause as the Federal Statutory and Constitutional Standard for Warrantless Felony Arrests

Carroll explicitly applied the Fourth Amendment's bare-probable-cause standard to assessing the constitutionality of the *search* at issue, but still discussed the arrest only in terms of "the usual rule" for a lawful arrest.²⁶⁰ This narrow focus on searches was still evident in 1949 when the Court reiterated *Carroll's* formulation of probable cause in another automobile search case, *Brinegar v. United States*.²⁶¹ Although Justice Rutledge's majority opinion in *Brinegar* did state at one point that "[t]he crucial question is whether there was probable cause for Brinegar's arrest," all of the analysis in the opinion was in terms of whether "probable cause to search exist[ed]."²⁶²

257. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 100–03 (1937). Lasson's monograph was his dissertation; Nelson B. Lisansky, *The History and Development of the Fourth Amendment* (Ph.D. Dissertation, Political Science, Johns Hopkins University, 1934). Davies, *Correcting History*, *supra* note 3, at 27 n.45.

Lasson also invented a rather preposterous claim that the motion to substitute "and no warrant shall issue" was voted down in the House, but then was surreptitiously added in by the later committee on style. See LASSON, *supra*, at 102–03. Yet, although there are conflicting accounts of the House debate, including even the identity of the person who made the motion, the weight of available evidence clearly indicates that the motion for the substitution carried. Davies, *Original Fourth*, *supra* note 3, at 716–21.

258. See *supra* notes 159–66 and accompanying text.

259. See Davies, *Original Fourth*, *supra* note 3, at 569 n.38 (citing opinions and commentaries that have uncritically repeated Lasson's claims).

260. 267 U.S. 132, 156 (1925). Indeed, Justice McReyold's dissent asserted that the warrantless misdemeanor arrest in that case "was unauthorized, illegal, and violated the *guarantee of due process given by the Fifth Amendment*"—but did not apply the Fourth Amendment to the arrest. *Id.* at 170 (emphasis added).

261. 338 U.S. 160, 164 (1949).

262. See also Justice Minton's 1950 discussion that "[o]f course, a search without warrant incident to an arrest is dependent initially on a valid arrest" but that "[w]here one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him" and "[i]t is [only] unreasonable searches that are prohibited by the Fourth Amendment." *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950).

One explanation for the Court's slowness in applying the Fourth Amendment's bare-probable-cause standard to warrantless arrests was that Congress did not get around to adopting statutory warrantless-felony-arrest authority for federal officers until the 1930s, which meant that the warrantless-arrest authority of federal officers depended on state law. Moreover, when Congress finally did act, it initially reverted to the framing-era requirement that a felony had to have been actually committed in fact, and it further limited the warrantless arrest authority of FBI agents to instances in which there were reasonable grounds to fear that the person to be arrested would escape if the agent undertook to obtain an arrest warrant.²⁶³ Congress deleted the felony-in-fact requirement in 1948 and deleted the reason-to-fear-escape criterion in 1950.²⁶⁴ Thereafter, in the 1959 ruling *Draper v. United States*, the Supreme Court announced that the statutory probable-cause standard was equivalent to the constitutional standard for warrantless felony arrests.²⁶⁵

VI

PROBABLE CAUSE IN THE WARREN COURT

The Warren Court's "due process revolution" during the 1960s consisted largely of "incorporating" federal constitutional criminal-procedure standards into the Fourteenth Amendment's Due Process Clause, making the federal standards applicable to state criminal proceedings.²⁶⁶ In particular, the Court announced the incorporation of the Fourth Amendment in 1960 in *Elkins v. United States*²⁶⁷ and applied the federal exclusionary rule to the states in 1961 in *Mapp v. Ohio*.²⁶⁸

Additionally, the Warren Court shored up the "warrant requirement"²⁶⁹ and made significant rulings regarding the use of informant hearsay to establish probable cause; but these latter rulings carried contrasting implications. On the one hand, the Court sought to ensure that police would provide a magistrate with adequate information to independently assess whether there was probable cause to support a warrant when the police were relying on a confidential

263. Davies, *Correcting History*, *supra* note 3, at 208–11.

264. *Id.* at 211–12.

