

## ARTICLES

### IN THE TRENCHES: SEARCHES AND THE MISUNDERSTOOD COMMON-LAW HISTORY OF SUSPICION AND PROBABLE CAUSE

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#### INTRODUCTION

Probable cause is central to our understanding of the Fourth Amendment's search and seizure protections, but it is more of a stranger than we generally acknowledge. The Fourth Amendment tells us that probable cause plays a leading role in the issuance of warrants. Its command sounds simple: "no Warrants shall issue, but upon probable cause."<sup>1</sup> This apparent simplicity, however, is surprisingly misleading.

The constitutional "probable cause" command could be interpreted as imposing different requirements, each of which would result in widely differing judicial roles. Does the probable cause man-

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1 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

date demand that judges act as vigilant sentries, aggressively inquiring into the merits of a probable cause assertion? Or, at the other extreme, is the command satisfied when a judge acts in a merely ministerial manner, not engaging in gate-keeping at all? Under this view, the mandate would impose only a duty to oversee the production of a record for a later motion to suppress. Or does the command represent a middle ground, essentially reflecting a presumption that a warrant should issue unless the application is obviously defective, meaning that a judge's sentryship role is satisfied by anything more than a mechanical, ministerial issuance of a warrant?<sup>2</sup>

Determining which definition is preferable is one issue; another is whether we share the same understanding of the probable cause concept as the Framers held. This historical inquiry has become crucially relevant today because, with the conservative ascendancy on the Supreme Court, originalism has become both a mission and a promise,<sup>3</sup> and this movement towards originalism has extended into Fourth Amendment jurisprudence. Since the 1990s the Court has repeatedly suggested that original intent should be the first factor considered in modern Fourth Amendment cases.<sup>4</sup> In one sense, this development

2 My thanks to George Thomas for suggesting this tripartite framework during our discussions about this manuscript.

3 The mission is to make it the dominant form of constitutional analysis. The promise is twofold. First, that by doing so we can achieve a level of jurisprudential coherence that previously has eluded us, or at least eluded us during the Warren and Burger Courts. Second, that embracing originalism will help avoid incorrect constitutional rulings (which usually, but not always, have resulted in pesky expansions of constitutional protections), a trend that originalists view as not only unjustified but actually dangerous. Justice Scalia's dissenting opinion in *County of Riverside v. McLaughlin*, 500 U.S. 44, 59–71 (1991), protesting the majority's expansion of what constitutes a "prompt" probable cause determination for warrantless arrests, is a prime example of this belief.

4 *E.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) ("In reading the [Fourth] Amendment, we are guided by the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing, since [a]n examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable." (alteration in original) (citations omitted) (internal quotation marks omitted)); *Florida v. White*, 526 U.S. 559, 563 (1999) ("In deciding whether a challenged governmental action violates the [Fourth] Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) ("In evaluating the scope of th[e] right [under the Fourth Amendment], we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."). Many

should not be surprising. The Fourth Amendment, with its dramatic and express limitation upon governmental power and its obviously implicit promise of individual privacy protection,<sup>5</sup> presents an attrac-

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commentators have been critical of the Court's interest in Fourth Amendment originalism. *See infra* note 207.

- 5 It is telling that the newly elevated Chief Justice Roberts and Justice Alito, superheroes to the conservative movement, both cited the Fourth Amendment during their confirmation hearings as one constitutional provision evincing an individual privacy right. *Judge Samuel A. Alito, Nominated to Be an Associate Justice of the U.S. Supreme Court: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Judge Samuel Alito), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html> ("I do agree that the Constitution protects a right to privacy. And it protects the right to privacy in a number of ways. The Fourth Amendment certainly speaks to the right of privacy."); *Judge John Roberts, Nominated to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (testimony of Judge John Roberts), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html> ("The right to privacy is protected under the Constitution in various ways. It's protected by the Fourth Amendment which provides that the right of people to be secure in their persons, houses, effects and papers is protected."). In terms of assessing the scope of the right they claimed to acknowledge, it is also telling that Chief Justice Roberts believes that the privacy right is not sufficiently broad to empower a private property owner to refuse entry to police over a co-owner's assent. *Georgia v. Randolph*, 547 U.S. 103, 127-42 (2006) (Roberts, C.J., dissenting; Justice Alito did not participate in the decision). Chief Justice Roberts contends that his approach is more consistent with Fourth Amendment privacy because it acknowledges that one can cede privacy by choosing to live with someone else. *See id.* at 137 (arguing that the Court should "adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government").

Chief Justice Roberts's privacy theory is provocative because it is so divorced from property rights, which are deemed to exist in large part to *promote* privacy from governmental intrusion. This was, indeed, a central tenet of the common law that the Court now claims is a guiding force in its Fourth Amendment jurisprudence. During the famous John Wilkes controversy in Great Britain (for a brief review of this dispute, see *infra* note 41), Lord Camden declared that "[t]he great end, for which men entered into society, was to secure their property." *Entick v. Carrington*, 19 How. St. Tri. 1029, 1066 (C.P. 1765). (Different reports of this case, though addressing the same themes, do not contain the exact same language. *Cf.* 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817.) The Wilkes dispute resulted in important changes to the common law, was celebrated in the Americas, and had a strong influence on our search-and-seizure jurisprudence. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1176-77 & n.208 (1991) [hereinafter Amar, *Bill of Rights*]; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 & n.31, 772 & n.54, 775 & n.67 (1994) [hereinafter Amar, *Fourth Amendment*]; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 933 & n.36 (1997) [hereinafter Maclin, *Fourth Amendment Complexity*]. Considering Chief Justice Roberts's conservative superhero status, close observers of the Court might have predicted his counterintuitive position since it is a progression of a previously observed dynamic in which "a liberal Court substituted privacy in lieu of property analysis to expand protected interests, [while] a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protections." Thomas K. Clancy, *What*

tive target to originalists. This is particularly so given that Fourth Amendment jurisprudence—quite often until the 1990s but certainly between the late 1960s through the early 1990s (mostly the Warren and Burger Court years)—so clearly followed paths other than originalism.<sup>6</sup>

Scholars have joined in the effort to gain a greater historical understanding of the Fourth Amendment.<sup>7</sup> One result has been dissonance concerning early judicial sentryship of probable cause. The leading originalist account, by law professor Thomas Davies, concludes that as a matter of legal *doctrine*, judges in the Framers' era<sup>8</sup> were expected to act as vigilant probable cause sentries prior to issuing warrants.<sup>9</sup> Throughout this Article, when I refer to judicial sen-

*Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 340 (1998).

- <sup>6</sup> See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739–41 (2000) (showing that, to the extent history played a role in the Supreme Court's Fourth Amendment jurisprudence prior to the 1990s, it was often in dissenting opinions); see also *id.* at 1762–70.
- <sup>7</sup> E.g., Amar, *Fourth Amendment*, *supra* note 5; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53 (1996) [hereinafter Amar, *Writs of Assistance*]; Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998) [hereinafter Amar, *Terry & Fourth Amendment*]; 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 (2002) [hereinafter Davies, *Fictional Originalism*]; Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999) [hereinafter Davies, *Original Fourth Amendment*]; Maclin, *Fourth Amendment Complexity*, *supra* note 5; Sklansky, *supra* note 6; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3 n.1 (1997); William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) [hereinafter Cuddihy Dissertation]. Cuddihy's dissertation came to prominence after Justice O'Connor cited it in a dissenting opinion. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting). Though unpublished, it is available through library holdings as well as from Proquest Information & Learning, 777 East Eisenhower Parkway, P.O. Box 1346, Ann Arbor, Michigan 48106-1346, telephone (800) 521-3042, facsimile (800) 864-0019, email info@il.proquest.com.
- <sup>8</sup> I use the phrase "Framers' era," and others like it, to refer to the period roughly bounded by 1787 (when the Constitution was drafted) and 1825 (when a new generation was taking over for the Framers; for example, James Madison, who drafted the Fourth Amendment, turned seventy-four in 1825). Obviously, others may have differing opinions about the period that constitutes the "Framers' era," as well as about whether preceding periods are relevant to discerning the Framers' intent. (Indeed, I agree that earlier periods are relevant to understanding our Fourth Amendment history, as is implicit in my discussion in Part I below.) My definition is useful for the purposes of this Article, one of which is to understand the state of actual search warrant practice (as opposed to doctrine) during this early part of our history. See *infra* note 10 and accompanying text. In making this attempt, I try to emphasize legal texts from "the Framers' era" as I have defined it, on the presumption that they are the most likely to have been both available and used.
- <sup>9</sup> See *infra* notes 58–60 and accompanying text.

