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### The Modern History of Probable Cause

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# THE MODERN HISTORY OF PROBABLE CAUSE

WESLEY MACNEIL OLIVER\*

We often assume that those who wrote the Constitution understood its terms in a way that bears at least some similarity to the way we understand those terms today. This assumption is essential to the legitimacy of using Framing Era sources to inform the meaning of Constitutional provisions that regulate this system. This assumption is incorrect for one of the most important terms in criminal procedure. Probable cause meant something very different to the Framers than it means to modern lawyers. Probable cause was, as a practical matter, often nothing more than a pleading requirement for victims or officers who witnessed crimes. The modern notion of probable cause, an evidentiary threshold permitting a search or arrest that can be satisfied by the fruits of an officer's investigation, is a creation of the mid-nineteenth century. As with a number of Constitutional doctrines regulating the criminal justice system, we must look beyond the Framing Era to discover the origins of probable cause as it is understood by present-day lawyers.

INTRODUCTION .....	377
I. VICTIMS DROVE EIGHTEENTH-CENTURY CRIMINAL INVESTIGATIONS.....	381
<i>A. Criminal Investigations</i> .....	382
<i>B. Customs Investigations</i> .....	394
II. NINETEENTH-CENTURY PROHIBITION FASHIONED POLICE-FRIENDLY SEARCH STANDARD.....	399
III. LAW ENFORCEMENT NEEDS PROMPTED A BROADER ARREST POWER .....	419
CONCLUSION .....	428

## INTRODUCTION

Our reliance on Framing Era materials to define how constitutional provisions ought to apply to modern law enforcement practices depends on

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a very basic premise: that the Framers understood the terms of their document as we understand them today. For one of the most important constitutional terms regulating modern criminal procedure—probable cause—that simply is not the case.

In the Framers' victim-driven criminal justice system, probable cause was both more and less restrictive than it is under modern law. Probable cause was not enough to initiate a search or perform an arrest. Unless an officer saw a crime in progress, probable cause was sufficient for an arrest only if a victim attested that a crime had occurred. Officers were, therefore, most unlikely to act on mere suspicion, regardless of how strong it may be, lest they face civil damages. The Framing-Era criminal justice system did not, however, need to depend on officers investigating crimes and vigorously acting on their suspicions. An oath that a crime had occurred was all the evidence required for a victim to obtain a warrant to search for physical evidence in criminal cases. The victim merely had to assert that he had probable cause to suspect the person identified as the culprit, or had probable cause to believe evidence of a crime could be located in the identified location. Probable cause was essentially a pleading requirement that was easy for victims to satisfy but nearly impossible for public investigators in criminal cases to satisfy.

The reasons those in the Framing Era relied on victims were twofold. First, the eighteenth-century criminal justice system had little choice but to rely on victims.<sup>1</sup> The apparatus of law enforcement was in its infancy, ill-equipped to investigate criminal activity as a matter of routine.<sup>2</sup> Furthermore, its officers did not enjoy a privileged status in the social hierarchy. Therefore, eighteenth-century constables and watchmen lacked the capability and even the public trust necessary to engage in criminal investigations. Second, the eighteenth-century criminal justice system *could* rely almost exclusively on victims. Victimless crimes were virtually unknown in the Framing Era, so there was little need for the eighteenth-

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1. See George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1468–69 (2005); J.M. Beattie, *Early Detection: The Bow-Street Runners in Late Eighteenth-Century London*, in POLICE DETECTIVES IN HISTORY 1750–1950 15 (Clive Emsley & Haia Shpayer-Makov, eds., 2006) (observing that “there were severe limits as to the help victims of crime could expect to receive from [constables.]”); 3 I.N.P. STOKES, THE ICONOGRAPHY OF MANHATTAN ISLAND 642–44 (1918).

2. Burt Neuborne, *The House was Quiet and the World was Calm The Reader Became the Book*, 57 VAND. L. REV. 2007, 2032 n.78 (2008) (“The civilian law enforcement authorities contemplated by the Founders did not include large professional police forces, which did not evolve until the middle of the nineteenth century. Instead, civilian law enforcement was the province of bounty hunters, individual officials, and/or *ad hoc* bodies, often using temporary personnel provided by powerful private interests or drawn from the local population.”); see generally Wesley MacNeil Oliver, *Magistrates' Examination, Police Interrogations, and Miranda-Like Rules in the Nineteenth Century*, 81 TUL. L. REV. 777 (2007) (describing the rise of police interrogation).

century probable cause standard to authorize the intervention of the criminal justice system without a victim's complaint. Moreover, in a world in which victims were strictly liable for the fruitless searches they requested, there was little reason to require victims to provide more than their assurance that they had suspicion.<sup>3</sup>

The modern notion of probable cause, an evidentiary threshold that can be satisfied by anyone with relevant information, developed as society called for, and came to accept, modern police forces and began to regulate private moral practices. In no small part, metropolitan police forces were created for the express purpose of investigating and controlling crime.<sup>4</sup> The existence of these departments created pressure for a legal standard that did not require them to first ensure that a crime had been committed before arresting. The new standard developed despite the concerns created by the abuses of early police forces.

These new law enforcement organizations would have soon discovered that they also had an interest in a legal rule that would allow them to conduct *searches* without a victim's complaint. Mid-nineteenth century moral crusaders, however, beat them to the punch. Statewide versions of Prohibition preceded National Prohibition by about seventy years and required a search and seizure mechanism for enforcing this victimless crime. Unwilling to grant temperance zealots crime victims' power to

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3. See Fabio Arcila, *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1318 (2010) (describing strict liability for affiant who sought fruitless search in the eighteenth century).

4. There is substantial agreement that the immediate impetus for these new departments was a wave of nineteenth-century riots, though the mission statements of these new departments all included the investigation of crime. See Robert Libman & Michael Polin, *Perspectives on Policing in Nineteenth Century America*, 2 SOC. SCI. HIST. 346 (1978) (reviewing scholarship on the creation of early police forces); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 119–20 (1989) (“Direct attempts at reform and efforts to retrain private prosecution made little contribution to the development of state prosecution. Instead, it emerged piecemeal, as a response to the increasing erosion of public order, primarily through the haphazard growth of the authority of the police.”); SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 4 (1977) (contending that modern police forces were developed as a “consequence of an unprecedented wave of civil disorder that swept the nation between the 1830s and the 1870s.”); see also MARILYNN JOHNSON, *STREET JUSTICE: A HISTORY OF POLICE VIOLENCE IN NEW YORK CITY* 17–18 (2003). But see ERIC MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 56 (1981) (contending that cities seized the opportunity to create a mechanism of social control but were not motivated by any particular events); EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 637–38 (1999) (attributing to a brutal unsolved murder willingness of New Yorkers to finally accept a new police force); AMY GILMAN SREBNICK, *THE MYSTERIOUS DEATH OF MARY ROGERS: SEX AND CULTURE IN NINETEENTH-CENTURY NEW YORK* 87 (1995) (noting a brutal unsolved murder as a source for New Yorkers' willingness to accept a new police force).

satisfy probable cause upon a mere plea, legislators offered a new method for obtaining a search warrant in liquor cases. Prohibition statutes required applicants for search warrants to describe the liquor sales they allegedly observed in order to obtain warrants to search a dwelling. This was the first time a warrant could be obtained in an ordinary criminal case by an investigator who, though he could not say with absolute certainty that a crime had been committed, could satisfy probable cause, understood as an evidentiary threshold.

Therefore, probable cause, as we understand it today, is not the Framing-Era standard referred to in the Fourth Amendment.<sup>5</sup> Probable cause as an evidentiary threshold effectively did not exist in criminal cases in the late eighteenth century. The origins of the modern standard lie neither with the Framers, nor in ancient doctrines that long preceded their work. Modern probable cause—a standard for criminal cases—was a by-product of the work of mid-nineteenth-century reformers.

This article traces the mid-nineteenth-century development of this criminal standard believed to be of considerably older origins. Part I looks at the standard in the Framing Era, observing that there were two parallel tracks of law enforcement during this period. The enforcement of ordinary criminal laws depended on victims' complaints while customs and revenue enforcement could, obviously, not await the complaint of victim. In the early years of the country, these parallel tracks remained quite separate. Customs officials, who were no more harmed by violations than any other members of society, were necessarily required to obtain warrants on the basis of their investigations. Ordinary constables and watchmen, who enforced the general criminal law, could—and were expected to—rely on victims' investigations.

These systems began to merge, as Part II describes, as Prohibitionists sought a mechanism to search for alcohol. There was considerable distrust of those zealots who would seek warrants, prompting a mechanism to ensure the accuracy and veracity of complaints in the cases of victimless crimes. Probable cause, the evidentiary threshold sufficient for a search that we know today, developed as victimless crimes made a new method of authorizing searches a necessity. Distrust of Prohibition investigators ensured that this new standard for victimless searches would not rely on the

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5. Many commentators have observed the increase in police officers' search and seizure powers beginning in the mid-nineteenth century with the creation of professional police departments, but no one has previously attempted to explain how feared rules giving extraordinary discretion to officers came to be accepted. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999); Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 689 (2009) (noting nineteenth-century "shift toward greater police powers over the suspect"); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 579 (2008) (noting "dramatic" and "all encompassing" changes that accompanied creation of nineteenth-century police forces).



good faith of complainants as the criminal law had previously done. While the nineteenth-century version of Prohibition did not last, it left a search standard permitting magistrates to authorize search warrants on probable cause, as understood in the twenty-first century, alone.

A standard that allowed a government intrusion once an investigator had sufficient evidence was obviously useful to the work of members of newly created metropolitan police departments. As Section III describes, this standard allowed them to arrest immediately when their investigations suggested the guilt of a suspect. Such a standard was nearly essential for the new forces to perform the role assigned to them of aggressively preventing and solving crime. The early years of at least one police department, the New York Metropolitan Police Department, reveal that early and frequent misconduct made the public understandably reluctant to trust these new officers. The interests of the new police department nevertheless prevailed and the new arrest standard was embraced.

Probable cause as we understand it today, a foundational criminal law standard believed to substantially pre-date the Constitution, was thus not a criminal law standard at all in the eighteenth century. Rather, this standard, which alone justifies a search or arrest in a criminal case, is a creature of the mid-nineteenth century. At least in criminal cases, it meant something very different to the Framers than it means to modern lawyers. If history is to be a guide, its usefulness begins no earlier than the point at which our understanding of these terms began to map onto modern practice. For probable cause, that point occurred as law enforcement and Temperance interests first converged.

#### I. VICTIMS DROVE EIGHTEENTH-CENTURY CRIMINAL INVESTIGATIONS

The rules governing ordinary criminal investigations recognized and marginalized the role of the eighteenth century's part-time law enforcement officers in the criminal justice system. They were the ministerial assistants—the muscle—for victims and magistrates who directed their searches and seizures.<sup>6</sup> A victim's oath that a crime had occurred, and that he suspected a particular person, was both necessary and sufficient to initiate a criminal prosecution, leaving only a minor role for the constable.<sup>7</sup> Customs officers, by contrast, could act on the basis of what they learned

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6. See Beattie, *supra* note 1, at 15; Roger Lane, *Urban Police in Nineteenth Century America*, 15 CRIM. & JUST. 1, 5 (1992); H.B. Simpson, *The Office of Constable*, 10 ENG. HIST. REV. 625, 635–36 (1895).

7. See Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 17–45 (2007) (contending that magistrates in the Framing Era did not require applicants for warrants to provide facts supporting their suspicions); WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791 754, 757 (2009). *But see*, Davies, *supra* note 5, at 623.

through their investigations. Unlike ordinary officers, they routinely sought warrants and acted without warrants. Ordinary officers could not act on any quantum of proof—probable cause or otherwise—with or without a warrant, unless a crime had actually occurred, typically requiring them to wait for victims' complaints. Probable cause alone therefore had no role in the ordinary criminal justice system. Until broader search and seizure powers were conferred on officers enforcing the criminal law in the mid-nineteenth century, there were two very different schemes of search and seizure law in this country—one for criminal investigations, the other for customs and revenue enforcement.

### A. Criminal Investigations

Early nineteenth-century criminal procedure severely limited the discretion of the majority of officers by effectively making them the ministerial assistants of magistrates and, ultimately, crime victims. Crime victims at the turn of the nineteenth century exercised the greatest discretion of any of the actors in the ordinary criminal justice system.<sup>8</sup> For most crimes, they alone conducted the investigation, identified suspects, and determined whether their suspicions were adequate to initiate a criminal prosecution.<sup>9</sup> Once victims announced their suspicions, constables were given fairly precise directions about the persons or property to seize.<sup>10</sup> Even

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8. See William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 650–54 (1975).

9. There seems to have been some variation in state practices, as one would logically expect in a world lacking modern instantaneous communication capability. Sources from some states suggest that applications for search or arrest warrants during the Framing Era required complainants to provide a factual basis for their suspicions. See Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common Law Criminal and Arrest and Search Rules in "Due Process of Law" – "Fourth Amendment Reasonableness" is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 90–91 (2010) (observing that the Virginia Constitution of 1776 and the North Carolina Constitution of 1777 required that criminal warrants be supported by "evidence of a fact committed," while the Massachusetts Constitution of 1780 required only that "the cause or foundation" for a warrant be "supported by oath or affirmation."). As discussed below, however, it seems likely that the practice even in Virginia and North Carolina did not involve complainants providing the factual basis for their suspicions. In New York, for instance, even after a statute made a magistrate's duty to decide whether the facts offered by the complainant justified the warrant, in practice these magistrates do not have appear to have done anything other than accept the affiant's assertion that he had probable cause.

10. See Beattie, *supra* note 1, at 15; Lane, *supra* note 6, at 5. The broad power of search incident to arrest would seem to undermine this claim and, as a matter of pure doctrine, surely it does. See discussion *infra* at note 43. The victim, however, accompanied the officer and directed his search. See 5 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 199–200 (1776). This is not to say that there was not broad discretion in the eighteenth century to search for stolen goods. The discretion, however, was as a practical

when an officer had a sound basis for suspecting guilt, there was no mechanism for the officer to seek a warrant. An applicant for a warrant had to swear that a crime had been committed, which an officer could not do in most cases.<sup>11</sup> Before taking any action, a Colonial or early American officer responsible for enforcing the criminal law waited for a complainant to obtain a warrant, which shielded the officer from civil liability for fruitless searches or erroneous arrests.<sup>12</sup> Once the complaint was made, the officer relied on the victim's suspicions—he had no reason to conduct his own investigation.<sup>13</sup>

Victims exercised extraordinary discretion in this system. A criminal action at the turn of the nineteenth century was generally commenced by securing a warrant for a suspect's arrest or a warrant to search for particular property.<sup>14</sup> It was remarkably easy for crime victims to obtain arrest and

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matter, exercised by the victim of the crime, not the officer.

11. See Davies, *supra* note 5, at 622–23.

12. The public had an intense fascination with search and seizure law at two points in American history: the era immediately preceding the American Revolution and during the effort to enforce national Prohibition. One of the critics of Prohibition, United States Senator A. Owsley Stanley of Kentucky (one of the country's largest producers of alcohol, then and now) observed that "the right to search and seize without a warrant was never vested in constables." A. Owsley Stanley, *Search and Seizure: Senator Stanley Attacks Constitutionality of New Prohibition Act*, N.Y. TIMES, Jan. 8, 1922, at 88. His conclusion was certainly correct with regard to the specific law enforcement officers to which he referred. See Davies, *supra* note 5, at 640–41. Customs and revenue officers, since the earliest days of the republic, however, had been vested with substantial powers of warrantless search and seizure. See Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 924 (2002) (observing that the modern Court has used the broad powers of customs agents to search without warrants to justify searches to enforce ordinary domestic crimes).

13. See discussion at *supra* note 12 and accompanying text.

14. Arrest warrants were far more common in the late eighteenth and early nineteenth centuries than search warrants. Search warrants were generally useful only in cases involving stolen items. In these collections, warrants in theft cases are more often for an arrest than for a search. ELIJAH ADLOW, *THRESHOLD OF JUSTICE: A JUDGE'S LIFE STORY* (1973) (describing Judge Adlow's discovery of these documents); *Barrett Warrants (1787–1791), Gorham Warrants (1816–1818)*, Adlow Collection, Boston Public Library. Probable cause necessary to obtain a search warrant also permitted the applicant to obtain an arrest warrant. The very broad doctrine of search incident to arrest permitted an officer to search the arrestee's entire house for the stolen item. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 27–29 (1969); Morgan Cloud, *Searching Through History, Searching for History*, 63 U. CHI. L. REV. 1707, 1729 n.73 (1996) (describing Taylor's conclusion about a broad search incident to arrest doctrine as "noncontroversial").

Despite Cloud's conclusion, there has been some debate about the scope of the doctrine of search incident to arrest. William Cuddihy colorfully described the scope as follows. "Anyone arrested [in the eighteenth century] could expect that not only his surface clothing but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." Thomas, *supra* note 1, at 1474 (citing CUDDIHY, *supra* note 7, at



search warrants, making public investigations unnecessary, at least in those cases in which the victim was fairly comfortable identifying the culprit. A complainant would appear before a magistrate and swear that a crime had occurred and that he had probable cause to believe the identified suspect guilty, or that evidence of the crime could be located in a particular location.<sup>15</sup> His assertion of the injury associated with the crime—i.e., loss of property in a theft case—was sufficient to demonstrate that the crime had occurred.

What it meant for the complainant to provide the magistrate probable cause has become the subject of a fairly intense debate in the academic community. Thomas Davies has argued that a complainant in the Framing Era was required to provide a magistrate with the facts upon which he based his suspicions and that the magistrate was to review the facts to determine whether they rose to the level of probable cause.<sup>16</sup> By contrast, Fabio Arcila has contended that, as a practical matter, probable cause was analogous to a pleading requirement.<sup>17</sup> He concludes that magistrates were not performing a gatekeeper function at all when presented with requests for warrants.<sup>18</sup> According to Arcila, a victim was only required to swear that a crime had been committed and that he *had* probable cause to believe the named suspect was guilty or that evidence of the crime could be discovered in the identified location.<sup>19</sup> Davies relies upon seventeenth- and eighteenth-century treatises that describe a magistrate as having a duty to consider the facts upon which the complainant relies for his suspicion. Arcila relies upon justice of the peace manuals and form books of the same period which appear to require the magistrate to ensure only that the complainant has sworn that a crime has occurred and that he, in fact, has

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847–48). George Thomas has quite reasonably responded that a society that strictly limited an officer's right to arrest a suspect would be reluctant to allow an officer to search "beyond what was necessary to disarm him." *Id.* While it is hard to argue with Thomas' logic, his conclusion seems undermined by the few archived warrants that have survived from the late eighteenth and early nineteenth centuries in the Adlow Collection of the Boston Public Library. Victims of theft would have been interested in securing the evidence necessary to prove that the theft occurred and, far more importantly, ensuring the return of their property. If the search incident to arrest power were not quite so broad, one would expect search warrants rather than arrest warrants to have been issued in the vast majority of theft cases.