265. 358 U.S. 307, 310 (1959) (equating "probable cause" in the Fourth Amendment with "reasonable grounds" in the arrest provision of the Narcotic Control Act); *see also* *Henry v. United States*, 361 U.S. 98, 100 (1959) (equating the "reasonable grounds" statutory standard for warrantless arrests by FBI agents with the Fourth Amendment's "probable cause" standard); Davies, *Correcting History*, *supra* note 3, at 212–13.

266. *See, e.g.*, THE OXFORD COMPANION TO AMERICAN LAW 415–16 (Kermit L. Hall ed., 2002) (chronicling the process of incorporation).

267. 364 U.S. 206 (1960). Despite the widespread view that the substance of the Fourth Amendment had been incorporated earlier in *Wolf v. Colorado*, 338 U.S. 25 (1949), Justice Stewart's opinion in *Elkins* distorted what had actually been said in *Wolf*. *See* Davies, *Mapp*, *supra* note 243, at 626 n.24.

268. 367 U.S. 643 (1961).

269. *Katz v. United States*, 389 U.S. 347, 357 (1967) (ruling that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions").

informant's tip. Under the two-prong *Aguilar–Spinelli* standard, the Court held that a police affidavit seeking a warrant on the basis of a confidential informant's tip must set out, in addition to the factual grounds for probable cause, both how the informant had obtained the relevant information and why the informant could be believed.²⁷⁰ The justices apparently hoped that this two-prong standard would provide federal courts with a more-precise test for reviewing the constitutionality of warrants issued by state judges.

On the other hand, the Warren Court also sapped the probable-cause standard of much of its substance when it ruled that police need not disclose the identity of a “confidential informant,” even to the magistrate from whom a warrant was sought, or during a motion to suppress proceeding.²⁷¹ As a practical matter, that ruling seems to have created an opportunity for police to meet the so-called “credibility” prong of the *Aguilar–Spinelli* standard simply by perjuringly reciting that a confidential informant had previously provided accurate information—or perhaps even by inventing completely fictional informant tips.²⁷²

In addition, the Warren Court created an entirely new branch of search-and-seizure doctrine in 1968 when it ruled in *Terry v. Ohio*²⁷³ that police had the authority to temporarily “stop” and “detain” persons whenever the officers had “reasonable suspicion” of criminal activity, and could also “frisk” detained persons for weapons if they had reasonable suspicion that the person might be armed. This new standard was defined to be less demanding than probable cause,²⁷⁴ but to require more than a mere hunch on the part of the police. The Justices seem to have hoped that the new reasonable suspicion standard would extend constitutional regulation to police conduct that was already common practice. But because the probable-cause standard turned out to be not very demanding in practice, and because *Terry* stops could produce grounds for arrest,²⁷⁵ the net result of the Justices' invention of the reasonable-suspicion justification for less-intrusive detentions and frisks appears to have been a

270. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (requiring that a search-warrant affidavit based on information from a confidential informant state both the way in which the informant acquired the information and reasons to support the informant's credibility); *Spinelli v. United States*, 393 U.S. 410, 415–18 (1969) (ruling that corroboration of aspects of the informant's information could not entirely replace the required information).

271. See *Rugendorf v. United States*, 376 U.S. 528, 534–36 (1964) (motion to suppress); *McCray v. Illinois*, 386 U.S. 300, 311–12 (1967) (probable-cause hearing).

272. See, e.g., Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 102–07 (1992) (noting pervasive police perjury in search matters).

273. 392 U.S. 1 (1968).

274. Notes from the justices' conference suggest that the justices initially intended to simply rule that the police officer in *Terry* had had probable cause to arrest, but then thought better of it. See generally John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749 (1998).

275. In *Terry* itself, the frisk for weapons produced a gun, which provided probable cause to arrest and that, in turn, provided authority to conduct a full search incident to arrest.

substantial further expansion of police power.²⁷⁶ Nevertheless, the remnants of the Warren Court majority still declared in 1972 that “[w]e allow our police to make arrests only on ‘probable cause’ Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality.”²⁷⁷