tryship, I am referring to this aggressive variety unless otherwise indicated. By contrast, the leading historical account of the Fourth Amendment, by historian William Cuddihy, asserts that, as a matter of legal *practice*, judges in the Framers' era did not widely engage in aggressive sentryship of probable cause.<sup>10</sup> One point of this Article is to more fully explore this dissonance. As will be explained in much greater detail below, I believe Cuddihy is right.

Another, and more important, purpose of this Article is to point out that the increased focus upon the Fourth Amendment's historical pedigree has not resulted in a sufficient reassessment of such fundamental concepts as suspicion or probable cause. I touched upon this subject in a previous article,<sup>11</sup> and will continue to expand upon it in future articles. The failure to reassess the roles of suspicion and probable cause is unfortunate. The historical material amply supports the need to reexamine the Framers' understanding of these concepts because there are numerous reasons to believe that the Framers' views differed from our own.

To properly understand history's lessons, it is necessary to appreciate the nature of search and seizure jurisprudence during the Framers' era. During this period, Fourth Amendment claims as we know them today did not exist. For nearly a century after the Constitution was adopted there was no constitutional search and seizure jurisprudence.<sup>12</sup> Instead, search and seizure claims were litigated

<sup>10</sup> See, e.g., *infra* notes 107–08, 153, 160 and accompanying text.

<sup>11</sup> Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1235–46 (2004).

<sup>12</sup> The Supreme Court's first major Fourth Amendment decision was *Boyd v. United States*, 116 U.S. 616 (1886), which held that an order to produce books and papers constitutes a seizure even in the absence of forcible entry into the defendant's house. The Court did not decide its next major constitutional search and seizure case until the next century.

There were some federal cases prior to *Boyd* in which the Fourth Amendment was invoked, often in the context of a challenged warrant. However, it is not clear that the Fourth Amendment was dispositive. Davies, *Original Fourth Amendment*, *supra* note 7, at 613 & n.174. Some early cases refer to the Fourth Amendment as the Sixth Amendment because two amendments were dropped between the proposal of the Bill of Rights and its ratification. See *id.* at 723 & n.503.

An argument could be made that *Ex parte Jackson*, 96 U.S. 727 (1877), a decision rendered in the decade prior to *Boyd*, was the Supreme Court's first important Fourth Amendment case. Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 952 n.42 (1977). The Supreme Court in *Ex parte Jackson* ruled that Congress had authority to bar material from the postal system. In extended dicta, the decision failed to cite the Fourth Amendment when asserting that the government lacked the power to open sealed postal mail, but did implicitly invoke it when the Court wrote that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to

through common law trespass or civil law forfeiture. This Article focuses upon the common law trespass portion of the puzzle, and only briefly considers statutory law. A future article will focus more deeply upon the statutory law applicable to civil law forfeiture claims and explain what the intersection between the common and statutory law means for an originalist analysis of probable cause.

A central point of both articles is that abundant reasons exist to believe that in our early history the judiciary did not always monitor the adequacy of prior suspicion during the search warrant application process. In terms of the common law, the historical material is surprisingly equivocal. It shows that a probable cause sentryship role on the judiciary's part had been articulated, particularly in learned treatises, but at the same time suggests that such a role may not have fully developed at any point during the Framers' era. Given the concept's articulation in influential treatises, it may well be that the Framers and other members of the legal elite embraced the concept, as Professor Davies believes. The legal elite, after all, probably had (relatively) easy access to these treatises, and likely read and trained from them. But the legal elite did not implement and enforce search warrant procedures. Rather, it is much more likely that non-lawyer executive officers (such as customs officials), non-elite lawyers, and non-elite judges, like justices of the peace, participated in the day-to-day process of applying for, and issuing or denying, search warrants.<sup>13</sup> These non-elites probably did not have easy access to leading treatises and often had little if any meaningful legal training. As a result, it seems likely that, even after the Fourth Amendment's ratification, two conflicting legal worlds existed during the Framers' era: the legal elites' aspirational one, and the non-elites' reality.<sup>14</sup>

This insight informs the most fundamental debate that exists in Fourth Amendment jurisprudence. The debate concerns the relationship between the Fourth Amendment's two clauses, the Reason-

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their papers, thus closed against inspection, wherever they may be." *Jackson*, 96 U.S. at 733. The Court also implicitly invoked the Fourth Amendment when it asserted that "regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter." *Id.* at 735.

13 In the common law system that prevailed during colonial times and the Framers' era, the judicial officers who issued search warrants were most commonly justices of the peace. See 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 420 (1792) (including in the definition of "warrant" that "most commonly it is issued by justices of the peace").

14 My thanks to Andrew Taslitz for helping me clarify my thinking about this issue during our exchanges about this manuscript.

ableness Clause and the Warrant Clause.<sup>15</sup> In contention is whether the constitutional touchstone is the Reasonableness Clause or the Warrant Clause and, if the latter, under what circumstances it is legitimate to turn to the Reasonableness Clause to justify a search. The tension between these approaches is evident in the Supreme Court's Fourth Amendment jurisprudence,<sup>16</sup> both in older cases<sup>17</sup> and in its trend of judging the constitutionality of civil searches under the Reasonableness Clause<sup>18</sup> while judging criminal searches, in many but certainly not all instances, under the Warrant Clause.<sup>19</sup>

This debate is also active among legal scholars. The strongest proponent of the Reasonableness Clause approach is Professor Akhil Amar, who in this respect has built upon the past work of Professor Telford Taylor.<sup>20</sup> Many commentators hotly contest arguments for giving prominence to the Reasonableness Clause. Among them are Professors Thomas Davies, Tracey Maclin, and George Thomas. Professor Davies denies that a Fourth Amendment reasonableness standard existed during the Framers' era.<sup>21</sup> Professors Maclin and Thomas have asserted that in many cases, and perhaps most, the

15 For the Fourth Amendment's language, see *supra* note 1.

16 Reasonableness Clause Preference: *E.g.*, *Samson v. California*, 126 S. Ct. 2193, 2201 n.4 (2006); *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Bell v. Wolfish*, 441 U.S. 520, 558 (1979); *Carroll v. United States*, 267 U.S. 132, 147 (1925).

Warrant Clause Preference: *E.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528–29 (1967); *Chapman v. United States*, 365 U.S. 610, 615 (1961); *Johnson v. United States*, 333 U.S. 10, 14 (1948); see also Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 994 (“The warrant preference model remains one of the methods the Court uses to measure reasonableness.”).

17 See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (exemplifying this debate, as seen through a comparison of the various opinions).

18 Since the mid-1980s the Supreme Court has judged the constitutionality of all civil searches under the “special needs” principle, which exempts the government from complying with the Warrant Clause and applies constitutional balancing under the Reasonableness Clause. See *Arcila*, *supra* note 11, at 1228–29 (reviewing the special needs principle); see also *Acton*, 515 U.S. at 652–53 (discussing the application of the “special needs” test outside of the criminal context).

19 *Acton*, 515 U.S. at 653; *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); see also cases listed *supra* note 16 under “Warrant Clause Preference.”