15. Form of a Complaint to Obtain a Search Warrant, in GENTLEMEN OF THE BAR OF NEW YORK, THE ATTORNEY'S COMPANION 435 (Poughkeepsie, N.Y., P. Potter & S. Potter 1818).

16. Davies, *supra* note 5, at 651–52; Thomas Y. Davies, *An Account of Mapp v. Ohio that Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619, 621–22, 624 n. 19 (2007).

17. See CUDDIHY, *supra* note 7, at 582 ("The general rule was that magistrates neither examined complainants independently to determine their adequacy for warrants nor withheld warrants if the assessment was negative."). See generally Arcila, *supra* note 7.

18. See generally Arcila, *supra* note 7.

19. See generally *id.*

probable cause. And while Davies points out that the form books contained explanatory notes reiterating the duty of the magistrate to determine that probable cause existed,<sup>20</sup> it is the forms themselves, not the explanatory notes that followed, that appear to have driven the practice. As one might expect, government officials appear to have developed a practice of obtaining merely the information required to complete the forms.

Legal treatises dating back to the seventeenth century observed that magistrates were to examine the facts supporting an application for an arrest or search warrant. This rule was announced by such legal luminaries as Matthew Hale, William Hawkins, and William Blackstone.<sup>21</sup> There are, nevertheless, substantial reasons to believe that Arcila has accounted for the actual practice of eighteenth- and early nineteenth-century magistrates.

In their landmark work on law enforcement in colonial New York, Julius Goebel and T. Raymond Naughton observe that magistrates around the turn of the eighteenth century occasionally declined to issue warrants requested of them, but that there were frequent complaints made that magistrates felt they had such discretion.<sup>22</sup> A magistrate's review of the facts supporting a complainant's suspicion seems to have been an aberration and there was great public pressure to eliminate these aberrations. Further, if magistrates at the turn of the nineteenth century were requiring complainants to provide factual support for their suspicions, they made no record of these facts. The few actual warrant applications that have survived from the turn of the nineteenth century reveal that, consistent with the form books Arcila cites, warrant applications contained no recitation of the facts complainants relied upon.<sup>23</sup>

Several pieces of evidence from the mid-nineteenth century provide further support for the conclusion. Oliver Barbour's treatise on New York criminal procedure observed in 1841 that, "[a]t common law, it seems a magistrate might issue his warrant upon a general oath of suspicion merely. This was on the ground that the complainant was a competent judge of the matters upon which his suspicion rested."<sup>24</sup> Henry Dutton's Connecticut

20. See Davies, *supra* note 9 at 78 n.122.

21. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 290–91 (London, 1826) (1790); 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 150 (London, E. Rider, Little Britain 1800); 2 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 130–31 (Thomas Leach ed. 6th ed., London, His Majesty's Printer 1824) (1787).

22. JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 424–25 (1944).

23. See Barrett Warrants (1787–1791), Gorham Warrants (1816–1818), *supra* note 14; Thomas Y. Davies, *Revisiting the Fictional Originalism in Crawford's "Cross-Examination Rule" - A Reply to Mr. Kry*, 72 BROOK. L. REV. 557 (2007).

24. OLIVER L. BARBOUR, THE MAGISTRATE'S CRIMINAL LAW: A PRACTICAL TREATISE ON THE JURISDICTION, DUTY AND AUTHORITY OF THE JUSTICES OF THE PEACE IN THE STATE OF NEW-YORK, IN CRIMINAL CASES 454 (1841). Barbour's conclusion that New York state practice after the adoption of the Revised Laws of 1829 required an applicant to demonstrate

treatise observed that a “justice of the peace may issue a warrant to search for stolen goods; but to authorize this, there must be the oath of the applicant that the goods have been stolen, and that he strongly suspects that they are concealed in a certain place.”<sup>25</sup> As a Justice of the Connecticut Supreme Court, Dutton would observe that the “oath of a person who lost the goods” swearing that he “has just grounds to suspect and does suspect that the goods were taken by [the identified culprit]” was sufficient to obtain a search warrant.<sup>26</sup>

Finally, mid-nineteenth-century courts were obsessed about the specific language in the complaint, which was generally contained in the pre-printed portion of a form that the complainant filled out.<sup>27</sup> State courts found search and arrest warrants invalid because the complainant had sworn that he “had cause to suspect and did suspect” that the identified person was the culprit, or that evidence of his crime could be found in a particular location.<sup>28</sup> The

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the factual basis of his suspicions to a magistrate was demonstrated to be false—at least as a practical matter—with the reports of the Commissioner on Pleading and Practice, who observed that magistrates were not examining the factual foundation at all. *See* discussion *infra* notes 36–37 and accompanying text.

25. HENRY DUTTON, A REVISION OF SWIFT'S DIGESTS ON THE LAWS OF CONNECTICUT 505 (New Haven, Durrie & Peck 1851). For a more complete description of Henry Dutton's life, *see* discussion *infra* note 26.

26. *Lowrey v. Gridley*, 30 Conn. 450, 456–57 (Conn. 1862). Connecticut is admittedly not a typical case. Henry Dutton had a clear motive to resolve any ambiguity about a magistrate's duty to examine the facts supporting a complainant's requested warrant in favor of not requiring such an examination. Dutton, a Yale Law Professor in 1851, wrote his treatise prior to advocating passage of the state's prohibitory law as a member of the legislature. The law he advocated contained the most permissive search standard in the country. *See* YALE UNIVERSITY, OBITUARY RECORD OF GRADUATES OF YALE COLLEGE: DECEASED FROM JULY, 1859 TO JULY, 1870 (New Haven, Tuttle Morehouse & Taylor 1870); Letter to the Editor, HARTFORD COURANT, April 21, 1854, at 2 (describing Dutton's role); *The Maine Liquor Law – As just passed by the Connecticut Legislature*, NEW YORK TIMES, June 22, 1854 (describing law). The mere allegation of three persons that liquor was present in a home was sufficient to obtain a warrant under this statute. *Id.* The same legislature that enacted the prohibitory law, elected him Governor of Connecticut. He subsequently became a justice on the state supreme court, where in the *Lowrey* case he was asked to pass on the constitutionality of the search and seizure process permitted under the statute. Dutton reasoned that the liquor law was more protective of individual liberty than searches for stolen goods, which could proceed on the mere allegation of a single person that the goods were in a particular location. *Lowrey*, 30 Conn. at 456–57. One could reasonably surmise that Dutton was laying the legal groundwork for the *Lowrey* decision for over a decade, even though it would be a stretch to suppose that he saw himself writing it ten years later.

27. Form of a Complaint, *supra* note 15; 2 N.Y. REV. STAT., pt. 4, ch. 2, tit. 2 (1836); Mass. Rev. Stat. title II, ch. 142, § 1 (1836).

28. *See* 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. Lago Vista*, 37 WAKE FOREST L. REV. 239, 381 n.480 (2002) (citing *Humes v. Taber*, 1 R.I. 464, 465 (1850)). The Massachusetts Supreme Judicial Court similarly found that a search

courts found these warrant applications insufficient because the complainant had not demonstrated adequate certainty about his suspicions.<sup>29</sup> Complainants in these states were thus required to swear that they had “probable cause to believe and did believe” that the identified person was the culprit, or that evidence of his crime could be located in the location identified.<sup>30</sup> If magistrates in the mid-nineteenth century reviewed the facts complainants offered, the complainant’s characterization of his level of suspicion would have been irrelevant. The magistrate’s independent determination that there was probable cause would have overcome any lack of certainty expressed in the form pleading used by the complainant.

Magistrates certainly could—and did—reject warrant applications, but their rejections appear to have been based on concerns about complainants, not their complaints. This victim-driven system was willing to trust victims only so long as they appeared trustworthy. As one treatise writer observed, “Where a magistrate has reasonable ground to believe that the charge preferred is the offspring of malice and a corrupt heart, he may require further evidence of its truth than the oath of the complainant.”<sup>31</sup> Somewhat

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warrant for lottery tickets based on a complainant’s oath that he had “probable cause to suspect” the tickets present was insufficient. *Commonwealth v. Certain Lottery Tickets*, 59 Mass. 369, 372 (Mass. 1850). Like Rhode Island, Massachusetts, by statute, required an applicant for a search warrant to swear that he believed the evidence could be discovered in the location identified. The court held that a warrant application “sworn to in the old form,” i.e., the one used before the Massachusetts Revised Statutes of 1837, was invalid, at least for searches that had not previously been authorized on “suspicion” rather than “belief.” *Id.* at 372. The Massachusetts case offered something of a preview of issues that would arise with Prohibition. Massachusetts, unlike most states of the mid-nineteenth century, had passed a statute authorizing a search for evidence of victimless crimes. Searches could be instituted in Massachusetts for counterfeit money, obscene publications, lottery tickets, or gaming devices. Mass. Rev. Stat. tit. II, ch. 142 § 2. The Revised Statutes required a complainant to assert his “belief” in seeking all warrants, whether to search for stolen goods or evidence of the new victimless crimes. *Id.* at § 1. The court held that it was not required to consider, in this case involving lottery tickets, whether the old form was adequate for a search warrant to recover stolen goods. The suggestion that different standards might apply to searches for victimless crimes would reappear when Prohibition created a realistic threat that victimless crimes would be prosecuted.

29. See *Certain Lottery Tickets*, 59 Mass. at 372.

30. *Id.*

31. See JOHN C.B. DAVIS, *THE MASSACHUSETTS JUSTICE: A TREATISE UPON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE: WITH COPIOUS FORMS* 192 (Worcester, Mass. 1847) (also observing that the magistrate “may, also, upon deliberate consideration, refuse to institute a criminal process,” suggesting that usual course was to grant requested warrant); see also BARBOUR, *supra* note 24, at 451 (stating that a magistrate “ought not . . . to proceed upon a complaint solely because such complaint has been made; for though there be a positive charge on oath by a competent witness, if the justice sees that no credit is to be given to it, he may, and should doubtless, decline acting on it”). Barbour’s treatise did recognize that New York judges had a duty to inquire into the facts supporting warrant applications. BARBOUR, *supra* note 24, at 454. This reference was, of course, to the



remarkably, victims were never required to provide any sort of surety when they requested arrest or search warrants. This is particularly striking in light of the fact that in the eighteenth century some authorities concluded that applicants for warrants were strictly liable in trespass for erroneous arrests or fruitless searches.<sup>32</sup> By the mid-nineteenth century, the burden had shifted. A victim of an improper search or arrest had the burden of proving that the complainant lacked probable cause, virtually immunizing him from suit.<sup>33</sup>

The mid-century battle over state prohibitory laws provides further evidence that magistrates were not expected to scrutinize warrant applications. As will be discussed much more fully below, legislatures refused to authorize warrants to search for liquor that followed the same procedures used for ordinary search and arrest warrants.<sup>34</sup> Prohibition bills permitting these warrants were accepted only after they were modified to require their applicants to explain why they believed alcohol could be discovered in the location indicated and a magistrate to find these facts provided probable cause.<sup>35</sup> If this procedure merely restated existing practice, it seemingly could not have ameliorated the concerns of even a single opponent of the proposed law.

Whatever the actual practice at the turn of the nineteenth century, it is very clear that by the middle of the century, magistrates were not considering the grounds supporting a requested warrant, even when expressly required to do so by statute. Statutory revisions in New York in 1829, and Massachusetts in 1836, contained provisions requiring a judge's evaluation of the facts supporting a complainant's fact, but magistrates ignored both provisions.<sup>36</sup> The New York Commissioners on Pleading and

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requirement codified in New York's statutes of 1829, which would not be followed in practice. As a corollary, the reputation of the suspect was expressly identified as a sufficient basis for a magistrate to determine that the complainant had demonstrated probable cause. See Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 481 n.94 (1983-84) (quoting William Hawkins' eighteenth-century treatise).

32. See *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.); 2 Wilson 275 (Eng.).

33. See *Burns v. Erben*, 40 N.Y. 463, 465 (N.Y. 1869) (in an action for malicious prosecution, "the burden was upon the plaintiff to show a want of probable cause.").

34. See discussion *infra* notes 114-133 and accompanying text.

35. See discussion *infra* notes 115-133 and accompanying text.

36. This is one example of the notice taken of New York's criminal procedure outside the Empire State. The Massachusetts legislature used virtually the identical language that the New York Legislature had used. GEORGE EDWARDS, A TREATISE ON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE AND TOWN OFFICERS IN THE STATE OF NEW YORK, UNDER THE REVISED STATUTES WITH PRACTICAL FORMS (Ithaca, Mark, Andrus & Woodruff, 3rd ed. 1836) (quoting N.Y. Rev. Stat. p. 746, Tit. 7, Part IV, § 25 ("if such magistrate be satisfied that there is reasonable ground for [the complainant's] suspicion, he shall issue a warrant to search for such property.")); Mass. Rev. Stat. tit. II, ch. 142, §1 (1836) ("if [the magistrate] be satisfied that there is reasonable cause for [the complainant's] belief, [he] shall issue a

Practice, charged with the duty of producing a Code of Criminal Procedure, complained in 1850 of the "loose practice" of magistrates in issuing warrants. They observed that "[i]t is very common, for example, to state in cases of larceny, nothing more, than that the property was stolen taken away &c., by the person charged."<sup>37</sup>

There were no penalties for ignoring statutory provisions requiring magistrates to assess the strength of the facts supporting a victim's allegation of probable cause. As an example of this, the Massachusetts Supreme Judicial Court held in 1841 that there was no remedy against a magistrate for granting a warrant without considering the facts supporting the complainant's allegation, or against the complainant for requesting it<sup>38</sup>:

The great security of the citizen from unreasonable arrest or seizure of goods is this, that the warrant is only to issue upon the oath of the complainant alleging a larceny, &c., and his belief that the party accused is guilty of the offence; or, in the case of seizure on a search warrant, that he believes the property stolen, embezzled, &c., to be in the place searched.<sup>39</sup>

This system placed great trust in victims who, by the mid-nineteenth century, were liable for malicious prosecution only if the target of the investigation could demonstrate that the complainant lacked probable cause.<sup>40</sup> When a crime victim went to the magistrate, he sought one of two types of warrants to initiate a criminal action. If he swore he knew who had committed the crime, he requested a warrant for the culprit's arrest; if he swore he knew where stolen goods could be found, he asked for a search warrant. For a variety of reasons, arrest warrants were far more common than search warrants.<sup>41</sup> In a world before forensic science, the only type of search warrant that would have been useful to a victim was one to recover stolen goods.<sup>42</sup> Further, the doctrine of search incident to arrest was extremely broad in the late eighteenth and early nineteenth centuries. If a victim swore he had probable cause to believe a particular person had stolen

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warrant to search for such property.").

37. SELECT COMMITTEE ON CODE OF CRIMINAL PROCEDURE, REPORT, DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW YORK, 78th Sess., NO. 150, at 79, § 149 (1855). [hereinafter CRIMINAL CODE].

38. *Stone v. Dana*, 46 Mass. (5 Metc.) 98 (1842).

39. *Id.* at 109–110.

40. See discussion at *supra* note 33.

41. See e.g., Barrett Warrants (1787–1791), Gorham Warrants (1816–1818), *supra* note 14.

42. It is frequently stated that the common law only permitted searches for stolen goods, which is true, but there is a caveat: certain statutes allowed searches for smuggled goods and dangerous items, such as gunpowder or diseased or infected animals. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 765 (1994).

his property, an arrest warrant would have permitted his apprehension as well as a search of his premises for the missing items.<sup>43</sup>

State officers exercised almost no discretion in the investigatory or prosecutorial process. The constable's role in the criminal case ended with the arrest and any search that accompanied it. The magistrate was the only participant in the criminal justice system expected to question suspects.<sup>44</sup> The constable was not expected to question the suspect.<sup>45</sup> Some English authorities at the turn of the nineteenth century actually forbid the constable to question the suspect, though American authorities never adopted this position.<sup>46</sup> In the United States, custom and lack of institutional incentive were likely sufficient to prevent the practice of routine police interrogation from developing before the creation of professional police departments.<sup>47</sup> Beyond this, any inducement or promise held out by a constable threatened the admissibility of the statement the accused made further discouraging any effort at interrogation.<sup>48</sup>

Limitations on the officers power to investigate criminal matters, either pre-arrest or post-arrest were as much a function of customary practice, institutional incentives (or a lack thereof), and the constable's social standing (or lack thereof).<sup>49</sup> The history of a particularly despised type form of investigatory authority illustrates this point. Though they no longer existed at the time the United States Constitution was written, general

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43. See TAYLOR, *supra* note 14, at 27–29.

44. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996) (observing inconsistency between Fifth Amendment right to remain silent and routine practice of magistrates to interrogate suspects).

45. See Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 323 (1998) (observing that the duties of sheriffs, constables, and watchmen “did not generally include either the investigation of unsolved crimes or the interrogation of suspects”).

46. See 1 S. MARCH PHILLIPPS, TREATISE ON THE LAW OF EVIDENCE 406 (New York, Banks, Gould & Co., 3rd ed. 1849) (citing *Rex v. Wilson* (1817) 171 Eng. Rep. 353, 353; 7 Holt 596.). (“A confession, obtained without threat or promise has been received, notwithstanding it was elicited by a police officer.”) Phillips and Amos noted, however, that there were English authorities to the contrary of this proposition. *Id.* (citing *Rex v. Wilson* (1817) 171 Eng. Rep. 353, 353; 7 Holt 596).

47. There were rare instances of officers performing interrogations and likely involved cases involving rewards. See Oliver, *supra* note 2, at 795 n.100, 797 (2007).

48. By the mid-nineteenth century, there was a growing consensus in England that any police interrogation rendered a statement involuntary. See *Bram v. United States*, 168 U.S. 532, 556 (1897) (describing English voluntariness rule).