VII

THE EVISCERATION AND EXPLOITATION OF PROBABLE CAUSE IN THE BURGER, REHNQUIST, AND ROBERTS COURTS

The Warren Court’s extension of the protections of the Fourth Amendment to state criminal proceedings fundamentally changed the politics of federal criminal justice. Prior to the 1960s, federal constitutional standards had applied largely to the sorts of white-collar or revenue prosecutions that did not scare or incite the general public. But applying Fourth Amendment search-and-seizure standards to the states—plus the Fifth Amendment’s protection against compelled self-incrimination in *Miranda v. Arizona*²⁷⁸—meant that street criminals could also claim constitutional protections. And that *did* scare and incite the public. Richard Nixon exploited that fear in the 1968 presidential election, and a tipping point occurred in criminal procedure when he was able to fill four vacancies on the Court between 1969 and 1972 with law-and-order appointees.²⁷⁹ Since that change, the interactions of presidential elections and vacancies on the Court has produced what seems to be a permanent right-of-center majority, and the overall result has been a drastic dilution of Fourth Amendment protections, including the evisceration of the bare-probable-cause standard itself.

Although the Burger Court majority initially focused on restricting the operation of the exclusionary rule,²⁸⁰ several early Burger Court opinions are relevant insofar as they characterized bare probable cause as the “touchstone” of “Fourth Amendment reasonableness”²⁸¹ and also embellished the already existing myth that bare probable cause had always been the common-law, or

276. For example, *Terry* has also provided the doctrinal basis for “protective sweeps” of houses, *Maryland v. Buie*, 494 U.S. 325, 331–35 (1990), and for “frisks” of automobiles for weapons, *Michigan v. Long*, 463 U.S. 1032, 1043–46 (1983).

277. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972).

278. 384 U.S. 436 (1966).

279. See generally JOHN W. DEAN, *THE REHNQUIST CHOICE* (2001) (reporting that Nixon made opposition to the Warren Court’s criminal procedure rulings a primary criterion for choosing nominees to the Supreme Court).

280. See, e.g., *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Janis*, 428 U.S. 433 (1976); *Stone v. Powell*, 428 U.S. 465 (1976).

281. The “touchstone” language initially appeared in *Hill v. California*, 401 U.S. 797, 804 (1971) (“[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . .”).

even the “ancient,” standard for lawful warrantless arrests.²⁸² In 1975 Justice Powell blurred historical and modern citations together to erroneously imply that the bare-probable-cause standard for warrantless felony arrests comported with “the common-law antecedents” of the Fourth Amendment.²⁸³ A year later, Justice White also asserted that the “ancient common law rule” permitted an officer to make a warrantless arrest “if there was reasonable ground for making the arrest.”²⁸⁴ He concluded that “[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without warrant, has survived substantially intact.”²⁸⁵ But the Burger Court did not merely distort the history of bare probable cause; rather, the conservative majority drastically relaxed that standard in the 1983 ruling in *Illinois v. Gates*.²⁸⁶

A. *Illinois v. Gates*

Justice Rehnquist’s majority opinion in *Gates* altered the probable-cause standard in several important ways. One was that it totally jettisoned the two-prong *Aquilar–Spinelli* requirement as to the kinds of information regarding informant tips that had to be presented to a magistrate, and instead held that a finding of probable cause was to be assessed on the basis of the “totality of the circumstances.”²⁸⁷ That formulation meant that “everything is relevant, [but] nothing is determinative.”²⁸⁸

282. The myth was well established by the time of the Burger Court. For example, Professor Horace L. Wilgus imparted a false appearance of historical continuity in a 1924 article by comingling sources from Coke and Hale with twentieth-century decisions and presenting them as though they evidenced a consistent treatment of “common law” warrantless arrest authority. See generally Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924). Later commentators continued to reiterate the myth. For example, Professor Landynski asserted in 1966 that at common law “[a] felon could be apprehended on probable cause alone”—apparently without understanding that in framing-era usage the term “felon” denoted the requirement that a felony had actually been committed. JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 45 (1966). For “ancient,” see *Watson v. United States*, 423 U.S. 411, 418 (1976) (discussing the “ancient common law rule”).

283. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975).

284. *Watson*, 423 U.S. at 418 (citing Hale, Blackstone, *Samuel*, *Beckwith*, and *Rohan*).

285. See *id.* at 421. Justice White made similar claims in his 1980 dissenting opinion in *Payton v. New York*, 445 U.S. 573, 607, 609 (1980) (White J. dissenting) (citing the English ruling in *Beckwith* and the 1850 Massachusetts decision in *Rohan* as though they reflected the “common law” standard for warrantless arrests).