20 TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 42–47 (1969); Amar, Terry & Fourth Amendment, *supra* note 7, at 1106–14, 1118–26; Amar, *Fourth Amendment*, *supra* note 5, at 761–71.

21 Davies, *Fictional Originalism*, *supra* note 7, at 389–400; Davies, *Original Fourth Amendment*, *supra* note 7.

constitutionality of a search or seizure should be judged by reference to the Warrant Clause.<sup>22</sup>

At this point, I find the arguments in favor of the Reasonableness Clause approach more persuasive. I will wait until my concluding remarks to briefly expand upon the potentially significant implications that my historical analysis has on this debate, as well as on how it may actually harmonize our current practice with our history.

Evidence supporting my conclusion that probable cause sentryship during the Framers' era was at best inconsistent is found in the controversies that inspired the Fourth Amendment, and also in sources such as legal doctrine, as represented in legal treatises,<sup>23</sup> as well as in American manuals for justices of the peace (commonly referred to as "justice manuals"),<sup>24</sup> American legal forms, civil search statutes and case law, and the extended development of sentryship jurisprudence that we actually experienced. With regard to the historical controversies and the lessons learned from them, Part I.A will discuss colonial hostility to writs of assistance, and Part I.B will examine the British litigation arising from a disputed search of Parliamentary John Wilkes, which reverberated in the colonies. Both controversies focused upon particularity, and thus did not meaningfully engender or advance an understanding of probable cause.

22 Maclin, *Fourth Amendment Complexity*, *supra* note 5; Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) [hereinafter Maclin, *Central Meaning*]; George C. Thomas, III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1832–34 (1997) [hereinafter Thomas, *Remapping Criminal Procedure*] (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)). Thomas has recently suggested a rewriting of the Fourth Amendment. 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, 1478 (2005) [hereinafter Thomas, *Madison Rewrites Fourth Amendment*].

23 For convenience, I use the phrase "legal treatise" or the word "treatise" loosely to refer to the secondary legal literature, excluding justice of the peace manuals, that was published in the Framers' era. Technically, this secondary literature covered numerous genres, including, but not limited to, treatises, encyclopedias, commentaries, abridgments, and digests. See generally ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* (1990) [hereinafter SURRENCY, *AMERICAN LAW PUBLISHING*]. I address justice of the peace manuals separately because of their importance to my argument. See *infra* notes 81–90 and accompanying text.

24 These justice manuals were aimed at particular colonies or states, or small groups of them. John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 264 fig.I, 294–95 bibliog. (1985); Davies, *Fictional Originalism*, *supra* note 7, at 280 & n.122; see also *infra* notes 75, 110–111, 124 (citing numerous justice manuals and indicating their geographical coverage where this is not evident from the title). A bibliography of the American justice manuals that have come to my attention is provided in Appendix.



Part II contains an analysis of the common law and explains that, even after the Fourth Amendment's adoption, judges could have felt empowered to issue search warrants without acting as probable cause sentries, and that this state of affairs lasted throughout the Framers' era. This explanation consists of several parts. Part II.A acknowledges that legal elites may have endorsed judicial sentryship given that the concept had already been articulated, primarily as legal doctrine in learned treatises. This ethic also had been advanced to a lesser extent through British case law and through a bit of American case law as well.

A detailed study of the guidance that likely influenced non-lawyer executive officers, non-elite lawyers, and non-elite judges as they actually engaged in search warrant practice follows in Part II.B. Crucially, both legal treatises and, most importantly, American justice manuals often and expressly stated that a judicial sentryship role was merely optional, as explained in Part II.B.1. The evidence from justice manuals is especially significant because these legal publications likely exerted a dominant influence on day-to-day search warrant procedure. Part II.B.2 examines American application forms used to obtain search warrants, as well as American search warrant forms themselves. The application forms often did not call for specifying the underlying facts supporting a probable cause claim, and the warrant forms were devoid of any meaningful evidence that judges monitored probable cause. Part II.B.3 presents a plain text argument against a judicial sentryship duty during the Framers' era.

Part III briefly turns to early American statutory law, as it may have been interpreted in light of existing British case law, to show that judges often did not perceive the law as imposing a probable cause sentryship function upon them. Finally, Part IV notes that, if judicial vigilance with respect to probable cause had been understood and implemented during the Framers' era, it is difficult to explain why the Supreme Court found itself having to establish this judicial duty as late as 1964.

## I. THE PRE-REVOLUTIONARY FOCUS UPON PARTICULARITY, NOT PROBABLE CAUSE

As we seek to uncover the understanding of probable cause that prevailed during the Framers' era, it is instructive to recognize that aggressive judicial sentryship would have been a rather novel, as well as developing, concept. As such, it is significant that of two controversies that were central to fostering the Framers' desire for constitutional search and seizure protections—namely, the colonial experi-

ence with writs of assistance and the famous John Wilkes general warrant controversy in Great Britain—neither would have engendered a widespread understanding of probable cause sentryship. This is because each of these controversies focused much more strongly upon particularity than probable cause.<sup>25</sup>

#### A. Colonial Experience with Writs of Assistance

It is widely accepted that colonial disputes with royal authorities over writs of assistance contributed both to the Revolution and the Fourth Amendment's inclusion in the Bill of Rights.<sup>26</sup> Writs of assistance, which "received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution," were used to perform general searches with the aim of enforcing the customs laws.<sup>27</sup> The common law did not authorize

<sup>25</sup> There is some tension between my assertion and Professor Thomas Clancy's scholarship. He argues that a primary lesson the Framers took from these controversies was that individualized suspicion, which in the case of warrants had to amount to probable cause, was "an inherent quality of reasonableness." Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 488–89, 526–31 (1995). His position has been influential. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 671 (1995) (O'Connor, J., dissenting) (citing Clancy).

While we have some areas of agreement, we do have a core disagreement on this issue. Clancy agrees with me that the Framers, looking back on these controversies, were concerned with a lack of particularity. See Clancy, *supra*, at 499–501, 504 (discussing writs); *id.* at 510–12 (discussing Wilkes cases). And, at a higher level of generality, we agree that the Framers were troubled by the assertion of a governmental power to engage in general searches. But Clancy believes that the Framers meant to attack general searches primarily through an increased emphasis upon individualized suspicion/probable cause, which had the welcomed secondary impact of allowing greater particularity. For the reasons I explain below, I believe the evidence shows more of a focus upon particularity. While the concepts of individualized suspicion and probable cause were raised, they were insufficiently developed and not adequately focused upon, at least in practice. Thus, individualized suspicion and probable cause played a role, but much more as rhetoric than concrete procedural protections. See, e.g., *infra* notes 36–40 and accompanying text.

<sup>26</sup> *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–12 (1978); *United States v. Chadwick*, 433 U.S. 1, 7–8 (1977); *Boyd v. United States*, 116 U.S. 616, 624–27 (1886); O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40 (Richard B. Morris ed., 1939) [hereinafter Dickerson, *Writs of Assistance*]; 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, 1369–71 (1983); Thomas, *Madison Rewrites Fourth Amendment*, *supra* note 22, at 1488; see also Scott E. Sundby, *Protecting the Citizen "Whilst He Is Quiet": Suspicionless Searches, "Special Needs" and General Warrants*, 74 MISS. L.J. 501, 507–08, 537–42 (2004) (describing James Otis's fight against writs of assistance).