49. Justice White concluded that the primary limitation on eighteenth-century officers was “the generally ministerial nature of the constable's office at common law.” *Payton v. New York*, 445 U.S. 573, 607 (1980) (White, J., dissenting). Justice White was incorrect in concluding that “the constable possessed broad inherent powers to arrest,” but his assessment of the institutional limits on early officers is certainly correct. *Id.*

warrants, permitting the officer to search wherever he suspected, or arrest anyone he suspected of committing the crime in question, had been fairly common in early colonial era.<sup>50</sup> Yet the American colonists were never outraged by the authority exercised by constables when they used these warrants.<sup>51</sup> The reason for this was that in practice, constables bearing these general warrants searched those only places, and arrested only those persons identified by the complaining victims who sought warrants.<sup>52</sup> Controversies over general warrants in customs enforcement led to their quiet replacement with specific warrants in criminal cases. As will be discussed below, general warrants for customs searches were much less comfortably tolerated.<sup>53</sup> When ordinary officers were entrusted with great discretion, they were practically prevented from exercising it; the informal limits were as important as the formal.<sup>54</sup>

The formal limits were, however, far from insignificant. An officer's authority to act without a warrant prior to the mid-nineteenth century was quite limited.<sup>55</sup> He had authority to search without a warrant only incident to arrest, and only under very narrow circumstances could an officer arrest without a warrant.<sup>56</sup> If an officer actually witnessed a crime occur, he was

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50. CUDDIHY, *supra* note 7, at 555 (outside Massachusetts and New Hampshire, "general warrants for stolen objects remained in use despite the opposition of legal authors.").

51. *Id.* at 575 ("Until the 1760s . . . colonial law had neither rejected general warrants nor embraced specific ones.").

52. *Id.* at 754, 757. A warrant issued after Independence illustrates the practice well. The constable was instructed: "You are commanded forthwith to search all suspected places and persons that the complainant thinks proper, to find his lost pork, and to cause the same, and the person with whom it shall be found, or suspected to have taken the same, and have him appear before some proper authority, to be examined according to law." *Frisbee v. Butler*, 1 Kirby 213, 213-14 (Conn. 1787).

53. See discussion *infra* notes 64-74 and accompanying text.

54. See Beattie, *supra* note 1 (observing that "there were severe limits as to the help victims of crime could expect to receive from [constables]."); 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, 1004 (2003) ("The constable had neither a duty nor the authority to investigate the possibility of uncharged crimes; in fact, in the absence of a warrant, the constable had little more arrest authority than any other person."); JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901* 17-18 (1970) (describing similar powers by New York constables in early nineteenth century); H.B. Simpson, *The Office of Constable*, 10 ENG. HIST. REV. 625, 635-36 (1895) (distinguishing the role of modern police from constables who were "regarded merely as . . . police officer[s] attendant on the justices [of the peace] and other ministers of the crown."). For a description of the weakness of constables before the colonial era, see Joan Kent, *The English Village Constable, 1580-1642: The Nature and Dilemmas of the Office*, 20 J. BRIT. STUD. 26 (1981).

55. See Davies, *supra* note 5, at 554 ("At common law, controlling the warrant did control the officer for all practical purposes.").

56. Customs officers were permitted to search ships without warrants, but this



not liable if the person he arrested was not the culprit. Finally, an officer was immune from liability if he arrested an innocent person but a crime had in fact occurred and the officer had probable cause to believe the person he arrested had committed it. These bases for arrest also necessarily depended on a victim in most cases. Unless the officer witnessed the crime occur, he would seldom have a sufficient basis for concluding—at the risk of civil judgment—that a crime had in fact occurred. The part-time, often volunteer officers of the Framing Era, with little incentive to patrol, would have seldom discovered a crime in progress.<sup>57</sup>

Greater arrest powers in the early 1800s served only to bolster the importance of victims. Beginning in the early nineteenth century, an officer was not liable for false arrest if a citizen complained of a crime and identified the suspect for the officer to arrest.<sup>58</sup>

The lack of trust eighteenth-century society was willing to place in officers—and the lack of financial investment it was willing to make in police organizations—often left those least able to vindicate their rights solely responsible for doing so. By contrast, victims at the turn of the nineteenth century, who did not always know who had perpetrated the crimes against them, could have been aided by constables in the investigation. There was, however, no incentive for the constables to assist, because investigation was not regarded as part of their job. Wealthy victims could offer rewards, which obviously changed the incentives for officers, essentially rendering them private investigators.<sup>59</sup> In all other cases, the

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warrantless search authority did not extend to constables seeking evidence of crimes. *Id.* at 571. At common law, officers were immune from liability for false arrest if they witnessed the crime occur, responded to a “hue and cry,” had a warrant for the arrest, or had probable cause to believe the arrestee had committed a felony when a crime had in fact occurred. *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 798, 809 (1923–24). Officers were also permitted to arrest suspects for misdemeanors that were committed in their presence. *Id.* at 814.

57. *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 451–452 (2010) (describing institutional incentives of Framing-Era officers).

58. *See* Davies, *supra* note 5, at 635–36. *See generally* Wilgus, *supra* note 56 (describing English and American arrest rules).

59. In the early years of the American republic, rewards were typically given by private parties seeking the return of their property. *See* *City Bank v. Bangs*, 2 Edw. Ch. 95 (1833) (discussing circumstances under which officer was entitled to receive private reward); BURROWS & WALLACE, *supra* note 4, at 637; ROGER LANE, *POLICING THE CITY: BOSTON, 1822–1885* 56 (1967); RICHARDSON, *supra* note 54, at 62–63. In England beginning in the 1730s, the government offered rewards for the identification and successful prosecution of those committing more serious property crimes. *See* GERALD HOWSON, *THIEF-TAKER GENERAL: THE RISE AND FALL OF JORDAN WILD* (1970); JOHN H. LANGBEIN, *THE ADVERSARY ORIGINS OF CRIMINAL TRIAL* 109 (2003); Ruth Paley, *Thief-takers in London in the Age of the McDaniel Gang c. 1745–1754*, in DOUGLAS HAY & FRANCIS SNYDER (ED.), *POLICING AND PROSECUTION IN BRITAIN 1750–1850* (1989).

public apparatus of the criminal justice system assisted the victim only after he made his complaint. The constable aided the victim in conducting any search and the magistrate interrogated the suspect, but any legwork, either prior to the allegation or trial, was left up to the victim.<sup>60</sup>

There were a couple of exceptions to this system of victim-driven investigations, neither of which involved conferring discretion on the constabulary. Customs and revenue violations, discussed below, could not have been investigated by victims because there were no victims.<sup>61</sup> Murders, for an entirely different reason, had to be investigated by someone other than the victim. Coroners, who were not required to have any medical training, assembled a jury that functioned much like modern grand juries.<sup>62</sup> These were private citizens who subpoenaed witnesses and considered any physical evidence, such as the crime scene and the body itself.<sup>63</sup> There were no public-employed criminal investigators until mid-nineteenth-century reforms created modern police officers, who would reluctantly be given the prerogatives of customs officers.

The Framing-Era and early American criminal justice systems did not involve investigations by public officers. Probable cause as it is understood in modern times would have allowed officers to act on the information they learned—or at least to seek judicial authorization to act on the information they learned. The eighteenth-century criminal justice system—driven by the investigations of private complainants—had no need for such a standard. A standard that allowed searches and seizure on the basis of an officer's investigation was, however, essential to customs and revenue enforcement in this era.

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60. See *United States v. Dickerson*, 530 U.S. 428, 435 n.1 (2000) (observing that “custodial police interrogation is relatively recent because the routine practice of such interrogation is itself a relatively new development”); Alschuler, *supra* note 44.

61. See 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, 118 (2007) (observing that John Adams, the primary drafter of the Massachusetts Constitution, doubtlessly recognized that the Virginia Constitution's requirements for a search warrant could not be satisfied for customs searches as no victim could swear that a crime had occurred).

62. See 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* 158–59 (London, A.J. Valpy 1816) (observing unique method of investigation for murders); JULIUS GOEBEL, JR., *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 59 (1946) (describing process of murder investigation); JOHN IMPEY, *THE OFFICE OF SHERIFF, SHEWING ITS HISTORY AND ANTIQUITY* 440–41 (London, W. Clark and Sons 4th ed. 1817) (discussing duties of the coroner); George C. Thomas, III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749–1757*, 1 *N.Y.U. J.L. & LIBERTY* 671, 679–80 (2005) (describing a proceeding under coroner's inquest).

63. For a history of the coroner's jury, see Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 *MICH. L. REV.* 413, 422–25 (1976); Irvin L. Langbein, *The Jury of Presentment and Coroner*, 33 *COLUM. L. REV.* 1329 (1933).

### B. Customs Investigations

In contrast with ordinary law enforcement officers, customs officers had considerable discretion to initiate investigations and substantial financial incentives to do so. Even though the authority exercised by customs officers had been a major source of contention between Great Britain and the American colonies, customs and revenue officers continued to possess a unique type of discretion for decades after independence.<sup>64</sup> Customs officials were the only officers capable of seeking warrants—or engaging in warrantless searches or seizures—on the strength of facts they learned through their investigations.<sup>65</sup> Probable cause, as understood in the modern world, was a standard uniquely applicable to customs officers. The method of compensating customs officers, however, gave them considerably more incentive to search than modern police officers possess. They received a portion of the government's fee or forfeiture for a violation.<sup>66</sup>

As there was no victim to swear that a violation had occurred, the limits imposed on searches and seizures in ordinary criminal cases would have completely prevented the enforcement of customs and revenue laws if extended in those contexts. Eighteenth-century Americans' historical

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64. See Davies, *supra* note 28, at 605–08 (observing that Framers did not intend Fourth Amendment to create the same search and seizure standard for customs officers and officers who enforced ordinary criminal laws).

65. The broad authority of eighteenth-century customs officers has been frequently recognized. See *Carroll v. United States*, 267 U.S. 132, 151 (1925) (describing authority of late eighteenth- and early nineteenth-century customs officers to search vessels without a warrant); Fabio Arcila, Jr., *The Framer's Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 363, 410 (2009) (observing that early Congresses gave customs officers considerable immunity from suit); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1783 n.279 (1991) (describing Marshall Court cases providing customs officers immunity from suit for seizing goods without warrant even when there was no good faith basis for officers' suspicion of illegal conduct); Alfred S. Martin, *The King's Customs: Philadelphia, 1763–1774*, 5 WM. & MARY Q. 201 (1948) (describing the roles of customs officers in the Port of Philadelphia and the specific job performed by one officer whom the author regarded to be particularly honest and efficient); see also Amar, *supra* note 42, at 766 (describing authority of customs officers under late eighteenth-century statutes to search vessels without a warrant and suggesting that a warrant may not have been required under language of early customs laws to search homes, buildings, or stores). But see Tracey Maclin, *The Complexity of the Fourth Amendment*, 77 B.U. L. REV. 925, 952–53 (1997) (disputing Amar's claim). See generally THOMAS C. BARROW, *TRADE AND EMPIRE: THE BRITISH CUSTOMS SERVICE IN COLONIAL AMERICA 1660–1775* (1967).

66. See Davies, *supra* note 5, at 659; see also Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998) (describing modern issues with allowing police departments to retain a portion of forfeited funds).

concerns about the discretion of customs officers may, however, make the amount of discretion uniquely vested in these officers seem surprising.

General warrants empowering customs officers to search anywhere they suspected they would discover violations of import and tax laws particularly drew the ire of colonists. The first, and certainly most famous, of these controversies occurred in Massachusetts after the Superior Court issued customs officers a particular version of general warrants, known as writs of assistance, to discover evidence of illegal trading with French Canada.<sup>67</sup> When the warrants expired upon the death of King George II in 1760, Boston area merchants and smugglers (groups with largely overlapping memberships) retained two of the best lawyers in Massachusetts, Joseph R. Frese and James Otis, to argue against reissuing them.<sup>68</sup> Otis' now-famous argument objected that these warrants placed the liberty of every man in the "hands of a petty officer."<sup>69</sup> John Adams, then a young lawyer, was in the audience and later said of the argument against this sort of authority for customs officers, "Then and there was the child Independence born."<sup>70</sup>

The threat uniquely posed by customs officers brought about this intense criticism. The general warrant was not new to colonists in 1760. Constables had been issued general warrants throughout the colonial era to arrest unnamed persons or search unidentified places. While specific warrants, identifying the place to be searched or person to be seized, had come to replace general warrants in Massachusetts (though not in other colonies) well before Otis made this argument, this transition had been gradual and had not been provoked by any particular outrage.<sup>71</sup> By contrast with the Americans, the English had long had philosophical objections to general warrants. Treatise writers had regarded them to be illegal for over a

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67. See John M. Burkoff, "A Flame of Fire": *The Fourth Amendment in Perilous Times*, 74 MISS. L.J. 631, 634–35 (2004).

68. Writs of Assistance conferred their extraordinary discretion on the officers to whom they were issued for the life of the sovereign in whose name they were issued. To be precise, they expired six months after, in this case, the death of King George II. See NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 57 (1970). The reputation of Boston's most prominent eighteenth-century merchants as smugglers has been well confirmed. See JOHN W. TYLER, *SMUGGLERS AND PATRIOTS: BOSTON MERCHANTS AND THE ADVENT OF THE AMERICAN REVOLUTION* (1986). But see O.M. Dickerson, *John Hancock: Notorious Smuggler or Near Victim of British Revenue Racketeers?*, 32 MISS. VALLEY HIST. REV. 517 (1946).

69. Otis' argument was recorded by a young John Adams who sat in the audience with a number of luminaries of the Boston legal, political, and commercial world. LASSON, *supra* note 68, at 58–59. Adams would later say of Otis' argument, "there the child of Independence was born." T. H. Breen, *Subjecthood and Citizenship: The Context of James Otis's Radical Critique of John Locke*, 71 NEW ENG. Q. 378, 378 (1998).

70. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 909 (2010) (quoting John Adams).

71. CUDDIHY, *supra* note 7, at 328–29.



century, and Sergeant William Hawkins's treatise in 1721 had specifically objected to general warrants empowering "a common Officer to arrest what Persons, and search what Houses he thinks fit."<sup>72</sup> Americans did not object to the use of general warrants until they were placed in the hands of customs officers.<sup>73</sup>

The writs of assistance added insult to injury by permitting customs officers to demand the assistance of citizens in conducting searches.<sup>74</sup> The right to call on the citizenry for assistance in the enforcement was not unique to the writs of assistance, but it prompted a public outrage in this context. If a constable was outmatched by the strength of either the offender he was to apprehend or the homeowner he was to search, he could call for a posse to assist him.<sup>75</sup> There were penalties for able-bodied men refusing to assist law enforcement officers, but typically members of the community very willingly came to the constable's aid.<sup>76</sup> Alexis de Tocqueville observed the eagerness of Americans to join in the hunt for an accused.<sup>77</sup> However, constables were enforcing laws that generally met with the approval of the public. By contrast, colonial customs agents, at least those working for the British Crown, were enforcing laws that were anything but popular and, when armed with Writs of Assistance, were able to demand that the public become complicitous in their offensive enforcement.

The abolition of general warrants did not, however, define the scope of authority for customs and revenue investigators, whose investigations were essential in a world prior to an income tax. It was, however, clear that general warrants were unlawful in early American Republic. American and English law had thoroughly repudiated general warrants by the time the colonies had separated from Great Britain but without a controversy in the colonies outside the customs context. The death knell for these warrants may well have been sounded in a case involving something other than

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72. Davies, *supra* note 5, at 579, 629.

73. See discussion *supra* note 50 and accompanying text.

74. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 405 (2002).

75. See Steven J. Heyman, *Foundation of the Duty to Rescue*, 47 VAND. L. REV. 673, 689 (1994) (attributing the end of the requirement to assist police to the creation of nineteenth-century police departments charged with preventing crime).

76. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 57 (1996); Gautham Rao, *The Federal Posse Comitatus Doctrine: Slavery, Compulsion, and Statecraft in Mid-Nineteenth-Century America*, 26 LAW & HIST. REV. 1, 3 (2008) (observing that typically "[s]tates and localities exercised this power over persons with little apparent difficulty."). The meager state of law enforcement left a sort of citizen's veto in place. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 26 (2004) (describing the necessity of citizen cooperation with a posse and the possibility of citizen interference with attempts to arrest).

77. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 95-96 (Perennial Classics 2000).

customs enforcement, but this occurred in England, not the colonies. In the 1760s, an outlandish pamphleteer, who made a career out of maligning the king's ministers, waged a spectacular legal battle against general warrants.<sup>78</sup> General warrants were issued for the seizure of any papers revealing the authorship of *North Briton Number 45*, one installment of John Wilkes' weekly publication attacking King George III.<sup>79</sup> The warrants also called for the arrest of any persons suspected of authoring or publishing *Number 45*.<sup>80</sup> In a variety of suits filed by those, including Wilkes, who had been arrested or had their homes searched, the English courts provided precedent for the proposition, long espoused in the treatises, that general warrants were unlawful.<sup>81</sup> Following the Wilkes cases, colonial courts refused to issue general warrants to customs officers even though Parliament specifically authorized these warrants in the Townshend Acts.<sup>82</sup> The Fourth Amendment to the United States Constitution would then permanently memorialize this rejection of general warrants.

While the Framers were in accord in rejecting general warrants, they appear to have been of mixed minds about the sort of discretion customs officers should possess.<sup>83</sup> The broader principle comprehended by a ban on general warrants is still debated in Fourth Amendment cases today.<sup>84</sup> Early federal legislation imposed varying requirements on these officers seeking search warrants. The First Congress, admittedly prior to the adoption of the Fourth Amendment, authorized magistrates to issue warrants permitting customs agents to search any specific building the officer alleged contained

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78. See ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 65–95 (2006).

79. *Id.* at 99–100; CUDDIHY, *supra* note 7, at 440–41.

80. CUDDIHY, *supra* note 7, at 440–41.

81. *Id.* at 444–46.

82. See Davies, *supra* note 5, at 702.

83. Davies, *supra* note 28, at 371 (“There is no indication in the historical record that the language of the Fourth Amendment was understood to alter the settled common-law standards for criminal arrest or search warrants.”).