More recently, Justice Scalia has made similar claims. See *California v. Acevedo*, 500 U.S. 565, 584 (1991) (Scalia, J., concurring) (citing *Rohan* as though it were authority that common law authorized that “a person may be arrested . . . on the basis of probable cause, without an arrest warrant”). And additional commentators have done likewise. See, e.g., Akhil R. Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 61, 71 (1996) (erroneously describing the post-independence English rulings in *Samuel* and *Beckwith*, which expanded the warrantless arrest authority of peace officers, as though they reflected framing-era common law and the American Framers’ expectations).

286. 462 U.S. 213 (1983).

287. 462 U.S. at 230.

288. Yale Kamisar, *Gates*, “*Probable Cause*,” “*Good Faith*,” and *Beyond*, 69 IOWA L. REV. 551, 570 (1984).

Even more importantly, *Gates* drastically lowered the threshold for finding probable cause by jettisoning the traditional criterion of information sufficient to justify a prudent person's strong suspicion or belief in guilt. To accommodate the poorly corroborated and even partly erroneous anonymous tip in that case, Justice Rehnquist announced that probable cause was satisfied if police had information merely indicating a "fair probability" or "substantial chance" of criminal activity.²⁸⁹

The police investigation in *Gates* began with an anonymous letter asserting that Sue and Lance Gates were drug dealers who had "over \$ 100,000.00 worth of drugs in their basement" and who brought drugs to their home by car from Florida. The writer predicted that Sue would drive the car to Florida to be loaded and then fly home, and that Lance would then fly down and drive the loaded car home. But the letter oddly lacked some basic information; in particular, the Gates's address was simply given as "Greenway, in Condominiums" without a house number. Moreover, it did not disclose the means by which the tipster had obtained this information except by stating that "[t]hey brag about the fact they never have to work, and make their entire living on pushers."²⁹⁰ Nor did the letter indicate whether the tipster had heard this personally or whether this was a hearsay report from someone else. Justice Rehnquist conceded that the letter alone could not constitute probable cause.²⁹¹

Subsequent police attempts to corroborate the tip revealed that the tipster was correct on some points, but incorrect on others. The letter arrived too late for the police to determine if Sue Gates had traveled as predicted.²⁹² The police did confirm, however, that "L. Gates" had a reservation to fly to West Palm Beach, Florida, a few days later, and Lance Gates was then observed boarding and deplaning from that flight. Significantly, he was then observed entering a motel room registered in his wife's name and was seen the next morning leaving "with an unidentified woman" and driving onto a northbound highway in a car with a license registered to the couple.²⁹³ Although Justice Rehnquist's opinion did not confront the point, Sue Gates's presence in Florida—it was certainly highly probable she was the so-called "unidentified woman"—was not only contrary to the tipster's travel prediction but also undercut the claim of a quantity of drugs in the Gates's basement. The odd travel predicted by the tipster suggested that one of the couple always stayed at home to protect the drugs, but that was not what the police actually observed.²⁹⁴ Moreover, the police had merely observed the couple entering a northbound highway. But the

289. 462 U.S. at 238, 246 ("fair probability" of criminal activity); *id.* at 244 n.13 ("substantial chance" of criminal activity).

290. *Id.* at 225.

291. *Id.* at 227.

292. *See id.* at 225–26 (stating that the police received the anonymous letter on May 3, 1978, the same day Sue Gates was supposed to drive to Florida).

293. *Id.* at 226–27.

294. *Id.* at 291–92 (Stevens, J., dissenting).

geography of Florida is such that one would do that to go to numerous vacation sites such as Sea World as well as virtually anywhere else in North America. Thus, the police actually had no significant information as to the Gates's destination when the search warrant was issued for their car and house.²⁹⁵

In sum, the information the police had at the time they obtained the search warrant—which is the time that is relevant for assessing probable cause—consisted of an anonymous tip that had been shown to be incorrect in important ways and uncorroborated in others. Justice Rehnquist would have been hard pressed to claim that that information was either “reasonably reliable” or that it would have “suffice[d] to warrant a man of reasonable caution in the belief” that the Gateses were transporting drugs.²⁹⁶ So he jettisoned that traditional definition of probable cause and instead asserted that information that merely indicated a “fair probability” of criminal activity would do. Moreover, *Gates* also directed reviewing courts to generally defer to the judgment of the magistrate who issued a warrant that probable cause had been shown.²⁹⁷