<sup>27</sup> NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 53–54 (Leonard W. Levy ed., Da Capo Press 1970) (1937);

writs, which instead were statutorily created. Technically, writs did not provide any search authority (as opposed to warrants, which do).<sup>28</sup> Writs merely purported to require law enforcement officers and even bystanders to assist in a search.<sup>29</sup> Thus, the search authority that writs represented had to emanate from statutory sources. Both British and colonial customs officers claimed a right to search *ex officio* on the theory that the statutory search authority was incorporated into their commissions.<sup>30</sup> In the 1760s, however, colonial authorities increasingly sought to use writs of assistance to help validate these searches.<sup>31</sup> Continued colonial resistance to the writs, premised in part upon arguments that the British legislation authorizing writs in Great Britain did not extend to the colonies, resulted in Great Britain promulgating the Townshend Act of 1767, which was intended to

see also POLYVOIS G. POLYVIUO, SEARCH AND SEIZURE: CONSTITUTIONAL AND COMMON LAW 10 (1982); William J. Cuddihy, *Fourth Amendment (Historical Origins)*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 761, 761 (Leonard W. Levy et al. eds., 1986) [hereinafter Cuddihy, *Fourth Amendment (Historical Origins)*]; Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States* (pt. 1), 3 U. RICH. L. REV. 278, 294 (1969).

- 28 Dickerson, *Writs of Assistance*, *supra* note 26, at 45. Nonetheless, writs have been considered to be a type of general warrant. *E.g.*, *Stanford v. Texas*, 379 U.S. 476, 481 (1965); POLYVIUO, *supra* note 27, at 10; Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 835 (1989); Davies, *Original Fourth Amendment*, *supra* note 7, at 561; Osmond Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 364 (1920).
- 29 LASSON, *supra* note 27, at 53–54; William Cuddihy, *From General to Specific Warrants—The Origins of the Fourth Amendment*, in THE BILL OF RIGHTS: A LIVELY HERITAGE 87 (Jon Kukla ed., 1987); Dickerson, *Writs of Assistance*, *supra* note 26, at 45–46.
- 30 3 THOMAS HUTCHINSON, THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS-BAY 67 (Lawrence S. Mayo ed., 1936); LASSON, *supra* note 27, at 55 & n.20; JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDICATED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY 1761–1772, at 55 n.15 (1865); Cuddihy, *supra* note 27, at 761; Dickerson, *Writs of Assistance*, *supra* note 26, at 45 & n.6; Maclin, *Central Meaning*, *supra* note 22, at 219–20.
- 31 JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 31–32 (1966); LASSON, *supra* note 27, at 55; Maclin, *Central Meaning*, *supra* note 22, at 219–21.

I need to correct the record at this point. I previously claimed that colonial authorities also began using writs of assistance to take advantage of their immunizing effect; in doing so, I was equating the immunizing effect of writs and warrants. Arcila, *supra* note 11, at 1237 & nn.69–70. My assertion was overly broad. Based upon numerous cases, Professor Amar suggests that writs and warrants offered differing levels of immunity to the searcher, with writs providing immunity only if a successful search had occurred, while warrants extended immunity even if a search had been unsuccessful. Amar, *Writs of Assistance*, *supra* note 7, at 78–80. Given that his was the earlier publication, it is particularly unfortunate that I had overlooked Amar's position when I made my assertion.

formally legalize the writs in the colonies.<sup>32</sup> The effort was largely unsuccessful, with most colonial judges continuing to resist issuing writs, especially those that were unparticularized.<sup>33</sup>

The writs of assistance controversy probably did not meaningfully advance a judicial sentryship ethic regarding probable cause since the disputed issues concentrated on other concepts. Continued colonial resistance to the writs, even after the Townshend Act, was justified on several grounds, including objections that the writs were equivalent to general warrants that lacked particularity and therefore granted the searcher too much discretion,<sup>34</sup> and that they were virtually perpetual in nature.<sup>35</sup>

I am unaware of any clear evidence that a lack of probable cause was the animating reason behind any refusal to issue a writ. This point, however, is admittedly a bit fuzzy.<sup>36</sup> The reason is that prob-

32 LASSON, *supra* note 27, at 69–71; M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 1–2*, 239 (1978).

33 2 Cuddihy Dissertation, *supra* note 7, at 1054–84; LASSON, *supra* note 27, at 72–76; Davies, *Original Fourth Amendment*, *supra* note 7, at 566–67 & n.26; Dickerson, *Writs of Assistance*, *supra* note 26, at 48–74; Joseph R. Frese, *James Otis and Writs of Assistance*, 30 *NEW ENG. Q.* 496, 506–07 (1957).

34 Davies, *Original Fourth Amendment*, *supra* note 7, at 566 & n.26, 581; David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 *SAN DIEGO L. REV.* 227, 243–44 (2005).

35 2 Cuddihy Dissertation, *supra* note 7, at 1054–84; Arcila, *supra* note 11, at 1236–37 & n.63 (“[W]rits were of nearly unlimited duration, remaining valid during the entire lifetime of the sovereign under whom they had been issued and even six months after his death.”). The perpetual nature of the writs had been a sore point in the colonies even before the Townshend Act. See Sundby, *supra* note 26, at 540 (reprinting James Otis’s famous 1761 argument against writs, which included this grievance).

36 Colonial America certainly experienced, for instance, calls for a probable cause limitation upon searches. One famous incident involved the 1768 seizure of John Hancock’s ship *Liberty*. HERBERT S. ALLAN, *JOHN HANCOCK: PATRIOT IN PURPLE* 105–08 (1953); OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* 238 (1951); 11 LAWRENCE HENRY GIBSON, *THE BRITISH EMPIRE BEFORE THE REVOLUTION—THE TRIUMPHANT EMPIRE: THE RUMBLING OF THE COMING STORM, 1766–1770*, at 152–53 (1965); LASSON, *supra* note 27, at 72; Andrew P. Peabody, *Boston Mobs Before the Revolution*, 62 *ATLANTIC MONTHLY* 321, 326–27 (1888). Hancock participated in a Boston town meeting, which issued a declaration that the seizure was wrongful, in part, because it had lacked “any probable cause of seizure that we know of, or indeed any cause that has yet been made known.” *Petition to Massachusetts Governor Bernard*, *BOSTON GAZETTE, OR, COUNTRY J.*, June 20, 1768; *Boston Town Meeting Report* (June 17, 1768), in *A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE BOSTON TOWN RECORDS, 1758 TO 1769*, at 257, 258 (1886); see also W.T. BAXTER, *THE HOUSE OF HANCOCK: BUSINESS IN BOSTON 1724–1775*, at 266–67 (1945).

On the other hand, whether “probable cause” was widely understood as a protective standard is open to debate. In 1766, a mere two years before the *Liberty* episode, George Mason railed against a British revenue statute, the 1765 Stamp Act, that conditioned immunity upon probable cause, writing that “probable” was “a word before an unknown in

able cause and particularity are often closely related: generally, probable cause provides the knowledge that makes particularity possible. As Professor LaFave has explained,

[T]he requirement of particularity is related to the probable cause requirement, in that—at least under some circumstances—the lack of a more specific description will make it apparent that there has not been a sufficient showing to the magistrate that the described items are to be found in a particular place.<sup>37</sup>

Thus, I must acknowledge that some of the refusals to issue writs could be perceived as hinging upon a lack of probable cause. For example, the historical record indicates a judicial willingness to issue writs, provided that they were requested on oath that reason existed for believing that uncustomed goods were located in a particular place.<sup>38</sup> It is difficult to parse this standard in relation to whether the primary objection was to a lack of particularity, probable cause, or some combined deficiency.

Nonetheless, the consistent and overarching themes in colonial judicial resistance to the writs was opposition to their unparticularized nature and to the unconstrained discretion they therefore afforded a searcher. A chief justice in Florida, for example, repeatedly refused to issue writs that the customs house requested, explaining that “I do not think myself justified by Law to issue general writs . . . to be lodged in the hands and to be used discretionally . . . at the will of subordinate officers.”<sup>39</sup> Moreover, the probable cause and particularity concepts are distinct. It is possible to have probable

the Language and Style of Laws!” Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 979 & n.158 (2003) (quoting Letter from George Mason to the Comm. of Merchs. in London (June 6, 1766), in 1 PAPERS OF GEORGE MASON 65, 67 (Robert A. Rutland ed., 1970)). The year prior to Mason’s diatribe, the colonies had erupted in riots in protest of the Stamp Act. Arcila, *supra* note 11, at 1236 & n.59.