84. There is no shortage of efforts to analogize the discretion given to modern police to the discretion given customs officers under general warrants. See, e.g., Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 132–60 (2008) (analogizing the problem with general warrants to use of undercover agents, detention of enemy combatants, and wiretapping); Barbara Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989); Scott E. Sunby, *Protecting the Citizen “Whilst He is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L. J. 501 (2004) (arguing that intrusions lacking probable cause or a warrant justified under “special needs” exception is analogous to general warrant). In the late nineteenth century, analogies were similarly drawn to subpoenas for records of telegraphed communications. See, e.g., *Ex Parte Brown*, 72 Mo. 83 (Mo. 1880). Andrew Taslitz has recently drawn an analogy between slave patrols in the antebellum South and general warrants. See ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868 12 (2006).

evidence of an import violation.<sup>85</sup> The Third Congress, following ratification of the Fourth Amendment, adopted Alexander Hamilton's Excise Act, which required revenue officers to provide magistrates with facts demonstrating probable cause to believe evidence of a violation could be discovered in the place described.<sup>86</sup> The First Congress's scheme did little to constrain the discretion of customs agents. It merely placed an administrative burden on them in the form of necessary paperwork. Much like victims in criminal cases, customs officers' allegations were sufficient for warrants. The Third Congress' scheme placed a genuine limitation on revenue agents. A disinterested magistrate had to agree with the (very) interested agent that probable cause existed. This latter scheme looked very much like the modern warrant standard under which a neutral and detached decision maker evaluates the basis of the officer's suspicions.

Under either scheme, customs and revenue officers had discretion that far eclipsed that of ordinary law enforcement officers. The mechanism for obtaining a warrant tells only part of the story. Much like in modern times, warrants were not always required. Each of these Congressional schemes also allowed officers to engage in warrantless seizures—customs agents could search ships without a warrant and revenue officers could search registered distillers without suspicion.<sup>87</sup> Beyond that, Congressional legislation and Marshall Court opinions made suits against customs officers for trespass extraordinarily difficult to win.<sup>88</sup>

Ironically, Americans, who had just fought a war of independence in large part over customs enforcement, conferred remarkably more authority on customs and revenue officers than they would contemplate giving officers enforcing criminal laws. Probable cause, as we understand it in modern terms, was sufficient for these searches, in some cases more than sufficient. Customs officers were permitted to seek authorization for searches and seizures on the basis of their investigations, or sometimes act on their own as a result of their investigations. They were financially rewarded when their suspicions were correct. Neither financial incentives nor legal standards equipped officers enforcing criminal laws with such motivation or discretion. The realities of urban life—and new types of criminal laws—would confer similar legal powers on police officers.

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85. See CUDDIHY, *supra* note 7, at 757 (2009) (observing that under the Federal Collections Act of 1789, magistrates were given no discretion to refuse a customs officer's request for a warrant).

86. *Id.* at 757 (observing that Alexander Hamilton's Excise Act of 1791 required "reasonable cause of suspicion to be made out to the satisfaction of . . . [a] judge or justice.").

87. Amar, *supra* note 42, at 766; Cloud, *supra* note 14, at 1743 n.127.

88. See Arcila, *supra* note 65, at 420–21 (describing how early American customs statutes operated to limit access to remedies for unreasonable searches); Fallon & Meltzer, *supra* note 65, at 1783 n.279.

## II. NINETEENTH-CENTURY PROHIBITION FASHIONED POLICE-FRIENDLY SEARCH STANDARD

As modern police departments were created, ordinary officers were given incentives—though not as overtly pecuniary as those given to customs officers—to investigate crime aggressively. With the development of full-time police forces, law enforcement became a career rather than a part-time obligation. Successful performance became a basis for retention and promotion.<sup>89</sup> Conferring power on these officers to conduct searches or make arrests on the basis of information discovered they discovered made sense, as their investigations were only useful if they could supplant, or at least supplement, victims' complaints.

Good record keeping in New York City and the abundance of secondary materials on its history make the city a good starting point when examining nineteenth-century changes in criminal procedure. When the City of New York created a force of career officers to suppress riots and investigate and prevent crimes, it increased the amount of manpower dedicated to law enforcement, developed a military-style hierarchy, and perhaps even increased the social standing of those responsible for policing the City.<sup>90</sup> The creation of the new force had changed the incentives for police officers. There were political motivations for those at the top of the hierarchy to at least appear to be suppressing crime, and those lower in the hierarchy had an interest either in climbing the ladder or simply retaining a better-than-average-paying job in the mid-nineteenth century.<sup>91</sup> The legal standards that had inhibited eighteenth-century constables did not, however, immediately change with the adoption of this new force. While the state legislature had authorized the force's creation a year earlier, it had done nothing to modify the search and seizure standards that had made police investigations legally irrelevant.<sup>92</sup> Because of public hostility to police departments, the legislature's abstinence on this issue is hardly surprising. Indeed, the creation of professional police departments had been thwarted

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89. See Oliver, *supra* note 57 at 459–60 (describing rise of career officers).

90. See LISA KELLER, *TRIUMPH OF ORDER: DEMOCRACY & PUBLIC SPACE IN NEW YORK AND LONDON* 163 (2009); Davies, *supra* note 5, at 641. The new rules for the New York Municipal Police made it clear that officers were to be more proactive than their predecessor constables and watchmen. CITY OF NEW YORK, RULES AND REGULATIONS FOR THE GENERAL GOVERNMENT OF THE POLICE DEPARTMENT OF THE CITY OF NEW YORK 25 (1848) [hereinafter *NEW YORK, RULES AND REGULATIONS*] (stating that the “prevention of crime [is] the most important object” of the officer). Certainly the social standing of higher-ranking police officers in the early twentieth century exceeded that of any law enforcement officer in the eighteenth century. For example, Police Commissioners Teddy Roosevelt and Arthur Woods were both Harvard graduates and were definitely in the upper echelon of New York society.

91. See Oliver, *supra* note 57, at 459–60.

92. See RICHARDSON, *supra* note 54, at 51.



for nearly a decade by concerns about maintaining a military-style force with broad police powers.<sup>93</sup>

For nearly a decade after the creation of the Municipal Police Force, the law did not permit an officer to apply for a search warrant; crime victims alone retained this prerogative. The needs of law enforcement may have been a contributing factor to the willingness of New Yorkers to accept police-initiated searches, but the timing of the new standard demonstrates that another factor was far more substantial. Victimless crimes—to the extent they existed in the mid-nineteenth century—were neither regularly investigated nor prosecuted. It would take the Temperance Movement to whip up support for a new search procedure.

As the Temperance Movement shifted from moral suasion to successful advocacy of legislation in the mid-nineteenth century, it needed a mechanism to ensure compliance with state-wide prohibitory laws.<sup>94</sup> With a few rare exceptions in the mid-nineteenth century, searches outside the customs context could occur only if someone could swear that a crime had actually occurred.<sup>95</sup> The advocates of Prohibition did not seek an opportunity to conduct a search for an obscure crime that was rarely prosecuted. They sought a mechanism to search for the most commonly committed “crime” of their era, a mechanism that would have to be capable of frequent exercise if Prohibition were to have a chance of success. The drafters—and certainly the opponents—of this new law recognized that they were reshaping the rules relating to searches in ordinary criminal cases.<sup>96</sup> And in response to this new power, courts crafted a new mechanism for limiting police officers: the exclusionary rule, which would quickly be cabined to searches for liquor that lacked the requisite formalities.

Prohibition introduced New York, and many other states, to a warrant application process in ordinary criminal cases that did not require a victim’s complaint. For as much as New York City owned the nineteenth century

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93. See BURROWS & WALLACE, *supra* note 4 at 636–38. See generally William S. Fields & David T. Hardy, *The Third Amendment and the Issue of Maintenance of Standing Armies: A Legal History*, 35 AM. J. LEGAL HIST. 393 (1991).

94. JOHN A. KROUT, *THE ORIGINS OF PROHIBITION* 266 (1925); LORI D. GINZBERG, *WOMEN IN THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE NINETEENTH-CENTURY UNITED STATES* 98–132 (1990); Jed Dannenbaum, *The Origins of Temperance Activism and Militancy Among American Women*, 15 J. Soc. Hist. 235, 239–40 (1981) (explaining the Temperance Movement’s shift from moral suasion to prohibition in terms of gender).

95. See *supra* discussion note 56 and accompanying text.

96. Efforts at liquor enforcement obviously required enhanced investigatory powers, which benefited the advocates of greater police authority. The relationship between Prohibitionists and advocates of stronger police powers was strained, however, as even the fledgling policing organizations of the first half of the nineteenth century had recognized the perils of enforcing limits on alcohol. See ROBERT L. HAMPEL, *TEMPERANCE AND PROHIBITION IN MASSACHUSETTS, 1813–1852* (1982).

(just as Boston and Philadelphia had owned the eighteenth century), the nineteenth-century Prohibition movement did not have its origins anywhere near Manhattan.<sup>97</sup> Its origins lie in a much smaller town whose historical significance is often underappreciated: Portland, Maine. Of course, Portland does seem an unlikely location to have spawned a national social reform or legal change. Maine was then, as it is now, a relatively unpopulated state, with most of its citizens residing in southern coastal towns. Portland itself was a mid-sized port, comparable to New Haven, Salem, and Charleston. Its status as an import and export hub was a blessing and a curse to the town of 20,000 in the antebellum era.<sup>98</sup> While, trade benefited the city, drunken sailors created a market for the ready flow of cheap rum. However, alcohol use in this town was not unique to transient sailors; over 300 bars and taverns operated within the city limits, some serving alcohol out of open troughs.<sup>99</sup> Minors as well as adults were intoxicated on Portland's streets at all hours of the day and night.<sup>100</sup>

It was not the character of the town, but rather the determination and single-minded devotion of one of its residents, that made Portland the home of the American Prohibition movement. Neal Dow was a Quaker far less passive than one might imagine for a man of that religious sect. He owned a tannery he had inherited from his father, was a leader in his local fire department, and had a reputation for being a firebrand orator prone to

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97. Philadelphia had, of course, been the revolutionary capital and became the nation's financial capital in the eighteenth century, a status it maintained well into the nineteenth century. ROBERT E. WRIGHT, *THE FIRST WALL STREET: CHESTNUT STREET, PHILADELPHIA, AND THE BIRTH OF AMERICAN FINANCE* 11 (2005). Boston began the eighteenth century as America's premier city. See EVARTS BOUTELL GREENE, *PROVINCIAL AMERICA, 1690–1740*, in *THE AMERICAN NATION: A HISTORY* 244 (Albert Bushwell Hart ed., Classic Reprints 1964) (1905) (“during the first half of the eighteenth century Boston held its place as the most considerable centre of population and trade on the continent.”). Both Philadelphia and New York had larger populations than Boston by outbreak of the American Revolution, but Boston had a political significance that neither of the larger cities could rival. The oft-held perception of New York as America's most important city did not emerge until the second half on the nineteenth century. See ROBERT A.M. STERN, THOMAS MELLINS & DAVID FISHMAN, *NEW YORK 1880: ARCHITECTURE AND URBANISM IN THE GUILDED AGE* 15 (1999) (“In the eyes of the so-called civilized world, and especially those in major European capitals, post-Civil War New York was only just beginning to come into focus as America's representative city.”); DAVID MCCULLOUGH, *GREAT BRIDGE: THE EPIC STORY OF THE BUILDING OF THE BROOKLYN BRIDGE* 121 (1972) (New York “was the undisputed center of the new America that had been emerging since the [civil] war.”).

98. CAMPBELL GIBSON, POPULATION DIVISION, U. S. BUREAU OF THE CENSUS, POPULATION DIVISION WORKING PAPER NO. 27, 1998, POPULATION OF THE 100 LARGEST CITIES AND OTHER URBAN PLACES IN THE UNITED STATES: 1790 TO 1990, Table B, available at <http://www.census.gov/population/www/documentation/twps0027/twps0027.html> (last visited Apr. 2, 2011).

99. NEAL DOW, *THE REMINISCENCES OF NEAL DOW: RECOLLECTIONS OF EIGHTY YEARS* 153–80 (1898).

100. *Id.* at 169.

lobbing personal attacks against his opponents.<sup>101</sup> Long a temperance advocate of powerful constitution, very early in his adult life he was heard to object to the excesses of alcohol use, particularly rum, in his city.<sup>102</sup> Inspired by a failed effort at statewide prohibition in Massachusetts in the 1830s, he embarked on a tireless campaign to create a criminal penalty for the sale, manufacture, or possession of alcoholic beverages in Maine in the 1840s.<sup>103</sup>

In form, Dow's idea was unusual; in substance, it was revolutionary. There were few victimless crimes on the books in the first half of the nineteenth century, and those that did exist were rarely enforced.<sup>104</sup> Their enforcement was so infrequent that no one had given much thought to the mechanism used to obtain a warrant to search for pornography, for instance.<sup>105</sup> Dow had not, however, proposed creating a run-of-the-mill victimless crime: he had targeted alcohol. Since the colonial era, local licensing laws had regulated alcohol, which ensured lenient liquor laws in towns in which demand for alcohol was high.<sup>106</sup> Port cities and rural

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101. See FRANK L. BYRNE, *PROPHET OF PROHIBITION: NEAL DOW AND HIS CRUSADE* 9–16 (1961).

102. *Id.* at 12–24.

103. *Id.* at 24. General James Appleton made the attempt in Massachusetts, and his family would insist that he had not received his due for the later success in Maine. See D. F. APPLETON, *THE ORIGIN OF THE MAINE LAW AND OF PROHIBITORY LEGISLATION, WITH A BRIEF MEMOIR OF JAMES APPLETON* (1886).

104. At the turn of the nineteenth century, American authorities recognized the legitimacy of search warrants only to recover stolen goods. See OLIVER L. BARBOUR, *A TREATISE ON THE CRIMINAL LAW AND CRIMINAL COURTS OF THE STATE OF NEW YORK* 499 (2d ed. 1852); *In re Special Investigations No. 228*, 458 A.2d 820, 831 (Md. Ct. Spec. App. 1983) (“the common law of England and of Maryland recognized the search warrant for stolen goods, but no other search warrant.”); Amar, *supra* note 42 at 765 (describing that “common law search warrants . . . were solely for stolen goods.”). But see A. OAKLEY HALL, *A REVIEW OF THE WEBSTER CASE BY A MEMBER OF THE NEW-YORK BAR* (New York, J.S. Redfield 1850) (rare case in which a search warrant was authorized without statutory authority for the search of a home for clothes which a witness claimed the culprit wore). Some early American statutes permitted searches for smuggled items or dangerous items such as gunpowder or diseased or infected items. *Id.* Treatise writer Joel Bishop recognized in 1880 that search warrants were most commonly issued for stolen goods although warrants to discover lottery tickets, intoxicating liquors, and gaming implements were beginning to be issued as new statutes created victimless crimes. 1 JOEL PRENTISS BISHOP, *CRIMINAL PROCEDURE; OR, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES* 145 (3d ed. 1880).

105. See ME. REV. STAT. tit. XII, Ch. 160, § 19 (1841). Even though state statutes in Maine authorized a search for pornography, for instance, Governor Dana observed in 1850 that the only victimless crime investigated using a search warrant was unlawful possession of gunpowder. There were very rare exceptions. 13 *THE MONTHLY LAW REPORTER* 208–09 (Stephen H. Phillips, ed., Boston, Charles C. Little & James Brown 1851) [hereinafter *MONTHLY LAW*].

106. See generally KROUT, *supra* note 94 (tracing history of prohibition from colonial

villages under the new law would be treated alike; neither would be allowed to permit any sales of alcohol. This was an attempt at a social revolution through the criminal justice system. For somewhat obvious reasons, prohibition would become the most prosecuted victimless crime of the nineteenth century.<sup>107</sup>

Maine adopted Dow's first prohibitory bill in 1846, which was largely ineffective. Because it did nothing to authorize searches for liquor, the law failed to put a meaningful dent in the amount of alcohol in the state, even by its proponents' estimates.<sup>108</sup> Witnesses alleging violations of liquor laws—often informants paid by Temperance Men—would testify to observing sales, but were seldom believed.<sup>109</sup> Prosecutions frequently suffered from a lack of physical evidence, as existing search and seizure doctrines did not permit searches for illegal alcohol.<sup>110</sup> There were no victims who could complain of an injury from a violation of the liquor law.

Dow would therefore return to the legislature in 1849 with a proposal to permit a search for evidence of this victimless crime.<sup>111</sup> Under the bill, any three persons could appear before a magistrate, allege that they had probable cause to believe liquor was in the location specified in the complaint, and obtain a warrant.<sup>112</sup> This was, of course, essentially the procedure in Maine, as in all early American states, for obtaining a search warrant to recover stolen goods.<sup>113</sup> There were some differences in the requirements for a search warrant, depending on whether an applicant wanted to search for alcohol or stolen goods. Dow's proposal required three complainants, while a search warrant for stolen goods could be obtained by

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era to enactment of Maine Law).

107. One piece of data confirming this conclusion can be found in a late nineteenth-century digest. The search and seizure entry refers the reader to the section on intoxicating liquors. ALBERT R. SAVAGE, AN INDEX-DIGEST OF THE REPORTS OF CASES DECIDED BY THE SUPREME JUDICIAL COURT OF MAINE (1897). There were victimless crimes in the mid-nineteenth century, all of which depended on searches and seizures for prosecution. *See, e.g.*, BENJAMIN KINGSBURY, JR., THE JUSTICE OF THE PEACE: DESIGNED TO BE A GUIDE TO JUSTICES OF THE PEACE, FOR THE STATE OF MAINE 180 (Portland, Sanborn & Carter 1852) (describing types of items that could be sought under search warrant); ME. REV. STAT. tit. III, ch. 34, § 5 (1841) (permitting searches for improperly stored gunpowder); *id.* tit. XII, ch. 160, § 18 (allowing search warrant to discover young women in bawdy houses); *id.* § 20 (permitting warrants for obscene publications). Yet the digest entry for search and seizure notes that all of the cases decided in Maine on this topic have been considered in the context of intoxicating liquors.

108. Neal Dow himself recognized that without the search mechanism, his efforts would have been doomed to failure. *See generally Prohibitory Laws of Maine*, N.Y. TIMES, Feb. 3, 1896, at 5.

109. BYRNE, *supra* note 101, at 39.

110. *Id.* at 42.

111. *Id.* at 42–43.

112. *The New Liquor Law*, KENNEBEC JOURNAL, Aug. 23, 1849, at 3.