To provide precedential support for the “fair probability” formulation, Justice Rehnquist exhumed Chief Justice Marshall's 1813 description of probable cause in *Locke* as “circumstances which warrant suspicion.”²⁹⁸ Justice Rehnquist stated that this definition had been given “in a closely related context” but did not actually disclose that *Locke* had articulated probable cause in a customs forfeiture proceeding rather than as a standard for a criminal arrest or search.²⁹⁹ Nor did he even mention the traditional definition of probable cause as sufficient information to warrant a prudent person's belief in guilt—the definition of probable cause that Justices of the Court had recited for nearly a century and a half in *Munns*, *Stacey*, *Carroll*, and *Brinegar*.³⁰⁰ Instead, Justice Rehnquist followed the well-established judicial practice of making the history seem to fit the desired result.

In a concurring opinion in *Gates*, Justice White warned that the *Gates* fair-probability formulation threatened to “eviscerate” the probable-cause standard

295. *Id.* at 292 n.3 (Stevens, J., dissenting).

296. *See supra* note 251 and accompanying text.

297. *Gates*, 462 U.S. at 236 (“[A]fter-the-fact scrutiny by courts of the sufficiency of [the showing of probable cause in] an affidavit should not take the form of *de novo* review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.”).

298. *Id.* at 235 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (affirming condemnation of imported goods as forfeit to the government)). In condemnation proceedings, the burden of proof was on the person opposing condemnation provided only that that “probable cause is shewn for such prosecution.” *Locke*, 11 U.S. (7 Cranch) at 341–42; *see also id.* at 348. It seems unlikely, though, that *Locke* would have been regarded as a precedent for criminal procedure when it was decided in 1813. *See* the discussion of *Locke*, *supra* notes 219–22 and accompanying text.

299. *Gates*, 462 U.S. at 235.

300. *See supra* notes 217, 226, 229, 230 and accompanying text. The closest Justice Rehnquist came to acknowledging the earlier definition was to observe, in a footnote, that the Court had previously discussed probable cause in terms of the officer's “reasonable belief” that a suspect possessed drugs. *Gates*, 462 U.S. at 232 n.7 (citing *Ker v. California*, 274 U.S. 23 (1963)).

for all practical purposes.³⁰¹ That fear was well-founded: although the application of the traditional standard was never overly rigorous in practice, lower-court judges have found probable cause to support police arrests and searches on extremely marginal grounds under the fair-probability formulation.³⁰²

Gates also laid the groundwork for the Burger Court to effectively end enforcement of the Fourth Amendment's explicit ban against the issuance of warrants lacking probable cause. A year later, in 1984, the Burger Court majority adopted the misnamed "good faith exception" to the exclusionary rule in *United States v. Leon*³⁰³ and announced that it no longer mattered if there actually was probable cause for a warrant; rather, evidence seized pursuant to an unconstitutionally issued warrant would be admissible for all purposes provided that the police affidavit was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."³⁰⁴ That is, anything more than a blank or purely conclusory affidavit will suffice to admit evidence seized under a warrant.³⁰⁵ After *Leon*, the probable-cause standard itself matters only for assessing the constitutionality of *warrantless* police searches or arrests—and even then the police need to identify only circumstances sufficient to indicate a fair probability of criminal activity.

B. *Atwater v. City of Lago Vista* and *Virginia v. Moore*

The Rehnquist and Roberts Courts have expanded police power in myriad ways. But two additional decisions are especially relevant insofar as they exploit the *Gates* fair-probability formulation of bare probable cause. The first is the 2001 decision of the Rehnquist Court in *Atwater v. City of Lago Vista*, in which the majority upheld a custodial arrest, complete with handcuffs and booking, of

301. 462 U.S. at 272 (White, J., concurring) (declining to join the majority's adoption of the "fair probability" definition because it "threaten[ed] an evisceration of the probable-cause standard"). See also Wayne R. LaFare, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1065–70 (1987) (criticizing the *Gates* formulation of probable cause).