Another well-known protest about search power in the colonies under writs of assistance complained about an insufficiently demanding suspicion threshold.

Thus our homes and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches . . . whenever they are pleased to say they suspect there are in the house wares etc. for which the dutys [sic] have not been paid. Flagrant instances of the wanton exercise of this power, have frequently happened in this and other sea port Towns.

*A State of the Rights of the Colonists (1772)*, in TRACTS OF THE AMERICAN REVOLUTION 1763–1776, at 233, 243 (Merrill Jensen ed., 1967) (emphasis added). Samuel Adams generally is credited with authorship of this passage. *Id.* at 233–34; Davies, *Original Fourth Amendment*, *supra* note 7, at 602 n.139.

37 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.5, at 562–63 (4th ed. 2004) (citation omitted).

38 See Dickerson, *Writs of Assistance*, *supra* note 26, at 49–52, 58–61 (discussing experiences in Rhode Island and Pennsylvania).

39 *Id.* at 64.

cause but not particularity.<sup>40</sup> It is also possible to satisfy particularity but not probable cause, such as when a search applicant specifies the items being sought and the locations to be searched, but based upon an unsupported hunch rather than on detailed factual grounds. It is on these bases that I claim that the animating objection was to the lack of particularity, rather than to a lack of probable cause.

### B. *The Wilkes Cases from Great Britain*

Moving from writs to warrants, we see that the successful challenges to warrants in the British cases involving the John Wilkes dispute<sup>41</sup> help explain my position. At the heart of that controversy were *unparticularized* general warrants. The principal warrant called for a “strict and diligent search for the authors printers and publishers of a seditious and treasonable paper intituled [sic] *The North Briton* No. 45. *Saturday April 23. 1763.* printed for *G. Kearsley* in *Ludgate-Street London.*”<sup>42</sup> With respect to the search of Wilkes’s home, the objection to this warrant was not really that probable cause had been lacking. Indeed, Lord Chief Justice Pratt indicated that “the evidence . . . plainly sh[o]w, that Mr. Wilkes was” the author.<sup>43</sup> What was objectionable was the lack of particularity, which resulted in “a discretionary power given to messengers to search wherever their suspicions may chance to fall.”<sup>44</sup> This empowered the searchers to “rummage[] all the papers together they could find,” including all manuscripts and papers in drawers, after which they left with a sack they had filled with pa-

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40 See, e.g., *infra* notes 43–44 and accompanying text.

41 In 1763, John Wilkes, “a flamboyant member of Parliament,” anonymously published a critique of King George III and his ministry in a pamphlet entitled *The North Briton* Number 45. Amar, *Fourth Amendment*, *supra* note 5, at 772 n.54. Asserting a seditious libel, the Secretary of State, Lord Halifax, issued a general warrant against the author and printer, and also against several other allegedly seditious publications. One warrant was specifically directed against John Entick as author of *The Monitor*. See *infra* note 48 and accompanying text. Between 1763 and 1769, Wilkes and about fifty other search targets lodged successful trespass actions, with British courts ruling such general warrants void and juries assessing significant damages. See generally LASSON, *supra* note 27, at 43–49; TAYLOR, *supra* note 20, at 29–35; Amar, *Fourth Amendment*, *supra* note 5, at 772 n.54; Davies, *Original Fourth Amendment*, *supra* note 7, at 562–63; Maclin, *Fourth Amendment Complexity*, *supra* note 5, at 933 & nn.36, 38–39. The Wilkes dispute was highly publicized in the colonies. See LASSON, *supra* note 27, at 45–46; Amar, *Bill of Rights*, *supra* note 5, 1176–77; Amar, *Fourth Amendment*, *supra* note 5, at 772 n.54; Davies, *Original Fourth Amendment*, *supra* note 7, at 563.

42 *Money v. Leach*, 3 Burr. 1742, 1747, 19 How. St. Tri. 1001, 1008, 97 Eng. Rep. 1075, 1078 (K.B. 1765).

43 *Wilkes v. Wood*, 19 How. St. Tri. 1153, 1166, 98 Eng. Rep. 489, 498 (C.P. 1763).

44 *Id.*, 19 How. St. Tri. at 1167, 98 Eng. Rep. at 498.

pers.<sup>45</sup> Adding to the insult was that “Mr. Wilkes’s private pocket-book filled up the mouth of the sack.”<sup>46</sup>

Similarly, though the probable cause concept is certainly addressed in *Money v. Leach* (which concerned the same warrant)<sup>47</sup> and *Entick v. Carrington* (which involved a different warrant that specifically named Entick and a publication entitled *The Monitor* but otherwise lacked particularity),<sup>48</sup> it does not appear to have been seriously in dispute. In *Money*, the court noted that, after the general warrant was issued but before the search, an official had been informed that Wilkes had been seen going into the house of Leach, who was a printer, and also that Leach had printed *The North Briton* No. 45.<sup>49</sup> In *Entick*, the court recounted that the warrant had been issued upon a written statement from Jonathan Scott, a bookseller and publisher, that Entick had been involved in publishing *The Monitor*.<sup>50</sup>

What was most objectionable about the warrants at issue in *Money* and *Entick* was their lack of particularity. In *Money*, a litigant focused on this deficiency in arguing that the warrant was invalid.

[T]he WARRANT itself is *illegal*. ‘Tis against the author, printer and publisher of the paper, *generally*, without naming or describing them . . . [1]t is also, “To seize his papers;” that is, *all* his papers.

. . . .

If “*Author, printer and publisher,*” without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, “To take up *the robber* or murderer of such a one.” This is no description of the *person*; but only of the *offence*. It is making the *officer* to be judge of the matter, in the place of the person who *issues* the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

. . . .

. . . And *this* is a warrant “To seize ALL a man’s papers,” without any particular relation even to the crime they would *suppose* him chargeable with.<sup>51</sup>

45 *Id.*, 19 How. St. Tri. at 1156, 98 Eng. Rep. at 491.

46 *Entick v. Carrington*, 19 How. St. Tri. 1029, 1065 (C.P. 1765). Different versions of this case do not report this same language. *Compare id.*, with 2 Wils. K.B. 275, and 95 Eng. Rep. 807 (C.P. 1765).

47 3 Burr. at 1742, 19 How. St. Tri. at 1001, 97 Eng. Rep. at 1075. The principal warrant against Wilkes, which also was at issue in *Money v. Leach*, is reprinted in reports of the latter case. See *supra* note 42 and accompanying text.

48 The warrant against Entick is reproduced in the reports of that case. *Entick*, 2 Wils. K.B. at 278–79, 19 How. St. Tri. at 1034, 95 Eng. Rep. at 810.

49 3 Burr. at 1748, 19 How. St. Tri. at 1009, 97 Eng. Rep. at 1079.

50 2 Wils. K.B. at 277–78, 19 How. St. Tri. at 1033, 95 Eng. Rep. at 809.

51 3 Burr. at 1762–63, 19 How. St. Tri. at 1023–24, 97 Eng. Rep. at 1086, 1088.

Similarly, in *Entick*, the court criticized the warrant's generality, which required that "the lock and doors of every room, box, or trunk must be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, must be seized and carried away."<sup>52</sup> A different reported version of the same case emphasizes the court's disapproval of the discretion that the warrant allowed the officers due to its lack of particularity—"they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed."<sup>53</sup> It is also instructive that the court contrasted the *Entick* general warrant with common law search warrants for stolen goods, which even according to the court's own description did not necessarily require either a showing of probable cause or judicial sentryship of probable cause.<sup>54</sup>

In summary, and as Professor Amsterdam has explained, the primary abuse thought to characterize the general warrants and the writs of assistance was their indiscriminate quality, the license that they gave to search Everyman without particularized cause, the fact that they were—as Wilkes proclaimed Lord Halifax's warrant for the authors and publishers of No. 45 of the North Briton—"a ridiculous warrant against the whole English nation."<sup>55</sup>

52 19 How. St. Tri. at 1064.