113. *See* notes 9–12 and accompanying text.



only one complainant. A complainant alleging stolen goods had to be a victim of the crime, while there were obviously no victims of the prohibitory laws. Each type of warrant, however, required only the complainant's allegation of his suspicions. Applicants for search warrants under Dow's proposal, just as applicants for search warrants to recover stolen goods, were not required to explain the basis of their suspicion.

Both houses of the legislature passed Dow's bill, but not enthusiastically. Searches for alcohol threatened a new degree of government intrusion. While a search for a stolen item could be initiated only if a victim identified missing property, presumably located only in a single location, a complainant could contend that liquor was housed in any number of locations. There was also concern about the character of applicants who would seek warrants for illegal liquor, for the same witnesses Dow and others had hired to bear witness against their neighbors under the old law were expected to appear as complainants under this new law.<sup>114</sup>

Many members of the legislature voted against the measure. However, others, opposed prohibition entirely or feared expanding the government's authority to search, voted for the bill because they were from pro-temperance districts. Legislators appear to have struck a deal with the outgoing Governor John Dana to veto the bill if it passed.<sup>115</sup>

When the legislature passed the bill, Governor Dana issued a preliminary statement summarily expressing his concern about the search and seizure provision.<sup>116</sup> Months later, he would issue a remarkably thorough veto message to the legislature.<sup>117</sup> Near the end of his life, Neal Dow paid this document a strong compliment, writing in his memoirs that "[f]rom that day to this nothing has been urged against Prohibition that was not expressed or implied in what Governor Dana had to say nearly half a century ago."<sup>118</sup> It could certainly be argued that Dow, a man with no wavering belief in the righteousness of his cause, was noting the lack of arguments that could be made against his reform. Far more likely, he was paying a genuine compliment to the thoroughness of a deceased and respected adversary. Dow also noted in his memoirs that Dana was "a man

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114. See BYRNE, *supra* note 101, at 42 (observing Dow's difficulty in finding credible witnesses to liquor sales).

115. This inference is supported by the fact that a similar development occurred with the passage of the liquor law of 1851, which was successful. Several members of the legislature who voted for the bill counseled then-Governor John Hubbard to veto it, noting that they could not have voted for it and retained their seats. They advised him to follow the course of his predecessor. See DOW, *supra* note 99, at 340-43. Neal Dow also observed that Governor Dana had taken the "counsel of some of the leaders in his party" in vetoing the bill. *Id.* at 320.

116. *Closing Proceedings of the Legislature*, KENNEBEC JOURNAL, Aug. 23, 1849, at 3.

117. MONTHLY LAW, *supra* note 105, at 205-13.

118. DOW, *supra* note 99, at 319.

of ability and influence, and justly entitled to leadership among his political associates."<sup>119</sup>

In the portion of the message dealing with the search provision, Governor Dana observed that common law protections against unreasonable searches were inapplicable to searches for evidence of this crime.<sup>120</sup> He acknowledged that searches for other items could be initiated by a mere complaint, but observed that most frequently searches were to recover stolen goods. In order to initiate this most common search,

there must be a pre-existing fact, not merely suspected, but *known* to the complainant, to wit, the loss of the goods; and when such a fact exists, the person suffering the loss, in instituting search, will give to it only that direction which the circumstances may indicate, as most likely to result in the recovery of his property.<sup>121</sup>

With no victim to swear to an injury, and no specific goods to search for, Governor Dana contended that there was no limit on the number of searches that could be authorized and no end point to a search for liquor.<sup>122</sup> The governor recognized that the Maine Legislature had previously authorized searches for some victimless crimes—crimes for which no one could swear to an injury. Searches were permitted, for instance, for pornography,<sup>123</sup> prostitutes,<sup>124</sup> gambling instruments,<sup>125</sup> and illegally stored gunpowder.<sup>126</sup> Of these, only gunpowder searches were conducted with any degree of frequency, and this was likely due to the extraordinary number of gunpowder mills that had cropped up shortly before Maine's statehood.<sup>127</sup> Governor Dana noted that, unlike in the case of alcohol searches, there was "no danger of general abuse" of the gunpowder warrant, as "the number is

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119. *Id.* at 321.

120. MONTHLY LAW, *supra* note 105, at 208–09.

121. *Id.* at 208.

122. *Id.* at 208–09.

123. ME. REV. STAT., tit XII, ch. 160, § 20 (1841).

124. *Id.* § 18.

125. *Id.* § 39.

126. One of the earliest statutes of Maine provided that a search warrant could be obtained by a selectman of the town to investigate the possibility that gunpowder was being stored contrary to the regulations of the town. An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, ch. 25, § 5, 1821 Me. Laws 112,114 (1821); JOHN MAURICE O'BRIEN, THE POWERS AND DUTIES OF THE TOWN OFFICER, AS CONTAINED IN THE STATUTES OF MAINE 261 (Hallowell, Glazier, Masters & Smith 4th ed. & Co. 1840). Statutes regulating the possession of gunpowder in early American states were somewhat common. See Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 510–12 (2004).

127. See MAURICE M. WHITTEN, THE GUNPOWDER MILLS OF MAINE 3 (1990) (indicating that around 1820, entrepreneurs in Maine sought to establish mills in the new state, where there had previously been none).

small to whom the suspicion could possibly attach, of violating the law, which regulates the keeping of gunpowder."<sup>128</sup>

Governor Dana's message reveals something very interesting about the protections eighteenth- and early nineteenth-century criminal procedure provided against unreasonable searches and seizures. The common law limitations on warrants had ensured that searches would be relatively *rare*, not that they would necessarily be *accurate*. Neal Dow had proposed greatly enlarging the role of the state by authorizing searches of homes to discover evidence of a frequently violated law. Searches for alcohol under his new prohibitory law would not be rare. To get his bill enacted, Dow would have to convince the legislature and the governor that he had discovered a mechanism to enhance the accuracy of searches.

A year after Governor Dana's veto, Neal Dow returned to the legislature with a bill that would not only be enacted in Maine, but would be adopted in several American jurisdictions. This bill, like Dow's previous bill, permitted magistrates to issue warrants to search for liquor when three voters alleged they had probable cause to believe alcohol could be located in the specified location.<sup>129</sup> The bill, however, forbade a search of a dwelling house unless one of the three complainants swore that he witnessed an alcohol sale out of the house.<sup>130</sup> Like Dow's previous attempt, this bill passed both houses of the legislature, and Dana's successor, John Hubbard, signed it into law on June 2, 1851.<sup>131</sup> This law would forever link the state with the prohibition movement, as around the world, prohibitionists would advocate adopting the "Maine Law."<sup>132</sup>

The provisions of the new law obviously required a magistrate to review a complaint containing facts supporting the affiant's conclusion that a crime had been committed. This was of course the process Hale, Hawkins, and Blackstone had prescribed for all search warrants, but which

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128. MONTHLY LAW, *supra* note 105, at 208. Governor Dana's analysis here is not unlike the justification for warrantless searches of closely regulated businesses. See 5 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 37-95 (4th ed. 2004).

129. Voting requirements in Maine were not particularly stringent in the mid-nineteenth century. All males, including African Americans, who were neither aliens nor paupers, and who had established a residence in the state for at least three months, were entitled to vote. See Opinion of the Supreme Judicial Court, 44 Me. 507 (1857) (responding to question posed to the court by the state senate).

130. An Act for the Suppression of Drinking Houses and Tippling Shops, 1851 Me. Laws 210, 214-15, Me. Rev. Stat. ch. 211, § 11 (1851).

131. *Id.* at 215.

132. See DOCUMENTARY HISTORY OF THE MAINE LAW: COMPRISING THE ORIGINAL MAINE LAW, THE NEW-YORK PROHIBITORY LIQUOR LAW, LEGISLATIVE DEBATES, ARGUMENTS, JUDICIAL DECISIONS, STATISTICS, IMPORTANT CORRESPONDENCE; "INQUISITION" AND PROHIBITION VERSUS "FREEDOM" AND ANTI-PROHIBITION 85-86 (New York, Hall & Brother 1855) [hereinafter DOCUMENTARY HISTORY].

was rarely, if ever, followed in practice.<sup>133</sup> For many members of the legislature, this standard not only provided a mechanism to prevent false searches, it also may have seemed a comfortable resort to a procedure deeply rooted in Anglo-American history. The statute, that is, may have evoked a sense of nostalgia for a past that never existed.

Neal Dow was widely (and falsely) credited as author of this new search provision,<sup>134</sup> which contemporaries recognized as fundamentally changing the law. Reformers, including Lyman Beecher, Horace Mann, and Sam Houston, hailed the passage of the new law.<sup>135</sup> Attracting such national attention were Dow's tireless self-promotion and the only substantial change from Maine's 1846 statewide prohibitory law, the new enforcement mechanism specified in the act's warrant section. Fellow prohibitionist John Marsh dubbed Neal Dow the "Napoleon of Temperance" and hailed the search and seizure provision for making prohibition a reality. Dow, Marsh wrote, had "brought into the battle-field every officer of the State, . . . turned its whole artillery against the rum-fortifications, and in less than six months, . . . swept every distillery and brew-house, hotel-bar, splendid saloon and vile groggery clean from the State."<sup>136</sup>

It would have been surprising if Dow had developed a standard that would have been so familiar to lawyers. Dow, a tanner by trade, never studied law, although it was his dream.<sup>137</sup> His father had great disdain for lawyers and insisted that his son not attend college.<sup>138</sup> In his memoirs, Neal Dow noted that he received some "technical" assistance in writing the Maine Law from Edward Fox, a prominent Portland lawyer who later would be appointed a federal district judge by Andrew Johnson.<sup>139</sup>

133. See sources cited *supra* note 21.

134. See e.g. BYRNE, *supra* note 101, at 45 ("Dow's greatest innovation was the provision for search and seizure."); HENRY S. CLUBB, THE MAINE LIQUOR LAW: ITS ORIGIN, HISTORY, AND RESULTS, INCLUDING A LIFE OF HON. NEAL DOW 23 (New York, Fowler & Wells 1856) ("Still persevering, Neal Dow again appeared in the Hall of Representatives in August, 1850, with a bill of his own drafting, subsequently known as the 'Maine Law.'"); ALLAN LEVINSKY, A SHORT HISTORY OF PORTLAND 79 (2007).

135. See BYRNE, *supra* note 101, at 49, 141.

136. *Id.* at 48.

137. Though he had no legal training, Dow did once appear as counsel to defend a woman who was charged with horsewhipping a rum-shop keeper for selling liquor to her husband. The woman requested that Dow be permitted to act as her lawyer, and notwithstanding his lack of training in the law, the judge permitted him to do so. The jury found her guilty but recommended mercy, and she was required to pay, as Dow later recalled, "a slight fine" which he paid. DOW, *supra* note 99, at 99.

138. See *id.* at 56-58; IX S.M. WATSON, THE MAINE HISTORICAL AND GENEALOGICAL RECORDER 1884-1898 226 (1973). It was boasted in his father's obituary that he had only once resorted to the legal system in a suit to successfully recover a debt against the advice of his lawyer. Death Notice of Josiah Dow, Fox Family Scrapbooks, Vol. 3, Collection 849, Maine Historical Society (describing father's sole resort to the law).

139. See DOW, *supra* note 99, at 334-35 ("Having completed [the bill] to my own



Fox's assistance was far more substantial than Dow would ever publicly acknowledge. A graduate of Harvard College and Harvard Law School, Fox was extremely well regarded as a scholarly and knowledgeable attorney.<sup>140</sup> He was, therefore, likely either already familiar with Blackstone's description of the process for seeking a search warrant or became familiar with this description. Even if he never handled a criminal case, he would have had ready access to a volume with this description of the warrant application process. One of the earliest American versions of Blackstone's *Commentaries on the Laws of England* was published in Portland, and early Maine manuals for justices of the peace reiterated this description, which was, as a practical matter, never followed.<sup>141</sup> Blackstone's *Commentaries* were a staple in the library of mid-nineteenth-century lawyers, and Fox was surely no exception.<sup>142</sup> He was also much more likely than Dow to be familiar with the similar procedure required to obtain a warrant under the Excise Act of 1791. These facts alone would suggest that Fox was the more likely author of the new search and seizure provision.

Open letters, published in Portland newspapers, between Neal Dow and his cousin, John Neal, confirm Fox's role in creating this provision. John, also a Portland lawyer, had initially been a supporter of his cousin's efforts to enact the Maine Law. However, a feud developed between the two, largely over a client of John's, a notorious Portland prostitute named Margaret Landigren, alias "Kitty Kentuck." She was convicted of violating the new liquor law—a charge John Neal believed to be false.<sup>143</sup> When John personally put up bond for her appeal, Neal Dow alleged that his cousin was having an affair, or at least a series of commercial transactions, with

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satisfaction, I submitted it to Edward Fox . . . . He suggested a few changes, principally on technical points, which I accepted.").

140. For biographical information on Edward Fox, see N. M. FOX, A HISTORY OF THAT PART OF THE FOX FAMILY DESCENDED FROM THOMAS FOX OF CAMBRIDGE, MASS. 47 (St. Joseph, Mo., Union Printing 1899); HERBERT T. SILSBY, II, MEMORABLE JUSTICES AND LAWYERS OF MAINE 188–91 (2006); WILLIAM WILLIS, A HISTORY OF THE LAW, THE COURTS, AND THE LAWYERS OF MAINE, FROM ITS FIRST COLONIZATION TO THE EARLY PART OF THE PRESENT CENTURY, at iv (Portland, Bailey & Noyes 1863).

141. See SIR WILLIAM. BLACKSTONE, KNT., COMMENTARIES ON THE LAWS OF ENGLAND (Portland, Thomas B. Wait 1807); JEREMIAH PERLEY, THE MAINE JUSTICE 75–76 (Hallowell, Goodale, Glazier 1823) (stating standard from Blackstone). I am grateful to Chris Livesay, who allowed me to spend a day going through these and other original nineteenth-century treatises he has collected in his Brunswick, Maine law office.

142. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 463 n.1 (3d ed. 2005) (describing Lincoln's reliance on Blackstone); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 47–48 nn.36–37 (1983) (observing that Blackstone's *Commentaries* provided the curriculum for early American law schools).

143. See Matthew J. Baker, *The Saga of Portland's Unsinkable, Irish Kitty Kentuck*, PORTLAND MONTHLY MAGAZINE, Dec. 1996, at 24, 25–27; JAMES MUNDY, HARD TIMES, HARD MEN: MAINE AND THE IRISH 1830–1860 90–91 (1990).

Kitty.<sup>144</sup> Angry letters between the two contained a variety of allegations, one of which Neal Dow never refuted.<sup>145</sup> John Neal alleged that his cousin was accepting accolades from all over the globe for drafting a search and seizure law everyone in the Portland community knew was drafted by Edward Fox.<sup>146</sup>

This new standard was indeed groundbreaking and, for prohibitionists, certainly worthy of the praise it received even if the wrong person was lauded. Fox's work had produced a standard that required a very specific type of proof to authorize a search. This new standard, however, took a step toward the modern probable cause standard in expressly requiring consideration of the facts supporting a complainant's accusations.

Prohibitionists turned to the legislature two years later to amend the statute they had successfully passed. It was a creative effort to permit liquor searches whenever three complainants swore that they had probable cause to believe alcohol could be discovered in the search requested and jettisoned the requirement that one of the complainants observe and testify to a liquor sale on the premises. Prohibitionists were attempting to install the original standard Neal Dow had proposed in 1849, which would have permitted a search whenever a complainant swore he had probable cause. Ironically, this effort would produce a rule that required a magistrate to review whatever facts a complainant offered in support of a search and determine whether sufficient suspicion existed to justify the search. The standard, in this generic form, could be applied to search (or arrest) warrants for anything, not just liquor. From this generic standard, it would be no great leap to permit officers to perform arrests when the facts available to them provided probable cause to believe a crime had occurred and the suspect had committed it.

The proposed amendment used vague language in an apparent attempt to dupe legislators into passing a law permitting a liquor search on the oath

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144. See John Neal, *The Liquor Law of Maine – No. 2*, MAINE EXPOSITOR, Sept. 7, 1853, at 1; JOHN NEAL, WANDERING RECOLLECTIONS OF A SOMEWHAT BUSY LIFE 370–72 (1869).

145. See Neal Dow, *John Neal and the Liquor Law of Maine*, MAINE EXPOSITOR, Sept. 14, 1853, at 1 (reprinting article from the newspaper *State of Maine*); John Neal, *Mr. Neal's Reply*, MAINE EXPOSITOR, Sept. 14, 1853, at 1.

146. John Neal stated that in drafting the Maine Law, Dow "had the help of a legal personage, for whom we profess to feel a sincere regard, in preparing the very portions which are most offensive and preposterous, and which mainly distinguish it from the old law. What those are, will be seen hereafter, as we proceed with the 'searching analysis' we have in our mind." John Neal, *The Liquor Law of Maine*, MAINE EXPOSITOR, Aug. 31, 1853, at 2. Given Dow's reference to Fox's "technical assistance," the reference is not difficult to decode, but subsequent writings from Neal would clarify any ambiguity. John Neal would quickly grow considerably less charitable toward Fox when he, one week later, specifically named him, noting that he was "the gentleman who ranks among one of the putative fathers of the Maine Liquor Law, and is rather disposed to glory in the co-partnership, though he thinks it too merciful." Neal, *supra* note 145.

of complainants that they possessed probable cause. Under the 1853 bill, three persons who were competent to be witnesses in civil cases were required to allege that alcohol could be discovered in the requested search.<sup>147</sup> A magistrate could not issue a warrant to search a dwelling unless he was convinced “by the testimony of witnesses upon oath, that there is reasonable ground for believing” that unlawfully possessed liquor was in the house.<sup>148</sup> The new bill imposed a hefty penalty for perjury—one year in the state penitentiary.<sup>149</sup> Magistrates were required to record the statements of these complainants, and the complainants were required to sign the transcriptions of their testimony.