302. See, e.g., Davies, *Arrest*, *supra* note 3, at 381 n.482 (listing cases).

303. 468 U.S. 897 (1984). The exception is misnamed because it has nothing to do with police "good faith" in the ordinary meaning of that term. Rather, the *Leon* opinion consists of a syllogism based on false dichotomies. The major premise is that the exclusionary rule was meant to apply only to police rather than to magistrates (a false dichotomy); the minor premise is that issuance of an invalid warrant is the fault of only the magistrate rather than the police officer (another false dichotomy because police initiate the warrant request, and the analysis also totally omits the role of the prosecutor who prescreened the warrant application); and the conclusion is that the exclusionary rule does not apply to invalid warrants. Thus, the exception would more appropriately be labeled the blame-the-magistrate exception. Police conduct is relevant under this analysis only if the departure from legal standards is so egregious that no hypothetical officer could have thought that the warrant at issue could be valid.

304. *Id.* at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)).

305. The justices previously ruled in *Nathanson v. United States*, 290 U.S. 41 (1933), that a bare conclusory claim that a police officer knew of or had information regarding criminal activity, without any statement of the factual grounds for that claim, was insufficient to justify issuance of a search warrant. That minimal standard may now be the effective standard for "probable cause" as far as warrants are concerned.

a suburban “soccer mom” who had committed the heinous crime of not wearing a seatbelt.³⁰⁶ Justice Souter’s majority opinion held that the Fourth Amendment’s reasonableness standard did not limit police authority to make arrests (and, by implication, searches of the arrestee’s person and vehicle incident to such arrests) for even the most minor regulatory offenses.³⁰⁷ Justice Souter’s opinion was noteworthy primarily for its unusually elaborate and almost certainly deliberate distortions of framing-era arrest law.³⁰⁸ In particular, he ran roughshod over the historical limitation of less-than-felony warrantless arrests to “breaches of the peace” and indicated in dicta that the majority was inclined to disregard any legal restriction on arrest authority other than the *Gates* fair-probability standard itself—especially the genuinely historical restriction of less-than-felony warrantless arrests to instances in which an officer actually observed an ongoing offense.³⁰⁹

Atwater’s dicta became law in the 2009 decision of the Roberts Court in *Virginia v. Moore*.³¹⁰ Justice Scalia’s opinion for the unanimous Court in that case tossed aside the settled prior rule—recognized in *Carroll* and numerous other precedents—that only a *lawful* arrest can justify a constitutional search incident to arrest.³¹¹ Instead, the justices announced that the Fourth Amendment reasonableness standard authorizes police to arrest whenever they have bare probable cause—that is, a fair probability—that an offense of some kind has been committed, regardless of whether the law of the jurisdiction actually authorizes an arrest for that offense, or permits only the issuance of a summons or ticket.³¹² That is so, according to Justice Scalia’s opinion, because bare probable cause is the *only* constitutional criterion for assessing whether an arrest comports with Fourth Amendment reasonableness, so any state criteria for lawful arrests other than the probable-cause standard itself are “beyond the

306. 532 U.S. 318 (2001). The majority indicated that *Atwater* could have been held for up to forty-eight hours before appearing before a magistrate without a violation of Fourth Amendment reasonableness. *Id.* at 352.

307. *Id.* at 354 (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

308. See Davies, *Arrest*, *supra* note 3, at 274–365 (discussing Justice Souter’s mischaracterizations of framing-era arrest law).

309. See *id.* at 382–88. Justice Souter’s *Atwater* opinion could address that point only in dicta because the arresting officer actually had seen the commission of the lack-of-seatbelt offense.

310. 553 U.S. 164 (2008).

311. See *supra* notes 245–50 and accompanying text (explaining that the Court invented the automobile exception to the warrant requirement in *Carroll* precisely because no *lawful* warrantless arrest could have been made for a misdemeanor violation regardless of probable cause); see also, e.g., *United States v. Robinson*, 414 U.S. 218, 221 n.1, 224–27, 229, 233–36 (1973) (referring repeatedly to the doctrine of a search incident to “a lawful arrest” or noting that arrest in the case was “lawful” and authorized by local statute).