53 2 Wils. K.B. at 291, 95 Eng. Rep. at 817.

54 The court compared the search warrants as follows:

Observe too the caution with which the law proceeds [for stolen goods warrants.]—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to sh[o]w them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehaviour.

19 How. St. Tri. at 1067; *see also* 2 Wils. K.B. at 291–92, 95 Eng. Rep. at 818 (different reported versions of same case) (reporting different but substantively similar language). A careful reading of this passage reveals that the described standard does *not* include either a probable cause requirement or a probable cause sentryship duty before a judge could issue a search warrant for stolen goods. The passage identifies an *oath* requirement (that a theft had been committed), and a *particularity* requirement (where the goods are lodged), and a few other requirements, but not a *probable cause* requirement. No doubt probable cause will often be linked to particularity, since the former will provide a basis for stating the latter. But the concepts are *not* identical and should be kept distinct. *See supra* text accompanying notes 36–39.

55 Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974) (emphasis added) (citations omitted). For the internal quotation, Amsterdam cites 2 THOMAS E. MAY, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 247 (3d ed. 1889), but it was the ninth edition that was published in 1889. *See* 2 LEGAL BIBLIOGRAPHY OF THE



## II. POST-INDEPENDENCE IMPLEMENTATION OF THE COMMON LAW

A close examination of the historical material shows that it is surprisingly equivocal as to whether judges consistently served as probable cause sentries prior to issuing search warrants. To assert that judges in the post-Independence era may not always have monitored probable cause is counterintuitive because early American statutes typically conditioned warrants upon prior suspicion.<sup>56</sup> Nonetheless, in terms of actual common law practice, Cuddihy and at least one other prominent scholar believe that the vast majority of judicial officers who issued search warrants often did not supervise the application process to ensure that prior suspicion validly existed.<sup>57</sup> Professor Davies has not opined on this specific issue, though, as I will detail in a moment, he believes that, as a matter of legal *doctrine*, judges in the Framers' era were expected to fulfill this role. In terms of formal originalism, it may be that the Framers and other legal elites of the period intended for judges to serve as probable cause sentries. As I acknowledge below, major English treatises and a few case decisions certainly articulated a probable cause sentryship ethic prior to and during the Framers' era. Legal elites of the era probably could have accessed and would have studied this material. But other indicia of common law *practice*, especially materials that non-lawyer executive officers, non-elite lawyers, and non-elite judges likely used as they engaged in search warrant procedure on a day-to-day basis, shows that this ethic probably was not consistently implemented during the period. In light of the ambiguity in the historical record, I am not yet prepared to take a position about the Framers' intent on this issue. But I do think that indicia concerning how the common law was actually carried out shows that Cuddihy is likely correct: it is quite likely that judges in the Framers' era often did not engage in probable cause sentryship.

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BRITISH COMMONWEALTH OF NATIONS 238 (W. Harold Maxwell & Leslie F. Maxwell eds., John Rees 1989) (2d ed. 1957). Amsterdam may have intended to cite to the American edition published in 1864. See 2 THOMAS E. MAY, THE CONSTITUTIONAL HISTORY OF ENGLAND 247 (photo. reprint 1986) (1864) (published in Boston).

<sup>56</sup> Arcila, *supra* note 11, at 1238 n.72.

<sup>57</sup> 3 Cuddihy Dissertation, *supra* note 7, at 1525 (concluding that "judicial sentryship against unfounded warrants . . . was . . . the exception"); see also *id.* at 1192-94, 1199, 1351. Professor Sklansky has accepted Cuddihy's conclusion. Sklansky, *supra* note 6, at 1798-99.

A. *Legal Elites and the Case in Favor of Judicial Sentryship: Major Treatises and a Few Cases Did Articulate Such a Duty*

It must be acknowledged that, in the treatises, the extent of guidance suggesting a probable cause sentryship role for the judiciary is impressive. A few cases also suggested such a duty. Professor Davies focuses upon this material in asserting that, as a matter of legal doctrine,<sup>58</sup> magistrates were “expected to assess the grounds for probable cause of suspicion respecting the person to be arrested or the place to be searched.”<sup>59</sup> He also asserts that, “like modern courts, the Framers understood that the magistrate’s review of the factual allegations offered as cause for a search could prevent an unjustified invasion of a house.”<sup>60</sup> In support of a sentryship role, Davies points to a passage in a dominant English treatise, *Hale’s Pleas of the Crown*,<sup>61</sup>

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58 Davies’s analysis specifically focuses upon legal doctrine rather than practice. Davies, *Fictional Originalism*, *supra* note 7, at 282 n.124.

59 Davies, *Original Fourth Amendment*, *supra* note 7, at 654.

60 *Id.* at 589. If Davies means to argue that the Framers expected judges to perform a probable cause sentryship role, he does not provide any direct authority on this point. He does, however, provide a cross-reference to his argument that judges enjoyed discretion to reject warrant applications if they did not believe probable cause existed. *Id.* at 589 n.103. I think the evidence supporting a lack of judicial discretion, at least on occasion and particularly in the civil search context, is better than Davies acknowledges. See *infra* Part III.

Davies does not equate all aspects of originalist and modern warrant standards. To the contrary, he argues that the Framers’ warrant standards were more demanding than modern standards. See *infra* note 107.

61 Hale was probably the preeminent legal scholar of his day. 6 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 580–81, 594–95 (1977). “Ever since its first publication,” *Hale’s Pleas of the Crown* was “regarded as a book of the highest authority.” *Id.* at 590.

*Hale’s Pleas of the Crown*, though generally not considered to be the most influential treatise in the new nation, probably did play that role with regard to search warrant procedure. See, e.g., *infra* notes 77–78 and accompanying text. Blackstone’s treatise is widely considered to have been the most influential in America during the Framers’ era. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (2d ed. 1985); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 23–24 (1991); DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 169–90 (1938); SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 23, at 132–34; Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 5–16 (1996); Davies, *Original Fourth Amendment*, *supra* note 7, at 580 n.78; Sklansky, *supra* note 6, at 1778 & n.240; see also Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976); Edwin C. Surrency, *The Beginnings of American Legal Literature*, 31 AM. J. LEGAL HIST. 207, 216 (1987) [hereinafter Surrency, *American Legal Literature*]. Blackstone’s popularity, however, “began to cool” after the Revolution because he was considered to be “too ardent a Royalist.” Howard Schweber, *Before Langdell: The Roots of American Legal Science*, in 2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES 606, 612–13 (Steve Sheppard ed., 1999); accord Alschuler, *supra*, at 9, 15. More importantly, Blackstone’s treatise did not include any discussion of search warrants (though it did discuss arrest warrants). Davies, *Original Fourth Amendment*, *supra*

which, in the context of arrest warrants, provided that a judicial officer is “a competent judge of those circumstances, that may induce the granting of a warrant” and that “[t]he party that demands it ought to be examin’d [sic] upon his oath touching the whole matter, whereupon the warrant is demanded, and that examination put into writing.”<sup>62</sup>

Davies additionally relies upon other contemporary English sources that give similar guidance in the context of discussing arrest rather than search warrants, including Blackstone’s and Hawkins’s treatises. Davies relies upon Blackstone’s guidance that:

[I]t is fitting [for the magistrate who hears a warrant application] to examine upon oath the party requiring a warrant [i.e., the complainant], as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed.<sup>63</sup>

This language was reiterated in at least one American justice manual.<sup>64</sup> Davies also cites Hawkins’s passage that:

[A] Justice of Peace cannot well be too tender in [issuing arrest warrants prior to indictment], and seems to be punishable not only at the Suit of the King, but also of the Party grieved; if he grant any such Warrant groundlessly and maliciously, without such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty.<sup>65</sup>

note 7, at 580 n.78. Hale’s treatise, as well as Hawkins’s, provided greater detail concerning criminal procedure in general, including with regard to search warrants. *Id.*

62 Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297 (citing 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 110–11 (photo. reprint 1971) (Sollom Emlyn ed., E. & R. Nutt & R. Gosling 1736) [hereinafter HALE’S PLEAS OF THE CROWN 1736] (apparently published in London)). Davies also has acknowledged Hale’s instruction (again referring to arrest rather than search warrants) that “it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, [for a justice of the peace] to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion.” Davies, *Original Fourth Amendment*, *supra* note 7, at 652 n.290 (quoting 2 HALE’S PLEAS OF THE CROWN 1736, *supra*, at 110). Another passage from *Hale’s Pleas of the Crown* that makes a similar point, once again in the context of discussing arrests, is that: “[J]ustices of peace are made judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of their suspicion, if they find the causes of suspicion to be reasonable, it is now become the justice’s suspicion as well as theirs.” 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 79 (Sollom Emlyn ed., London, E. Rider 1800) [hereinafter HALE’S PLEAS OF THE CROWN 1800]; 2 HALE’S PLEAS OF THE CROWN 1736, *supra*, at 79.

63 Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*287).

64 2 RICHARD BACHE, THE MANUAL OF A PENNSYLVANIA JUSTICE OF THE PEACE 138 (Philadelphia, William P. Farrand, & Co. 1810) (citing Blackstone).

65 Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297 (second alteration in original) (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 84–85 (Eliz.

In addition to English treatises, Davies also relies upon British cases that formed part of the Wilkes dispute, and which were well known in America.<sup>66</sup> As Davies points out,<sup>67</sup> Lord Camden stated in *Entick v. Carrington* that, before a search warrant is issued, “the justice and the informer must proceed with great caution; there must be an oath that the party has had his goods stolen, and a strong reason to believe they are concealed in such a place.”<sup>68</sup> Davies also notes<sup>69</sup> that, in *Money v. Leach*, Lord Mansfield said, “It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.”<sup>70</sup>

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Nutt & R. Gosling 1721) (apparently published in London) [hereinafter HAWKINS 1721]). Davies also cites to the same passage in a later edition. Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297 (citing 2 SERJEANT WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135–36 (Thomas Leach ed., 6th ed., London, His Majesty’s Law-Printers 1787) [hereinafter HAWKINS 1787]). Davies describes Hawkins as “the leading eighteenth-century authority on criminal procedure.” Davies, *Original Fourth Amendment*, *supra* note 7, at 579; *see also id.* at 579 n.76 (citing 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 361–62 (1938)).

Note that the passage quoted in the text actually suggests judicial liability for failing to engage in judicial sentryship. I address the implications this has for my argument below. *See infra* note 100.

66 Regarding the Wilkes dispute, see *supra* Part I.B.

67 Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297.

68 2 Wils. K.B. 275, 291–92, 95 Eng. Rep. 807, 818 (C.P. 1765). A different, more detailed version of the case does not contain this specific language. The analogous passage in the more detailed reporter states: “Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the good[s] are lodged in such a place.” 19 How. St. Tri. 1029, 1067 (C.P. 1765).

69 Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297.

70 3 Burr. 1742, 1766, 19 How. St. Tri. 1001, 1027, 97 Eng. Rep. 1075, 1088 (K.B. 1765).

Another major British case to the same effect was *Cooper v. Boot*, 4 Dougl. 339, 99 Eng. Rep. 911 (K.B. 1785), though it may have had little influence during the Framers’ era. Lord Mansfield declared in dicta, but on behalf of the court, that “[a] duty is also imposed on such commissioner or magistrate to exercise his judgment on the grounds of suspicion so laid before him, and if he thinks them sufficient, and not otherwise, he is bound to grant a warrant to search.” *Cooper*, 4 Dougl. at 348, 99 Eng. Rep. at 916; *accord Cooper v. Booth*, 3 Esp. 135, 144, 170 Eng. Rep. 564, 568 (K.B. 1785) (different reported version of same case). Along the same lines, he also asserted that “[i]f the magistrate thinks there is sufficient ground, he is bound to grant the warrant; if insufficient, to refuse it.” 4 Dougl. at 349, 99 Eng. Rep. at 916; *accord* 3 Esp. at 147, 170 Eng. Rep. at 568. One version of the decision also attributed to Lord Mansfield the statement that the officer “must swear to the grounds of his suspicion, [and] take the opinion of the magistrates as to their sufficiency, and obtain a warrant to authorize the search. It is not left to the discretion of the officer . . .” 170 Eng. Rep. at 568; *accord* 3 Esp. at 147. *Cooper*, however, may not have been widely known in America during the Framers’ era. *See infra* note 177 and accompanying text.

Davies could have added more to all this evidence. The lesson that the author of the *Canadian Freeholder* took from *Wilkes v. Wood*<sup>71</sup> was that “the business of a judicial officer, or magistrate” is to “exercise an act of judgment of an high nature,” which “ought not” be done “without having received an information upon oath from some credible witness.”<sup>72</sup> Additionally, in a pre-constitutional American case, a Connecticut court declared in *Frisbie v. Butler* that “it is the duty of a Justice of the Peace granting a search warrant . . . to limit the search to such particular place or places, as he, from the circumstances, shall judge there is reason to suspect.”<sup>73</sup>

American legal publications followed the lead of the English treatises, and in particular *Hale’s Pleas of the Crown*. Dane’s influential abridgment instructed that:

[A]s to some facts the process and proceedings are upon suspicion, but *this suspicion ought to be carefully examined and cautiously admitted by the magistrate*, otherwise it may be made an engine of malice and ill will; but as search warrants are of public convenience they are admitted in the English and our law, under the following cautions and restrictions: 1. They ought to be made on oath that a felony is committed: 2. That the complainant has probable cause to suspect that they are in such a house or place: 3. That he doth suspect &c.: 4. *Sh[ow]s the reasons of such suspicion . . .*<sup>74</sup>

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71 19 How. St. Tri. 1153, 98 Eng. Rep. 489 (C.P. 1763).

72 19 How. St. Tri. 1168, 1169–70 (1813).

73 1 Kirby 213, 215 (Conn. Super. Ct. 1787).

74 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 245 § 2 n.\* (Boston, Cummings, Hilliard & Co. 1824) [hereinafter 7 DANE’S AMERICAN ABRIDGMENT 1824] (emphases added); *see also id.* at 247 § 4 (explaining that “good and certain cause ought to be found in the complaint” submitted in support of warrant). Davies cites Dane’s abridgment in support of his position. Davies, *Original Fourth Amendment*, *supra* note 7, at 654 n.297 (citing 7 DANE’S AMERICAN ABRIDGMENT 1824, *supra*, at 243). Though Davies cites to page 243 of Dane’s abridgment, there is no discussion there concerning the judicial role in monitoring probable cause. Most likely Davies meant to cite to pages 244–45, section two, note \*, where the topic is addressed.

Dane’s was the first influential American abridgment having a broad scope and “had a tremendous impact on American law judging from references to it.” SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 23, at 113; *see also* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 35 (1994) (referring to Dane’s “great Abridgment”); A.W.B. SIMPSON, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 669–70 (1981) (discussing the significance of Dane’s work); SURRENCY, *American Legal Literature*, *supra* note 61, at 219; *cf.* SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 23, at 134–35 (noting that “[t]he work was extremely important, but failed to leave a lasting effect on American law,” but also that it was sufficiently successful that Dane used royalties from it “to found [a] professorship at Harvard Law School”). Dane’s abridgment was particularly important because it was apparently the only attempt during the Framers’ era to summarize American law. SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 23, at 113.