Opponents of the new bill alleged that the vague language in this provision would permit a search warrant on the mere oath of a complainant that he had reasonable grounds for his belief. Supporters of the bill suggested that the vague language did not change the law and pointed to the severe perjury penalty.<sup>150</sup> The final version adopted by the legislature, and signed by Governor Hubbard on April 1, 1853, differed from the initial bill only in punishment for perjury—two years in the final bill.<sup>151</sup>

Temperance forces quickly tested the parameters of the new law, seeking warrants to search dwellings for liquor without providing any facts to support the complainants’ conclusion that alcohol was indeed present. A number of decisions from the state’s highest court concluded that complainants were required to provide facts supporting their suspicions, and when this factual support was lacking, the court arrested the judgment

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147. With the exception of women, this did not substantially open up the pool of potential complainants given Maine’s otherwise very liberal suffrage laws. Women, of course, played a substantial role in the Temperance Movement, so this provision may have been perceived to greatly enlarge the number of informants appearing before magistrates. See generally HOLLY BERKLEY FLETCHER, *GENDER AND THE AMERICAN TEMPERANCE MOVEMENT OF THE NINETEENTH CENTURY* (2008). One member of the Maine Legislature objected to permitting women and aliens to seek search warrants. Hon. Geo. M. Chase, Speech In Opposition to the Additional Bill for the Suppression of Drinking Houses and Tippling Shops (March 26, 1853), in *MAINE EXPOSITOR*, April 27, 1853, at 1.

148. See REPORT OF JOINT SELECT COMMITTEE ON SO MUCH OF THE ADDRESS OF THE GOVERNOR AS RELATES TO THE ACT FOR THE SUPPRESSION OF DRINKING HOUSES AND TIPPLING SHOPS, 23 DOCUMENTS PRINTED BY ORDER OF THE LEGISLATURE OF THE STATE OF MAINE 26 (1853) (reciting bill).

149. *Id.* at 27.

150. *Id.* at 4 (noting that to search a dwelling house, “evidence of witnesses [had to] be given in writing, on oath, filed with the magistrate, sufficient to show that there is good ground to believe that spirituous and intoxicating liquors are kept or deposited therein”).

151. An Act in Addition to Chapter Two Hundred and Eleven of Eighteen Hundred and Fifty One, ch. 48, § 11, 1853 Maine Laws 51, 59. There do not appear to have been any convictions for perjury under the statute. There was one in Rhode Island under a similar statute, but this is the only one I have discovered reported either in the appellate reports, or newspapers, from the 1850s. See *Perjury*, *MAINE EXPOSITOR*, June 22, 1853, at 2.

against the defendant and returned his alcohol.<sup>152</sup> The court thus interpreted the amendment to the liquor law to have created a generic standard for warrant applications. So, while complainants were no longer required to observe, and testify to, a liquor sale to obtain a search warrant, they were required to testify to the facts they alleged provided reasonable grounds to believe alcohol present.

The remedy the court afforded for the violation was certainly novel. Arresting the judgment of a lower court because of a defect in the warrant effectively forbade a court to consider the fruit of an unlawful search.<sup>153</sup> These decisions appear to be the first American decisions based on the principle modern lawyers have come to know as the exclusionary rule.<sup>154</sup> Two decades later, the court would hold that the fruits of an officer's unlawful, warrantless search were admissible, retreating from the full implications of the new remedy it had fashioned.<sup>155</sup> Even this limited version of the exclusionary rule, however, represented a substantial innovation in the law as reliable evidence had always been admissible throughout Anglo-American history regardless of how it was discovered.<sup>156</sup>

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152. See, e.g., *State v. Staples*, 37 Me. 228, 230 (1854) (holding mere allegation of presence of alcohol insufficient for a warrant); *State v. Spirituous Liquors*, 39 Me. 262, 263 (1855) (holding the warrant was "fatally defective" because it was not signed by the witnesses).

153. The court had previously concluded that complaints seeking warrants that failed to allege that the alcohol was intended for sale in the town where it was housed were defective and the proceedings under them must be quashed. See *State v. Spirituous Liquor*, 33 Me. 527, 530 (1852). The exclusionary rule had thus been previously established in a case in which the pleadings in the complaint were inadequate. The cases, following the 1853 law, applied this remedy to a failure in the sufficiency of the proof supporting the allegations in the complaint. See *Staples*, 37 Me. at 229-30.

154. It is frequently assumed that the exclusion of illegally obtained evidence "first appeared in a cryptic statement in the 1886 decision *Boyd v. United States*, [and] did not fully emerge until the 1914 decision in *Weeks v. United States*." Davies, *supra* note 16, at 622-23 (citation omitted).

155. See *State v. McCann*, 61 Me. 116, 118 (1873) (holding conviction under liquor law will not be disturbed when evidence is unlawfully obtained by officer who acted without a warrant).

156. Amar, *supra* note 42 at 785-87; Davies, *supra* note 16 at 623-24 n.17 (citing *Commonwealth v. Dana*, 443 Mass. (2 Met.) 329 (1841)) ("The Massachusetts Supreme Court first upheld the constitutionality of the statute but nevertheless announced that it was contrary to common law to permit an inquiry into how evidence was obtained during the course of a trial, a rule that became known as the 'collateral issue' doctrine.") Federal courts well into the twentieth century would wrestle with a variety of justifications for the exclusionary rule. See Davies, *supra* note 16, at 624-25; Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Excl[us]ionary Rule in Search-and-Seiz[ur]e Cases*, 83 COLUM. L. REV. 1365, 1372-77 (1983). The judicially created remedy in the mid-nineteenth century—that returned the defendant's liquor and dismissed the conviction against him—can only be explained by an effort to make the defendant whole after having been unlawfully prosecuted for a crime that the courts found to



Much of the fossil record of modern criminal procedure can thus be found in the Supreme Judicial Court's interpretation of the nation's first prohibitory laws. With this 1853 modification to the liquor law, and its interpretation by the court, Maine had fashioned a standard for search warrants that would be familiar to a twenty-first century lawyer. Affiants were no longer permitted to provide what modern Supreme Court decisions describe as "bare bones" affidavits.<sup>157</sup> The actual practice of justices of the peace—at least in liquor cases—now conformed with Blackstone's description of a magistrate's role in reviewing requests for search warrants. For the first time, treatises in Maine contained forms for magistrates to record the facts supporting the allegations of complainants.<sup>158</sup> And suppression of evidence replaced tort suits as the mechanism for preventing at least a category of illegal searches. The historical roots of the exclusionary rule may, therefore, be greater than its critics—and even its proponents—have recognized.<sup>159</sup> Justice Potter Stewart observed in the *Columbia Law Review* that the "first case associated with the exclusionary rule is *Boyd v. United States*" from 1886.<sup>160</sup> However, the rule has a somewhat older lineage than that once one looks to state cases—in Maine, a form of the rule was developed in response to a new power to search for liquor. So, while it is certainly true that no form of the exclusionary rule existed during the colonial era or in the early years of the republic, a version of the exclusionary rule was fashioned contemporaneously with ordinary officers acquiring the discretion of customs officers.<sup>161</sup>

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be of dubious legitimacy. See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 7 (2006) (observing that the courts in the twentieth century doubted the legitimacy of Prohibition).

157. See e.g., *United States v. Leon*, 468 U.S. 897, 915, 923 n.24 (1984); *Illinois v. Gates*, 462 U.S. 213, 239 (1983).

158. BENJAMIN KINGSBURY, JR., *THE JUSTICE OF THE PEACE: DESIGNED TO BE A GUIDE TO JUSTICES OF THE PEACE, FOR THE STATE OF MAINE* 295 (Portland, Sanborn & Carter 1852).

159. See e.g., Luke M. Milligan, *The Source-Centric Framework to the Exclusionary Rule*, 28 CARDOZO L. REV. 2739, 2747–56 (2007) (looking at Justice Holmes' opinion in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), to explain the modern exclusionary rule); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 263–67 (1998) (describing the development of the exclusionary rule).

160. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983).

161. Thomas Davies has concluded that the United States Supreme Court "transferred [an] expanded concept of government illegality to the new law enforcement officer by ruling in 1914 in *Weeks* that a federal marshal's unlawful warrantless search of a residence violated the Fourth Amendment and, thus, was subject to the constitutional logic of nullity." Davies, *supra* note 16, at 625. The exclusionary rule, he argues, "arose contemporaneously with the modern conception of the modern law enforcement officer." *Id.* The process he describes

Versions of Maine's prohibitory law quickly spread through the country, winning acceptance in legislatures in every region of the country except the Southeast.<sup>162</sup> The year after Maine adopted the prohibitory law with its search and seizure provision, a bill containing very similar provisions was positively reported out of a committee of the New York Legislature.<sup>163</sup> In a preview of future events, Democratic Governor Horatio Seymour objected to the infringement of civil liberties in the Maine Law.<sup>164</sup> Later Seymour would oppose capital punishment and object to Abraham Lincoln's arbitrary arrests of those suspected of disloyalty.<sup>165</sup> One of his earliest public positions advancing a civil libertarian position, however, was his objection to the Maine Law.

Governor Seymour objected that the Maine Law permitted searches not previously allowed in ordinary criminal cases that worked a violation of the federal constitution.<sup>166</sup> Seymour's criticism demonstrated the most precise knowledge of search and seizure law of any of the objections to the nineteenth-century prohibitory laws. Searches had long been authorized on far less certainty that a crime had occurred, but not searches to reveal evidence of ordinary crimes. Customs searches had been permitted whenever customs or revenue officers had probable cause to believe goods had been unlawfully imported, or that required taxes had not been paid on them.<sup>167</sup> Throughout American history, however, customs and revenue

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occurring at the federal level seems to have occurred at the state level, first in Maine, then in states adopting the exclusionary rule as a new type of crime greatly expanded the role of officers.

162. See WILLIAM BLACKWOOD & SONS, BLACKWOOD'S EDINBURGH MAGAZINE, at 211 (1867) (describing the thirteen states to adopt the Maine Law and the efforts to secure its adoption in all the states); STEWART MITCHELL, HORATIO SEYMOUR OF NEW YORK 154 (1938) ("One state after another played with the reform until Maine laws were being argued over almost everywhere.").

It has been assumed that the Prohibition movement was not successful beyond these regions because of the linkage between the Prohibition and Abolition movements. Prohibition, however, came very close to becoming law in at least parts of the South in the mid-nineteenth century. See Thomas H. Appleton, Jr., "Moral Suasion Has Had It's Day": From Temperance to Prohibition in Antebellum Kentucky, in JOHN DAVID SMITH & THOMAS H. APPLETON, JR. (eds.), A MYTHIC LAND APART: REASSESSING SOUTHERNERS AND THEIR HISTORY 19-42 (1997).

163. DOCUMENTARY HISTORY, *supra* note 132.

164. See MITCHELL, *supra* note 162, at 156.

165. See Governor Horatio Seymour, Annual Message, (January 7, 1863) in V MESSAGES OF THE GOVERNORS, COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906 465 (Charles Lincoln ed., 1909) (describing opposition to death penalty); MITCHELL, *supra* note 162, at 267; see generally MARK E. NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991).

166. Governor Seymour's Message, N.Y. TIMES, May 7, 1852, at 3.

167. Thomas, *supra* note 1, at 1477, 1493.

officers had been regarded to have greater searching authority than ordinary police officers.<sup>168</sup> Giving every officer in America the power to search homes for alcohol that customs officers had to search warehouses for untaxed goods offended Seymour. The Governor recognized that the Maine Law was breaking down the separate system of criminal procedure by giving ordinary officers powers comparable to customs agents.<sup>169</sup> Even the supporters of the Maine Law recognized that the search and seizure provision had worked a change; they however applauded the change.

Notwithstanding Governor Seymour's objections, the Maine Law would be well received in his state—and a number of others. A stronger version of the law passed both houses of the New York Legislature in 1854. Under this version, a search was authorized if any two voters complained that unlawful alcohol was kept for sale in the county or town in which the complaint was made. Seymour vetoed this bill, offering in 1854 as one of his reasons that it effectively authorized general searches.<sup>170</sup> In contrast to his precision in his 1852 critique, this was sloppy. There had never been agreement on the principle that made general searches objectionable, but New York's version of the Maine Law certainly required as much specificity as any procedure for authorizing customs or revenue searches in

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168. Perhaps recognizing an opening to expand the powers of federal officers, within a decade of the Maine Law's widespread adoption, Congress expanded the power of customs officials to seize the books and papers of merchants that could be used to demonstrate revenue and import violations. See S.B. EATON, SEIZING BOOKS AND PAPERS UNDER THE REVENUE LAWS 5 (1874). This law would be famously rejected in the landmark case of *Boyd v. United States*, 116 U.S. 616 (1886), forbidding the seizure of books or records that merely recorded evidence that a crime had occurred, a rule which endured until the realities of the administrative state required the capacity to examine such records. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 419–28 (1995).

169. Seymour specifically charged that the search warrants issued under the Maine Law would provide for the general warrants that the Fourth Amendment had forbidden. Of course, the Fourth Amendment's limitations did not apply to the states, but despite Supreme Court precedent clearly stating this, there was a widespread belief in the mid-nineteenth century that they did. See Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1, 35–37 (2007). Seymour's description of the warrants, authorized under this law as "general warrants," seems a sloppier criticism than one might expect from Seymour given the precision of his description of the state of search and seizure law in 1852. Governor Seymour's Message, *supra* note 166, at 3. There had been a wide range of thought on exactly what made general warrants problematic. See CUDDIHY, *supra* note 7, at 580–81. The requirements under the Maine Law for a search warrant satisfied even the original Virginia Constitution's very thorough objection to general warrants. See Davies, *supra* note 61, at 100.

170. MITCHELL, *supra* note 162, at 155–56; Governor Horatio Seymour, Veto of a Bill Entitled "An Act for Suppression of Intemperance," (March 31, 1854) in IV MESSAGES OF THE GOVERNORS, COMPRISING EXECUTIVE COMMUNICATIONS TO THE LEGISLATURE AND OTHER PAPERS RELATING TO LEGISLATION FROM THE ORGANIZATION OF THE FIRST COLONIAL ASSEMBLY IN 1683 TO AND INCLUDING THE YEAR 1906 755 (Charles Lincoln ed., 1909).

the early republic.<sup>171</sup> It also required more assurances of accuracy than were required for any application for a customs search. Two witnesses were required to swear that probable cause existed and at least one of them had to provide facts under oath supporting their conclusions.<sup>172</sup> There was, however, an analogy to the type of fear that general searches produced: widespread searches. The search provision of the Maine Law sought to discover something that many New Yorkers had in their possession, and intended to keep in their possession.

With the temperance lobby now solidly against him, Horatio Seymour, like John Dana in Maine before him, lost the subsequent election. Seymour's successor Myron Clark signed into law a version of the Maine Law slightly different from the one Seymour vetoed.<sup>173</sup> Under this version, any "credible person" could complain to a magistrate that alcohol was kept or deposited in violation of the law.<sup>174</sup> The complainant was required to provide in writing, under oath or on affirmation, "the facts and circumstances upon which such belief is founded."<sup>175</sup> The statute then expressly recognized the screening role that the magistrate was to play. A magistrate was to issue the search warrant only "if he [was] satisfied that there [was] probable cause for said belief."<sup>176</sup> Earlier versions of the Maine

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171. Seymour contended that alcohol could not be particularly described but certainly the same was true for many things for which search warrants had been sought throughout Anglo-American history. Governor Seymour's Message, *supra* note 166, at 3. Money, for instance, was certainly fungible.

172. It is not clear what inspired the multiple complainant rule that began with the original version of the Maine Law. Multiple witnesses were of course required in treason prosecutions. See L.M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 95 (1968); John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 99 (1901).

173. Much like Henry Dutton in Connecticut, Myron Clark established himself as one of the chief proponents of the Maine Law and, like Dutton, this stance launched him into a brief stay in the Governor's Office. See discussion *supra* note 26 (discussing Dutton); see also WILLIAM E. GIENAPP, *THE ORIGINS OF THE REPUBLICAN PARTY, 1852-1856* 153 (1987); MYRON HOLLEY CLARK, *THE MAINE LAW: SPEECH OF HON. MYRON H. CLARK, 29TH DISTRICT, ON THE BILL FOR THE SUPPRESSION OF INTEMPERANCE IN THE SENATE, MARCH 3D 1854*.

Thomas Davies and Fabio Arcila disagree as to whether colonial and early American magistrates screened the basis a complainant offered for believing that stolen goods would be found in a particular location. The nineteenth-century liquor cases tend to suggest that Professor Arcila has the better end of this argument. The Connecticut Supreme Court, in affirming Connecticut's version of the Maine Law, asserted that a bare bones allegation that stolen goods could be located in a particular location satisfied the state constitution's search and seizure provision. *Lowrey v. Gridley*, 30 Conn. 450, 459-60 (1862).

174. DOCUMENTARY HISTORY, *supra* note 132, at 18.

175. *Id.*

176. *Id.*



Law had described the process in terms that were uniquely related to a liquor search. The search and seizure provision in this version was written in a very generic fashion and resembles language in twentieth-century hornbooks describing the probable cause requirement.

Probable cause in the ordinary criminal justice system was no longer merely a pleading requirement that victims alleged to obtain a warrant; it became the factual threshold that could be satisfied by the testimony of any "credible person." Police officers could satisfy this requirement—and the statute even recognized that police officers could rely on informants to satisfy this requirement.<sup>177</sup> The sworn written statement could offer the facts and circumstances known to the affiant, or the facts and circumstances known to "some other person."<sup>178</sup> In a host of states, the modern probable cause standard for obtaining a search warrant was no longer confined to customs cases, and much of the country embraced the mechanism the courts of Maine developed to remedy and prevent unlawful liquor searches. Failure to comply with the requirements of liquor warrants required exclusion of the fruits of ensuing searches in New York and a number of other states just as it did in Maine.<sup>179</sup>

New York's experiment with Prohibition ended almost as soon as it began.<sup>180</sup> Within a few months of the Maine Law's passage, an Albany jury had acquitted William Landon of violating the Maine Law despite clear

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177. See Davies, *supra* note 61 at 187–88 (probable cause standard made hearsay evidence sufficient for a warrant); see Lane, *supra* note 6, at 10–11 (describing the role of early police officers as developing an "intimate familiarity" with the criminals they were policing).

178. DOCUMENTARY HISTORY, *supra* note 132, at 18.

179. See *People v. Toynbee*, 11 How. Pr. 289, 330 (N.Y. Gen. Term 1855) ("The complaint [analogous to the modern affidavit in support of a search warrant] is a substitute for an indictment . . . and requires at least as much particularity . . ."); see also *State v. Twenty-Five Packages of Liquor*, 38 Vt. 387, 391 (1866) (recognizing that forfeiture action could be quashed for failure to have a sufficiently particular search warrant); *Fisher v. McGirr*, 1 Gray 1, 2 (Mass. 1854) (action for value of seized liquor permitted on the basis of an insufficient search warrant).