312. 553 U.S. at 177–78.

level that the Fourth Amendment requires.”³¹³ After *Moore*, police can make a constitutional search incident to an *unlawful* arrest!³¹⁴

Although *Moore* might appear to simply reflect the justices’ response to a potentially confusing issue of state arrest law,³¹⁵ it seems highly unlikely that its holding will be confined to that setting. Rather, *Moore* seems to mean that police have constitutional authority to make a warrantless arrest and an incidental search whenever they have information indicating a fair probability that even the most trivial misdemeanor offense has been committed, regardless of any restrictions state law places on making arrests for that offense. By implication *Moore* means that the “in the presence” restriction on warrantless misdemeanor arrests no longer matters for assessing the constitutionality of a warrantless arrest, or of a search made incident thereto, even though that is still a statutory requirement for a lawful warrantless misdemeanor arrest in most states.³¹⁶ Bizarrely, it seems that state law defines the existence of an offense, and also provides the lawful authority for state officers to enforce the offense, but that only the former, and not the latter, matters for Fourth Amendment analysis.³¹⁷

Moore opens the way for extravagant assertions of police arrest and search power. For example, *Moore* allows police to make a constitutional search incident to an arrest for a minor traffic violation for which they are authorized by law only to issue a ticket.³¹⁸ That arrest and search power is significant, moreover, because the Justices have previously held that police are also entitled to stop a car for a traffic violation as a pretext for investigating the possibility of other crime.³¹⁹ Indeed, it would appear that police can even make a

313. *Id.* at 171.

314. In *Carroll*, the justices invented the automobile-search exception to the warrant requirement precisely because they recognized that a search-incident-to-arrest could be based only on a *lawful* arrest, and a lawful arrest could not be made in the circumstances. See *supra* notes 245–50 and accompanying text. But in keeping with the judicial tendency to hide departures from prior rulings, Justice Scalia’s opinion in *Moore* never mentions *Carroll*, let alone acknowledge the contrary analysis in that case.

315. The offense observed in *Moore* would have been arrestable in some counties of Virginia, but was not in the county in which Moore was actually arrested. See 553 U.S. at 167.

316. At least that was still the case in 2002. See Davies, *Arrest*, *supra* note 3, at 386 n.499.

317. Or perhaps the Court will tell us in a future case that there need not actually even be a legally defined offense, but only a “fair probability” that there could be such an offense. For example, if American jurisdictions typically make particular conduct an offense, perhaps it will not matter whether the jurisdiction in which an arrest or search is made actually defines the conduct to be an offense because there was a “fair probability” that it might have been an offense.

318. The Court had previously ruled that issuance of a traffic ticket cannot justify a search. See *Knowles v. Iowa*, 525 U.S. 113 (1998). That ruling now appears to be irrelevant for purposes of applying the Fourth Amendment because an officer can make an illegal arrest for a traffic stop and conduct a constitutional search incident to that illegal arrest.

319. See *Whren v. United States*, 517 U.S. 806 (1996). The allowance of pretextual stops for traffic offenses in *Whren* may also have taken on increased importance as a result of the unanimous decision in *Arizona v. Johnson*, 129 S. Ct. 781 (2009), which authorized police to make “inquiries into matters unrelated to the justification for the traffic stop . . . so long as those inquiries do not measurably extend the duration of the stop.” *Id.* at 788. It remains to be seen what “measurably” will mean.

constitutional but illegal arrest and incident search based merely on a confidential informant's tip that there is a fair probability that a person had driven without a seat-belt on some previous occasion!

Justice Scalia's treatment of history in *Moore* is also noteworthy. Rather than attempt the impossible task of documenting that bare probable cause had been the framing-era standard for warrantless arrests of any kind (which it was not), Justice Scalia—the Court's leading “originalist”—opted for evasion. Specifically, he evaded the historical inquiry by adopting the false posture that *Atwater* had already established that bare probable cause sufficed to justify warrantless misdemeanor arrests at the time of the framing and declined to discuss the point further.³²⁰ So in the Supreme Court, history is reduced to stare decisis, and prior distortions are immune to correction regardless of the weight of contrary evidence.

To give the appearance of engaging with history, though, Justice Scalia decorated his evasion with gratuitous historical misstatements³²¹ and obfuscation. With regard to the latter, he wrote as though the issue was whether the purported (but false) original understanding of Fourth Amendment “reasonableness”—which *Atwater* had incorrectly portrayed to permit arrests for any offenses on bare probable cause—could be *limited* by additional statutory restrictions on arrest authority.³²² But that formulation inverted the

320. *Moore*, 553 U.S. at 169 n.2.

321. In one passage in *Moore*, Justice Scalia wrote that “[t]he immediate object of the Fourth Amendment was to prohibit the general warrants and writs of assistance that *English judges had employed against the colonists.*” 553 U.S. at 168–69 (emphasis added). The italicized statement is historically false. No English judge had any jurisdiction to do anything in the American colonies. The litigation regarding the validity of writs of assistance occurred in the colonial courts, and many of the colonial judges actually refused to issue writs of assistance. The colonial grievance was against the authorization of such writs by parliamentary statutes. See Davies, *Correcting History*, supra note 3, at 29–31. Indeed, one of the English judges, Lord Camden, was a hero to the colonists for condemning general warrants in the English Wilkesite cases. See Davies, *Original Fourth*, supra note 3, at 586, 657–58. I mention this because it seems highly unlikely that Justice Scalia's misleading historical claim merely reflects carelessness or over simplification. Rather, it dovetails too nicely with the attack on the historical warrant requirement that Professor Amar has previously advanced; namely, that the Fourth Amendment was meant to discourage the use of warrants because Americans viewed judges as oppressors. See *id.* at 583–88. Justice Scalia and Professor Amar have previously conducted a sort of tag-team endorsement of a purported historical “reasonableness” standard. See Davies, *Correcting History*, supra note 3, at 32 n.60. So it will not be surprising if some future opinion asserting that the Framers did not value warrants cites this passage in *Moore* as authority for a historical-sounding claim that the Fourth Amendment was actually aimed at curtailing the power of judges. That is how history by stare decisis is concocted.

322. *Moore*, 553 U.S. at 167–71. Citing my 1999 article and another work, Justice Scalia wrote that “No early case or commentary, to our knowledge, suggested the Amendment was intended to incorporate subsequently enacted statutes. None of the early Fourth Amendment cases that scholars have identified sought to base a constitutional claim on a violation of a state or federal statute concerning arrest.” *Id.* at 169. That is utterly beside the point because the constitutional provisions were meant to restrict legislative encroachments on common-law rights. The crucial question is whether Justice Scalia could identify any framing-era authority that permitted a search to be justified on the ground that it was made incident to an *unlawful* arrest. He could not because that claim would have been as bizarre in 1789 as it is today.

whole purpose of the constitutional protections that address arrest standards; they were aimed at protecting the people from expanded arrest authority, not at enhancing government arrest power. The genuine history is that the state and federal “law of the land” and “due process of law” provisions were actually meant to require that criminal arrests and searches be justified by more than bare probable cause—and far more than a mere “fair probability” of criminal activity. Indeed, even if the fictional claim about a historical Fourth Amendment reasonableness standard that Justice Scalia recited in *Moore* were true, his analysis would still invert the Framers’ actual purpose. The Framers sought to prevent legislative relaxation of common-law protections, not to prohibit legislative reinforcement of those protections. *Moore*, however, subverts the Framers’ purpose of preserving a constitutional right of personal security while offering only statist persiflage in its stead.

VIII

CONCLUSION

The authentic history of probable cause shows that “the living Constitution” is not a normative issue, but a historical fact. The authentic history of bare probable cause is not a story of staunch judicial enforcement of a long-standing historical standard. Rather, it is a story of how state and federal judges surreptitiously engineered a massive expansion of government arrest and search power. Thus, the purportedly originalist claims in recent Supreme Court search-and-seizure opinions do not track the real history; rather, they conceal it. The authentic history of probable cause is the story of how American judges, and particularly Supreme Court Justices, have effectively destroyed the civil right to be free of arbitrary arrest and search.

However, the moral of the authentic story of probable cause is not to call for a return to the historical common-law standards. Far too much has changed since the adoption of the Bill of Rights for that. Some relaxation of the common-law crime-in-fact requirement was surely necessary for effective law enforcement in a complex, largely urban society. The disquieting aspect of the authentic history of probable cause is that judges and justices have been unwilling to own up to the changes they have made. They have repeatedly expanded government police power while pretending to merely adhere to prior doctrine. The fact that they have been unwilling to describe their rulings honestly suggests that we should be very skeptical as to whether current doctrine strikes the right balance between liberty and law enforcement—especially because it is now difficult to identify meaningful constitutional limits on police arrest and search power.³²³

323. See Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY (forthcoming 2010).