Using an improper search as the basis for dismissing a prosecution would continue into the twentieth century. See *In re Huff*, 120 N.Y.S. 1070 (N.Y. App. Div. 1910) (recognizing that action against forfeited liquor can be dismissed if the search warrant for its discovery is invalid); *Foley v. One Hundred & Eighty Bottles of Liquor*, 204 N.Y. 623 (N.Y. 1912) (affirming denial of motion to dismiss on this ground). Courts began to expand this rule beyond searches for liquor that were based on invalid search warrants. See *State v. Kinney*, 185 N.Y.S. 645 (N.Y. Sup. 1920) (dismissing indictment for weapon and returning revolver seized by an invalid warrant); *People v. Jakira*, 193 N.Y.S. 206 (N.Y. Gen. Session. 1922) (gun seized illegally and without warrant excluded).

180. See John Joseph Coffey, *A Political History of the Temperance Movement in New York State, 1808–1920*, at 90–96 (May 1976) (unpublished Ph.D. dissertation, Pennsylvania State) (on file with author); DOCUMENTARY HISTORY, *supra* note 132, at 18; *People v. Berberich*, 20 Barb. 168, 266 (1855) (declaring New York's version of the Maine Law unconstitutional).

evidence to the contrary—his lawyer had argued to the jury that the law was unconstitutional.<sup>181</sup> The following year, the New York Court of Appeals agreed.<sup>182</sup> Rather than cure the defects the court identified in the law, the legislature returned to a licensing scheme that strictly regulated who could obtain a license and forbid the sale of alcohol on Sundays.<sup>183</sup> The Maine Law had nevertheless introduced New York's criminal justice system to a search mechanism unmoored from a victim's complaint.

With the new standard came police investigations of victimless crime. Police searches to discover vice in the early days of the New York Municipal Police were rare.<sup>184</sup> The first manual for police officers mentioned the possibility of a search warrant only to discover stolen goods; searches initiated by police to discover evidence of victimless crimes were not mentioned.<sup>185</sup> In the 1870s, private anti-crime organizations began to file complaints seeking arrest and search warrants in cases involving the

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181. See JOHN K. PORTER, ARGUMENT OF JOHN K. PORTER ON THE TRIAL OF WILLIAM LONDON, ACQUITTED JULY 21, 1855, ON A CHARGE OF VIOLATING THE PROHIBITORY LAW (Albany, H.H. Van Dyck 1855) in VII AMERICAN STATE TRIALS 901–53 (John D. Lawson, ed., 1917).

182. *Wynehamer v. People*, 13 N.Y. 378, 486 (1856); see also William John Jackson, Prohibition as an Issue in New York State Politics 1836–1933 (February 11, 1974) (unpublished Ph.D. dissertation, Columbia University) (Sacramento State Library).

183. Members of the state legislature were aware that New York Mayor Fernando Wood would thwart efforts to enforce the new licensing regulation, just as he had done with the Maine Law. When they created the new version of liquor violation, legislators replaced the mayor-controlled Municipal Police Force that it had permitted the City of New York to create in 1844 with the Metropolitan Police Force, established under the control of a board appointed by the Governor. An Act of Apr. 15, to Establish a Metropolitan Police District and to Provide for the Government Thereof, New York Laws 1857, ch. 569, 1857 N.Y. Laws 200. The new force was responsible for policing the counties of New York, Kings, Westchester and Richmond, rather than just Manhattan. *Id.* at 200.

184. Prior to the Maine Law, the police had a policy of responding to alleged liquor law violations (i.e., selling without a license or selling on Sunday) only if there was a complaint. See RICHARDSON, *supra* note 54, at 110. There was a coordinated raid of brothels in 1850, but other than Mayor Fernando Wood's efforts against lower-class street walkers between 1855 and 1858 (which obviously would not involve the search of any sort of dwelling), there was no substantial subsequent police action against prostitution until the latter part of the century. See BURROWS & WALLACE, *supra* note 4, at 807 (describing 1850 raids); *Id.* at 1163 (describing raids of gambling houses and brothels authorized by Mayor Grace in 1886); TIMOTHY J. GILFOYLE, CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790–1920, at 183–84 (1992); see also ANN FABIAN, CARD SHARPS AND BUCKET SHOPS: GAMBLING IN NINETEENTH-CENTURY AMERICA, at 97 (1999) (discussing lack of gambling enforcement from creation of Municipal Police Force through Civil War); RICHARDSON, *supra* note 54, at 154. Given the amount of corrupt coordination between the police and prostitution in the late nineteenth-century, the raids of the late nineteenth century were often more attributable to failure to pay “protection” money to police than the City's serious effort to eliminate prostitution.

185. See NEW YORK, RULES AND REGULATIONS, *supra* note 90, at 58.

victimless crimes of pornography, prostitution, gambling and liquor law violations.<sup>186</sup> By the 1880s, a statute specifically authorized police captains to seek warrants to search premises suspected of being houses of prostitution.<sup>187</sup> Police-initiated searches to discover evidence of gambling and alcohol sales without a license, or sales on Sundays occurred with frequency in the latter part of the nineteenth century (most often when the police had not been given their protection money).<sup>188</sup> The word “raid” began to regularly appear in appellate reports by the 1890s.<sup>189</sup>

The Maine Law in New York provided more than just an introduction to a formal search mechanism that could be initiated by someone other than a crime victim. The vigorous debate over the search and seizure aspects of the Maine Law appears to have put to rest any question about the legitimacy of searches initiated by suspicions developed by police officers. Opponents of the Maine Law had objected both to the prohibition of alcohol sales and the expansion of police discretion. In the latter half of the nineteenth century, there were proposals to regulate rather than prohibit

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186. See Dan Greenberg & Thomas H. Tobiason, *The New Legal Puritanism of Catherine MacKinnon*, 54 OHIO ST. L.J. 1375, 1377–78 (1993) (citing Felice F. Lewis, *Literature, Obscenity, & Law* 10 (1976)); Louis H. Pollack, *Review of: Federal Censorship: Obscenity in the Mail*, 75 HARV. L. REV. 1681 (1962).

187. *People ex rel. Eakins v. Roosevelt*, 44 N.Y.S. 1003 (N.Y. 1897). This was one example of many in the late nineteenth century of members of anti-vice societies who went undercover to discover prostitution and its lack of enforcement. See e.g., GILFOYLE, *supra* note 184, at 181–96 (describing these societies). The Court’s opinion in *Eakins* colorfully describes, using appropriately prudish language, the adventures of the undercover member of an anti-vice society who discovered a brothel and reported the failure of police to close it. The citizen-informant entered a dwelling between 2:00 and 3:00 am one morning, saw 16 to 20 women huddled around a few men while women continued to enter and leave the room and went upstairs with one of the women upon his payment of the 25 cents rent for the room. On his way to the room, he “saw and heard the most disgusting evidence of vice.” *Eakins*, 44 N.Y.S. at 1007.

Technically, prostitution itself was not a crime in New York in the second half of the nineteenth century, only the crime of maintaining a house of prostitution. See THOMAS C. MACKEY, *RED LIGHTS OUT: A LEGAL HISTORY OF PROHIBITION, DISORDERLY HOUSES AND VICE DISTRICTS*, 93–118 (1987); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 573–74 (2001) (“Before the late nineteenth century, most jurisdictions had no prostitution statutes; the relevant crime was running a ‘disorderly house,’ a more circumscribed offense.”).

188. Police corruption was rampant in the late nineteenth century. Bars, gambling houses, and brothels regularly paid police to avoid prosecution. EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 499 (2001).

189. See *Mott v. Mott*, 38 N.Y.S. 261, 262 (N.Y. 1896) (divorce action in which husband’s alleged adultery with a prostitute was testified to by a woman who saw the man in an apartment she kept; the husband was in the apartment a day or two before a police raid); *People ex rel. Doherty v. Police Com’rs of New York*, 84 Hun. 64, 66 (1895) (operator of house of ill fame claimed that officer extorted money from her so that she could avoid being raided again); *People ex rel. Cross v. Martin*, 32 N.Y.S. 933 (N.Y. 1895).

gambling and prostitution.<sup>190</sup> There were advocates of legalized gambling and prostitution, just as there were for lawful alcohol sales.<sup>191</sup> There were, however, no objections to the power of the police to conduct the raids necessary to enforce the prohibition on these vices.<sup>192</sup> Police-initiated and police-conducted investigations had come to be accepted by the latter part of the nineteenth century. Probable cause that could be satisfied by any person with relevant information, including officers, had become an unquestionably sufficient criterion for police searches.

### III. LAW ENFORCEMENT NEEDS PROMPTED A BROADER ARREST POWER

The police had no obvious ally in advocating a less restrictive standard for arrests. While prohibitionists and police wanted relaxed standards for conducting searches—prohibitionists to discover liquor, police to discover evidence of crime more generally—no analogous group shared the interest of police in readily being able to take suspects into custody. The success of the more police-friendly arrest standard turned alone on policymakers' interest in giving police greater discretion and their ability to exercise that discretion responsibly. The emergence of probable cause as a standard sufficient for arrest occurred more slowly in New York than in other

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190. A variety of laws were passed in the nineteenth century that allowed gambling in certain circumstances. See BURROWS & WALLACE, *supra* note 4, at 1164. The idea of legalizing prostitution received less serious attention but was nevertheless considered. See RICHARDSON, *supra* note 54, at 154 (discussing post-Civil War discussion to license and regulate prostitution as Union army had done in the occupied City of Nashville, Tennessee). For discussion of the nation's first legalized prostitution, see THOMAS PETER LOWRY, *THE STORIES THE SOLDIERS WOULDN'T TELL: SEX IN THE CIVIL WAR* 76–82 (1994); WALTER T. DURHAM, *RELUCTANT PARTNERS: NASHVILLE AND THE UNION, JULY 1, 1863 TO JUNE 30, 1865* (1987). Contemporaneous with General Hood's order in Nashville, Great Britain's Contagious Disease Act of 1864 effectively legalized prostitution. See BURROWS & WALLACE, *supra* note 4, at 1162.

191. Prostitution and gambling appealed to a smaller audience—at least a smaller audience willing to publicly associate themselves with these acts—than drinking. See Michael Woodiwiss & Dick Hobbs, *Organized Evil and the Atlantic Alliance: Moral Panics and the Rhetoric of Organized Crime Policing in American and Britain* 49 *BRIT. J. CRIMINOLOGY* 106, 109 (2009) (observing that proponent of legalized gambling lacked the financial wherewithal of the advocates of repealing Prohibition).

192. The procedural requirements for warrants that the Maine Law had introduced remained. In 1891, an appellate division of the New York Supreme Court held that an affidavit for a search warrant failed to state the facts supporting the affiant's suspicions that his stolen goods could be found in the location to be searched. The court further held that this failure in the affidavit prevented the justice of the peace from obtaining jurisdiction to issue the warrant, leaving him liable to a civil action. *Wallace v. Williams*, 14 N.Y.S. 180 (N.Y. Gen. Term 1891). Remarkably, this case involved a warrant to locate stolen goods, the paradigm search warrant in the eighteenth century, which had been authorized on a victim's mere assertion that he had probable cause to believe (or, before the adoption of revised statutes in several states, suspect) that the goods could be located in the place identified.



jurisdictions, and a quirk of legislative timing reversed the broader standard previously conferred on officers. Nevertheless, New York's experience is representative in illustrating the forces at play in expanding the arrest powers of police and how tenuously police departments held these powers in their early years.

The fear New Yorkers had of police power certainly did not dissipate with the creation of the Municipal Police Department in 1845.<sup>193</sup> Though the new department advocated legal reform to permit officers to arrest on mere probable cause of a felony, neither the courts of New York, nor the New York Legislature, were initially willing to embrace this new arrest standard. In 1853, New York courts began to accept probable cause as a sufficient basis for a warrantless felony arrest.<sup>194</sup> There was, however, an important difference between the probable cause standard for search and arrest warrants and the probable cause standard for warrantless arrests. Officers, not magistrates, obviously determined whether probable cause existed to justify a warrantless arrest, and these officers were known for rampant violence and arbitrary arrests when the New York Legislature adopted its Code of Criminal Procedure in 1881.<sup>195</sup> By considering this code in the early 1880s, New York politicians were forced to take a stand against the police during a period of fairly serious misconduct. By the 1890s, Progressive reformers had successfully blamed police misconduct on a culture of corruption and proposed good government reforms as a cure.<sup>196</sup> In the early 1880s, however, a limit on the discretion of officers to make warrantless arrests may well have seemed to be a decent remedy for arbitrary arrests.<sup>197</sup>

Americans were generally less willing, or at least slower, than their English counterparts to expand the discretionary powers of police officers—New Yorkers would appear especially unwilling to extend prerogatives to them. The King's Bench adopted the rule American lawyers would presently recognize as the standard for warrantless arrests in 1827—if an officer had probable cause to believe that a crime had been committed and that the person taken into custody committed it, the officer is not liable for false arrest even if the suspect he took into custody was factually innocent.<sup>198</sup> This modification of the English law may have been prompted by a perception that constables needed more tools at their disposal to deal

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193. New York's force represented the second full-time patrol force, second only to London's modern police force, created in 1829. WILBUR R. MILLER, *POLICE AUTHORITY IN LONDON AND NEW YORK CITY 1830-1870*, 8 *JOURNAL OF SOCIAL HISTORY* 81, 81 (1975).

194. *Burns v. Erben*, 40 N.Y. 463 (N.Y. 1869).

195. See JOHNSON, *supra* note 4, at 15-16.

196. See Oliver, *supra* note 57, at 468-83. See generally Jay S. Berman, *POLICE ADMINISTRATION AND PROGRESSIVE REFORM: THEODORE ROOSEVELT AS POLICE COMMISSIONER OF NEW YORK* (1987).

197. JOHNSON, *supra* note 4 at 15-16.

198. *Beckwith v. Philby*, (1827) 108 Eng. Rep. 585 (K.B.); 6 Bam. & Cress. 635.

with increasing concerns of crime and violence, particularly in urban areas. The new arrest rule was not, however, the product of pressure from, what we would call in modern times, the law enforcement lobby. The Metropolitan London Police Department would not be established for another two years.<sup>199</sup>

A number of American states followed the English precedent, adopting the new standard before the creation of metropolitan police forces. Cases in Massachusetts and Pennsylvania adopting probable cause as the standard for a warrantless arrest pre-dated the creation of modern police departments in Boston and Philadelphia by a few years.<sup>200</sup> Tennessee adopted the probable cause standard decades before the creation of modern police forces in Nashville or Memphis.<sup>201</sup> New York did not, however, accept this standard as a basis for warrantless arrests until almost a decade after the creation of the Municipal Police Force.

The New York Municipal Police Department was created in 1846 and its officers were instructed that they could arrest any “person who has committed a felony, or who for reasonable cause, is suspected of having committed a felony.”<sup>202</sup> As late as 1852, however, Oliver Barbour’s treatise on New York criminal law observed that officers were permitted to arrest on the basis of probable cause only if a felony had in fact been committed.<sup>203</sup> It was not until 1853 that two justices of the New York Supreme Court, the trial level court, in this case sitting in New York City, acknowledged in dicta the power of officers to arrest a felony suspect when there is “just suspicion.”<sup>204</sup> While this probable cause arrest standard would be accepted in New York, at least for a few decades, it was certainly not an uncontroversial standard.

*Burns v. Erben*, decided by a three-judge appellate panel of the New York Superior Court in 1864, would reveal that New York courts were not entirely comfortable with the new arrest standard.<sup>205</sup> The court did not have

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199. Craig D. Uchida, THE DEVELOPMENT OF THE AMERICAN POLICE: AN HISTORICAL OVERVIEW, 7 (2004).

200. *Rohan v. Swain*, 59 Mass. (5 Cush.) 281, 282 (1850); *Russell v. Shuster*, 8 Watts & Serg. 308, 309 (Pa. 1844); *Eanes v. State*, 25 Tenn. 53, 54 (Tenn. 1845).

201. See *Eanes*, 25 Tenn. at 54.

202. NEW YORK, RULES AND REGULATIONS, *supra* note 90, at 31.

203. OLIVER L. BARBOUR, A TREATISE ON THE CRIMINAL LAW OF THE STATE OF NEW YORK (Albany, Gould, Banks 2d ed. 1852).

204. *Pratt v. Hill*, 16 Barb. 303 (N.Y. Sup. Ct. 1853). *Pratt* cites *Holley v. Mix*, 3 Wend. 350, 353 (N.Y. 1829) for the proposition that an officer’s suspicion was sufficient for a felony arrest, but as Thomas Davies observes, *Holley* was a case recognizing only an officer’s immunity for arresting without a warrant when a citizen charged that the suspect had committed a crime. Davies, *supra* note 5, at 635 n.239.

205. There was a passing reference in dicta to officers being permitted to arrest on mere probable cause the year before *Burns* was decided. See *Brown v. Chadsey*, 39 Barb. 252, 263 (NY Supreme Ct, NY County 1863) (“probable cause, or reasonable grounds of suspicion against the party arrested, afford no justification of an arrest or imprisonment which is

to acknowledge the legitimacy of the probable cause standard to rule in favor of the officer in this case in which the plaintiff alleged a wrongful arrest. The officer in *Burns* made the arrest after a complainant alleged the suspect had stolen his property.<sup>206</sup> The officer was justified under well-established law, as a crime had in fact been committed. The officer was, however, represented by the Corporation Counsel for the City of New York, who hoped to use this case to clearly establish the new arrest standard. The City's lawyer observed that the law creating the New York Metropolitan Police had given members of the new police force the warrantless arrest powers of constables, which he argued included the power to arrest when an officer had probable cause.<sup>207</sup> In support of his description of a constable's authority, counsel offered the authority of *Beckwith v. Philby* from 1827, which several American jurisdictions had adopted but New York courts had not embraced.<sup>208</sup>

The court accepted the probable cause arrest standard the City advocated, but its reasoning differed from the City's in an important respect. The court observed that the "Metropolitan Police Act allow[ed] the officers of police to arrest persons suspected by them, without warrant, where there is reason to believe a felony has been committed."<sup>209</sup> The court therefore attributed the probable cause standard to the statute itself, concluding that the statute itself embraced the probable cause standard. The statute of course only gave officers the power of constables, but the court appears to have been reluctant to interpret the power of constables to include this standard. If this (elected) court accepted the English precedent, however, it would bear the responsibility for defining the power of constables, something it likely did not want to appear to do. It was far more comfortable attributing this standard, which it recognized to entrust a "dangerous power" in the police, to the legislature.<sup>210</sup>

There were certainly strong supporters of the probable cause arrest standard in New York who were less sheepish. A three-judge panel of the New York Supreme Court for New York County was bolder in its reasoning one year later when it affirmed the rule announced in *Burns*. The court questioned rhetorically, "How, in the great cities of the land, could police power be exercised, if every police officer is liable to a civil action for false imprisonment, if persons arrested upon probable cause shall afterwards be found innocent? Police authority would be a sham, its officers be made cowards, and government become a failure."<sup>211</sup>

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without authority of law.").

206. *Burns v. Erben*, 26 How. Pr. 273 (N.Y. Super. Ct. 1864).

207. *Id.*

208. See *Davies*, *supra* note 5, at 636 (discussing *Holley v. Mix*, 3 Wend 350 (1829)).

209. *Burns*, 26 How. Pr. 273.

210. *Id.*

211. *Hawley v. Butler*, 54 Barb. 490, 496 (N.Y. Sup. 1868).

The fear of officers' discretion was, however, particularly strong in the second half of the nineteenth century in New York. When the *Burns* case was appealed to the New York Court of Appeals, it was clear that serious questions remained about conferring discretion on officers to evaluate whether evidence was sufficient to justify a warrantless arrest. Two judges wrote opinions in *Burns*, each finding the arrest acceptable, though neither would accept the probable cause arrest standard. Judge Woodruff concluded that a warrantless arrest by an officer was acceptable, even if no crime had been committed, if the officer "acted upon information from another which he had reason to believe."<sup>212</sup> In the early nineteenth century, an officer's powers had been expanded to permit a warrantless arrest if a complainant had made a positive charge against the would-be arrestee—in other words, something analogous to a victim's complaint to a magistrate.<sup>213</sup> Under this long-standing justification for a warrantless arrest, not the new probable cause standard, Woodruff found the officer's actions justified. Judge James was more clear in his refusal to endorse the new arrest standard. He also wrote an opinion in *Burns*, concluding that "[p]robable cause, or reasonable ground, for suspicion . . . affords no justification for an arrest or imprisonment, unless a felony has actually been committed."<sup>214</sup>

New York's particular concern with police powers is difficult to explain.<sup>215</sup> New York's unique history may offer some insight. Historians typically explain early concerns about the powers of modern American police as a manifestation of Revolutionary-Era fears of standing armies.<sup>216</sup> Lingering fears about standing armies seem to have had particular salience in New York—the concern had successfully thwarted the effort to create a London-style modern police force in the 1830s.<sup>217</sup> Certainly there was a fear of standing armies throughout the young republic, but there may be a reason that the analogy to modern police forces got particular traction in New York.<sup>218</sup> Only New York, Philadelphia, and Boston had experienced British occupation during the Revolutionary War. Boston had been occupied for only eleven months,<sup>219</sup> Philadelphia for nine,<sup>220</sup> while New

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212. *Burns v. Erben*, 40 N.Y. 463, 469 (N.Y. 1869).

213. See Davies, *supra* note 5 at 650–54.

214. *Burns*, 40 N.Y. at 466.

215. While New York's resistance to the probable cause arrest standard is unique among states with large urban populations in the mid-nineteenth century, New York was certainly not alone in having concerns about the new standard. See Davies, *supra* note 5, at 637 and n.246 (describing a North Carolina Supreme Court Justice's resistance to the probable cause arrest standard).

216. See BURROWS & WALLACE, *supra* note 4, at 636; RICHARDSON, *supra* note 54, at 25.

217. BURROWS & WALLACE, *supra* note 4, at 636.

218. See RICHARDSON, *supra* note 54, at 15.

219. DAVID McCULLOUGH, 1776 25 (2005) (describing the siege and occupation of Boston).

220. JOHN W. JACKSON, WITH THE BRITISH ARMY IN PHILADELPHIA, 1777–1778 351



York was occupied for seven years during which time the houses of New Yorkers were frequently plundered.<sup>221</sup>

Legislators were required to weigh in on the probable cause standard in 1881 for reasons that appear to be accidental, or at least entirely unrelated to anything related to warrantless arrests. When New York codified its laws in 1829, the legislature provided for a Commission on Pleading and Practice to draft a Code of Civil Procedure and a Code of Criminal Procedure.<sup>222</sup> The Commissioners' proposal was considered in 1849, 1850, and 1855, but never adopted.<sup>223</sup> The legislature considered the Code again in 1881. The Code delineated rules for all aspects of the criminal justice system, not just the police. It did, however, include a variety of rules regarding officers, including the arrest standard.<sup>224</sup>

From the perspective of the police, it was particularly bad timing for elected officials to be publicly considering rules involving their discretion. Reports of police brutality became frequent in the late 1860s and continued to escalate into the 1870s.<sup>225</sup> As one might expect, working class New Yorkers were most frequently the targets of acts of official violence. While upper class New Yorkers tended to appreciate the peacekeeping role of police, working class New Yorkers tended to have some degree of fear of the new institution.<sup>226</sup> The class tensions in policing were aggravated by the police department's violent relationship with organized labor. Police efforts to contain labor demonstrations in the latter half of the nineteenth century frequently resulted in violence. Clubs were often used to break up strikes and protests.<sup>227</sup>

One such confrontation left long memories. In 1874, several labor organizations planned a rally in Tompkins Square.<sup>228</sup> Permits were required in New York after 1872 for any sort of public meeting.<sup>229</sup> The groups were initially granted permission to hold their event, but then the permits were revoked the night before the event because of the concern police had that "the proposed meeting would endanger the public peace."<sup>230</sup> The concerns

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(1979) (describing occupation of Philadelphia).

221. JUDITH L. VAN BUSKIRK, *GENEROUS ENEMIES: PATRIOTS AND LOYALISTS IN REVOLUTIONARY NEW YORK* 23 (2002) (describing occupation of New York).

222. See John T. Fitzpatrick, *Proposed Codes of the State of New York*, *LAW LIBR. J.*, 12, 20 (1924).

223. See *id.*

224. See *CRIMINAL CODE*, *supra* note 37, at 88–89.

225. JOHNSON, *supra* note 4, at 17–18.

226. *Id.* at 30–38.

227. *Id.* at 30.

228. At the time of the demonstration, New York City was overpopulated with out-of-work and homeless individuals. See Luc Sante, *LOW LIFE: LURES AND SNARES OF OLD NEW YORK* 354 (2003). An estimated 110,000 out-of-work individuals and 10,000 homeless resided in the city. See *id.*

229. KELLER, *supra* note 90, at 174.

230. *Id.*

of the police were not utterly unfounded. Various groups that were to participate in the event had accused one another of having dangerous affiliations, fostering fears that labor groups were inciting revolution.<sup>231</sup> The last-minute revocation of the license was not, however, a recipe for minimizing civil unrest. Many participants arrived for the event unaware that the permit had been revoked. Without telling the crowd to disperse, officers rushed into the crowd of 1,500 demonstrators with horses and clubs, battering an untold number with locust clubs and arresting forty-four on charges varying from disorderly conduct and incendiary speech to assault and battery.<sup>232</sup> An editorial in the *New York Herald* stated, "the average policeman, running a muck [*sic*] with his locust in hand, is not to be relied on for the exercise of much discretion."<sup>233</sup>

There were certainly defenders of the police after the Tompkins Square Riot who applauded the maintenance of order, just as police supporters had always done, but there was a growing sense that the police were out of control.<sup>234</sup> Newspapers increasingly reported random acts of violence by police.<sup>235</sup> A number of seemingly innocent citizens were clubbed while sitting on their front stoops in the mid-1870s, leading the *New York Times* to describe "The Front Steps Crime."<sup>236</sup> No clear consensus emerged on how to deal with the problem. Working class New Yorkers called for stricter regulation of the police while middle and upper class New Yorkers regarded police violence as the symptom of a larger problem of official corruption.<sup>237</sup> Working class New Yorkers also complained of corrupt

231. *Id.* at 173.

232. *Id.* at 174. Tompkins Square is no stranger to dramatic events. Ironically, there were two other riots in Tompkins Square in 1988 and 1995, aptly labeled "Tompkins Square Park Riot II" and "Tompkins Square Park Riot III." BRIAN ST. CLAIRE-KING, *FATES WORSE THAN DEATH* 405 (2003). Riot II resulted when police attempted to evict homeless individuals from the park. *Id.* When protesters showed up, several police placed tape over their badge numbers and began beating them up. *Id.* Riot III also occurred when police attempted to evict the homeless. *Id.*

233. KELLER, *supra* note 90, at 175. News quickly spread of the Tompkins Square Riot. Only an hour after the rioting began, the *New York Graphic* published a headline reading: "A Riot Is Now In Progress in Tompkins Square." MICHAEL SORKIN, *VARIATIONS ON A THEME PARK* 67 (1992).

234. KELLER, *supra* note 90, at 174–75; JOHNSON, *supra* note 4, at 32. Police blamed the riot on "Parisian 'Communists,' 'heavily armed German revolutionaries,' 'atheists,' and 'drunkards.'" M. J. HEALE, *AMERICAN ANTICOMMUNISM: COMBATING THE ENEMY WITHIN, 1830–1970*, 25 (1990). Following the riot, New York City police sent special detectives into socialist and labor meetings as spies. FRANK DONNER, *PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* 11 (1992). Meanwhile, the New York police board alleged that radicals were planning on burning down churches and accumulating firearms and ammunition for "a bloody showdown." *Id.*

235. JOHNSON, *supra* note 4, at 18, 38–39.

236. *Id.* at 39.

237. *Id.* at 39–41. New York City was no stranger to public rioting. The city endured

officers profiting from extortion while brutalizing citizens, but rather than criminal sanctions, they understandably wanted the more direct remedy of limits on discretion.<sup>238</sup>

By the 1890s, progressive reformers began to express more compassion toward the working-class victims of police violence and won public support for their view that good government, anti-corruption measures held the cure to police violence.<sup>239</sup> The Republican-led Wickersham Commission in 1895 provided a supportive forum for working class citizens to publicly describe the abuse they suffered at the hands of police.<sup>240</sup> In the 1880s, however, there were conflicting views of the appropriate remedy to very substantial problems within the police department. Increasing the discretion of officers to decide when to arrest, in light of patterns of abuse, was not politically expedient at a time when a number of New Yorkers were calling for greater restraints.

Even though the proposed code the legislature considered in 1881 was first drafted in 1849, when the police department was in its infancy, the final version the legislature adopted was far less favorable to the police than the original draft. The 1849 version of the code included all of the justifications for a warrantless arrest that had been recognized in the United States before the creation of professional police forces. Under the proposed code, an officer could arrest a suspect without a warrant:

1. For a public offense, committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; [and]
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested.<sup>241</sup>

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riots in 1806, 1826, 1834, 1837, 1849, 1855, 1857, 1863, 1870, 1874, and 1900. Eric H. Monkkonen, *History of Urban Police*, 15 CRIME AND JUSTICE 547, 553 (1992).

238. JOHNSON, *supra* note 4, at 33.

239. The New York legislature created the Lexow Commission in 1894 to investigate New York police. Monkkonen, *supra* note 237, at 565 (citing JAY S. BERMAN, *POLICE ADMINISTRATION AND PROGRESSIVE REFORM: THEODORE ROOSEVELT AS POLICE COMMISSIONER OF NEW YORK* 23-29 (1987)). Lexow was not the last commission to work against police corruption. It was followed by the Curran Committee of 1913, the Seabury Investigation of 1932, and the Hefland Investigation of 1955. Dean Joan Wexler, *Police Violence: Causes and Cures*, 7 J.L. & POL'Y 75, 77 n.1 (1998).

240. JOHNSON, *supra* note 4, at 133-41.

241. CRIMINAL CODE, *supra* note 37, at 88-89. The language in this proposed statute is awkward as a prescription for officers, as it was taken from decisions involving suits for unlawful arrests. Exceptions (2) and (3) provide the officer immunity from civil liability if the suspect is in fact guilty, or if a crime was in fact committed, something that could not be known with certainty. Practically speaking then, an officer would be willing to arrest only if

The Commissioners in 1849 additionally proposed permitting officers to make an arrest for a felony at night, even if it should “afterwards appear that a felony had not been committed.”<sup>242</sup> The Commissioners appear to have embraced the ages-old perceived need to allow greater security at night.<sup>243</sup> Under English, colonial and early American laws, persons who could not explain their presence on the streets of a town at night could be detained until they were taken before magistrates to explain themselves.<sup>244</sup>

The Code of Criminal Procedure adopted this warrantless standard from the proposed code but eliminated the fourth exception that allowed an officer to arrest on a complainant’s charge.<sup>245</sup> The New York Legislature had restored the very restrictive arrest standards that governed constables and watchmen in the eighteenth century. There is certainly an irony to this. New York had the largest police force in the country in the 1880s, and no other legislature had moved to restrict the discretion of police.<sup>246</sup> Just as New York’s particular history explained the reluctance of its judiciary to adopt the probable cause standard for warrantless arrests, events occurring only in New York set the state’s police regulation apart. Police violence was certainly not confined to New York in the latter part of the nineteenth century, but no other state with a modern metropolitan police force drafted a criminal procedure code in the 1880s.<sup>247</sup> Unlike other state legislatures, New York’s was forced to take the public’s pulse on police regulation in 1881, while the legislatures of other states could sit on the sidelines as courts continued to rely on mid-nineteenth century precedent.

The unease with broad arrest powers New Yorkers demonstrated in 1881 likely was not limited to residents of the Empire State, but the timing

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the facts giving rise to his suspicion occurred before his eyes, as described in exception (1), or a victim made a complaint to him, as in exception (4), or he had some extraordinary basis for suspecting the arrestee. *See generally* Davies, *supra* note 5.

242. CRIMINAL CODE, *supra* note 37, at 89; *see Atwater v. Lago Vista*, 532 U.S. 318, 333 (2001) (quoting 2 Hawkins, ch. 13, §6, at 130) (“[I]n affirmance of the common law,’ for ‘every private person may be the common law arrest any suspicious night-walker, and detain him till he give good account of himself.’”).

243. The nightwalker statutes are not the only ones that recognize additional security concerns at night. Burglary at night has long been recognized as a more serious crime than burglary during the day. *See* Theodore E. Lauer, *Burglary in Wyoming*, 32 LAND & WATER L. REV. 721, 726–29 (1997) (describing history of crime of burglary in England, noting distinction between entering a dwelling at night and day).

244. *See Atwater*, 532 U.S. at 333 (citing to sources recognizing nightwalker statutes).

245. N.Y. CODE CRIM. PROC. LAW § 177 at 52 (Gould 1881). The legislature did, however, retain the right of an officer to arrest at night on mere probable cause. *See* N.Y. CODE CRIM. PROC. LAW § 179 at 52 (Gould 1881).

246. Johnson, *supra* note 4, at 2.

247. This accident of history seems to explain why New York was alone in the mid-twentieth century in requiring that a crime have been committed in fact before an officer could make a felony arrest on probable cause alone. *See* Davies, *supra* note 5, at 578 (noting the anomaly).



of the Code of Criminal Procedure uniquely memorialized the public's view at a point when police power was particularly feared. The new limitation, however, appears to have had only a minimal effect on the police department, as relatively few cases can be located in which officers were sued for arresting a suspect when no felony had in fact been committed.<sup>248</sup> All the while, the more police-friendly probable cause arrest standard was gaining acceptance outside New York despite the concerns about arbitrary arrests and police brutality raised by the creation of modern police forces.<sup>249</sup> The need for greater police authority—to control the streets and investigate crimes—had ushered in a new arrest standard.

### CONCLUSION

Probable cause, as we understand it today, was not a sufficient basis for a law enforcement officer to make an arrest or seek a search warrant in late eighteenth-century America. However probable cause, as we understand it today, was more than sufficient for a *victim* to seek a search or arrest warrant, or instruct an officer to make an arrest. Probable cause was, in essence, a pleading requirement for victims. Law enforcement officers, by contrast, were required to observe the crime in progress, or wait for a victim's complaint, before they could even seek a magistrate's authorization for a search or arrest.

The modern understanding of probable cause is an evidentiary threshold that may be satisfied by any person with information "sufficient to warrant a person of reasonable caution in believing that a crime ha[s] been committed" or is about to be committed.<sup>250</sup> This evidentiary threshold may be satisfied by any person with evidence bearing on the question of whether there is suspicion; the modern standard does not depend on the identity of the person claiming to have probable cause or the type of crime investigated. More is required of victims than was required during the Framing Era and less is required of law enforcement than was required during the Framing Era. Victims must demonstrate the basis of their suspicion while law enforcement officers are no longer dependent on victims.

The need for greater security forced society to trust law enforcement officers with greater discretion—a trust that was not readily granted and not well-earned. At the same time the realities of urban life were forcing Americans to place the same faith in law enforcement officers that they placed in private citizens, the public began to lose its faith in the integrity of

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248. The first appellate case on this issue following the 1881 Code appears to have been *Stearns v. Titus*, 85 N.E. 1077 (1908). Carolyn Ramsey has noted a similar ineffectiveness of tort suits to constrain the practice of material witness detentions in the nineteenth century as potential litigants do not appear to have brought actions. Ramsey, *supra* note 5, at 703–04.

249. See Wilgus, *supra* note 56, at 818–20.

250. *New Jersey v. T.L.O.*, 469 U.S. 325, 366 n.7 (1985).

private complainants. The citizenry was unwilling to entrust Temperance Watchmen, the teetotaling private citizens who sought warrants against their less rigid neighbors, to direct the state's searching apparatus. The citizen-informants were disliked for their zeal that led them to make allegations on less than reliable evidence as much as they were for their thorough investigations accurately identifying liquor law violators. Their enthusiasm for a despised law thus prompted a new, more heavily scrutinized method for citizen-requested searches.

Probable cause is, of course, something of a universal standard for authorizing searches or arrests in the twenty-first century and has been for some time. But the standard's ubiquitous quality is of more recent origin than a reading of the Supreme Court's criminal decisions—or even the text of the Constitution itself—might suggest.