Dane's formulation, that a search warrant applicant should "show the reasons of his suspicion," is the most commonly used in American legal literature during the Framers' era.<sup>75</sup> Also regularly used in American justice manuals was that the applicant should "assign[]" before a judge his "suspicion, and the probable cause thereof" because search warrants should be granted only "upon the examination of the fact."<sup>76</sup>

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<sup>75</sup> American legal literature commonly stated that a judge "may grant a warrant to search" if an applicant "shows the reasons" or "shows the cause" of his suspicions, or some other similar formulation. *E.g.*, RICHARD BURN, *BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE* 357 (Dover, N.H., Eliphalet Ladd 1792) [hereinafter *BURN'S AMERICAN JUSTICE ABRIDGMENT* 1792]; RICHARD BURN, *AN ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER* 323 (Boston, Mass., Joseph Greenleaf 1773) [hereinafter *BURN'S JUSTICE OF THE PEACE ABRIDGMENT* 1773]; DANIEL DAVIS, *A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS* 46 (Boston, Mass., Cummings, Hilliard & Co. 1824) [hereinafter *DAVIS, TREATISE FOR JUSTICES* 1824]; JOHN A. DUNLAP, *THE NEW-YORK JUSTICE* 368 (N.Y., Isaac Riley 1815) [hereinafter *DUNLAP, THE NEW-YORK JUSTICE* 1815] (adopted to New York law); JAMES EWING, *A TREATISE ON THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 505 (Trenton, N.J., James Oram 1805) [hereinafter *EWING, TREATISE ON JUSTICE OF THE PEACE* 1805] (adopted to New Jersey law); JOHN FAUCHERAUD GRIMKE, *THE SOUTH CAROLINA JUSTICE OF PEACE* 398 (3d ed., N.Y., T. & J. Swords 1810) [hereinafter *GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE* 1810]; WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 621 (3d ed., Richmond, Va., J. & G. Cochran 1820) [hereinafter *HENING, NEW VIRGINIA JUSTICE* 1820]; WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 413 (Richmond, Va., J. & G. Cochran 1799) [hereinafter *HENING, NEW VIRGINIA JUSTICE* 1799]; WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE* 402 (Richmond, Va., T. Nicolson 1795) [hereinafter *HENING, NEW VIRGINIA JUSTICE* 1795]; HENRY HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* 407 (Cahawba, Ala., William B. Allen 1822) [hereinafter *HITCHCOCK, THE ALABAMA JUSTICE* 1822]; *A NEW CONDUCTOR GENERALIS: BEING A SUMMARY OF THE LAW RELATIVE TO THE DUTY AND OFFICE OF JUSTICES OF THE PEACE* 404 (Albany, N.Y., D. & S. Whiting 1803) [hereinafter *NEW CONDUCTOR GENERALIS FOR JUSTICES* 1803] (adopted to New York law); JAMES PARKER, *THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE* 315 (Phila., Pa., Charless 1801) [hereinafter *PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE* 1801] (printed for Mathew Carey); HENRY POTTER, *THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE* 273 (Raleigh, N.C. 1816) [hereinafter *POTTER, THE NORTH CAROLINA JUSTICE* 1816] (publisher illegible) (adopted to North Carolina law).

<sup>76</sup> *E.g.*, *BURN'S JUSTICE OF THE PEACE ABRIDGMENT* 1773, *supra* note 75, at 323; *GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE* 1810, *supra* note 75, at 398; *HENING, NEW VIRGINIA JUSTICE* 1820, *supra* note 75, at 621; *HENING, NEW VIRGINIA JUSTICE* 1799, *supra* note 75, at 413; *HENING, NEW VIRGINIA JUSTICE* 1795, *supra* note 75, at 402; *HITCHCOCK, THE ALABAMA JUSTICE* 1822, *supra* note 75, at 407; *PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE* 1801, *supra* note 75, at 315.

Other substantively similar formulations also appeared. *E.g.*, *BURN'S AMERICAN JUSTICE ABRIDGMENT* 1792, *supra* note 75, at 417 ("It is necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded."); *HENING, NEW VIRGINIA JUSTICE* 1799, *supra* note 75, at 462 ("warrants for felony, may be granted by a justice of the peace on probable grounds of suspicion: —Yet that they should be well satisfied of the reasonableness of the accusation").

In support of these propositions, these American works uniformly relied upon *Hale's Pleas of the Crown*, which evidences how influential that English work was on American search warrant procedure.<sup>77</sup> *Hale's Pleas of the Crown* indeed stated that search warrants for stolen goods were “not to be granted” unless “the party complaining hath probable cause to suspect they are in such a house or place, and do sh[ow] his reasons of such suspicion.”<sup>78</sup> It also similarly instructed that the only legal search warrants were those “where the party assigns before the justice his suspicion and the probable cause thereof,”<sup>79</sup> and emphasized that search warrants were “judicial acts” and therefore “must be granted upon examination of the fact.”<sup>80</sup>

The authorities discussed above undeniably constitute an impressive litany of doctrinal evidence in favor of judicial sentryship of probable cause. Yet, as I will explain below, there are numerous reasons to question whether the non-elite judges who were actually charged with issuing search warrants would have followed this guidance.

77 For a brief discussion of Hale's influence in American law, see *supra* note 61.

78 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 150; 2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 150; accord 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 113; 2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 113. The full passage from *Hale's Pleas of the Crown* is presented *infra* note 134. Of the thirteen American justice manuals cited above, see *supra* notes 75–76, every one of them cited to Hale's volume 2, page 150 in support, and sometimes to page 113 as well.

Davies himself recites Hale's passage that a complainant must “show the reasons of his suspicion,” though he does so while addressing issues other than whether judges served as probable cause sentries. See Davies, *Original Fourth Amendment*, *supra* note 7, at 651 n.289, 703 n.447.

79 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 150; 2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 150.

80 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 150; 2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 150.

Additionally, a few American justice manuals repeated Hale's arrest guidance suggesting that justices were to examine the accusing party because justices “are . . . judges of the reasonableness of the suspicion.” *E.g.*, BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 75, at 418; BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 75, at 372; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 75, at 360; *cf. supra* note 62 (citing 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 79, and 2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 79, and reciting relevant language). A few also repeated Hawkins's guidance that justices “cannot well be too tender” in issuing arrest warrants lest they be held liable for granting “any such warrant groundlessly and maliciously, without . . . probable cause.” *E.g.*, BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 75, at 419; BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 75, at 373; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 75, at 360; *cf. supra* note 65 and accompanying text (citing and reciting Hawkins's language).

## B. *Non-Elite Justices of the Peace and the Case Against Judicial Sentryship*

In spite of the guidance emanating from many elite legal sources, abundant reasons exist to believe that the non-elites who actually engaged in search warrant practice may not have followed it. Most importantly, treatises and American justice manuals often and explicitly stated that judicial sentryship of probable cause during the warrant application process was merely optional. Additionally, the legal forms that non-elite members of the legal profession and judiciary quite likely would have used as guides for search warrant procedure provide reasons for doubting that non-elite judges engaged in probable cause sentryship. Lastly, a plain text analysis of the weak language used to describe the duty, as well as consideration of the changes that have occurred in language since the Framers' era, also call into doubt whether the judiciary consistently monitored probable cause.

### 1. *Treatises and American Justice Manuals Explicitly Stated that Judicial Sentryship Was Merely Optional*

Treatises and American justice manuals from the Framers' era easily could have led justices of the peace to believe that a sentryship role was, at most, *optional*. This is because some guidance in these authorities clearly supports the view that, during the pre-issuance process, judicial vigilance in monitoring the adequacy of probable cause *was not obligatory*. At least seven American justice manuals from the Framers' era stated, in sections devoted to arrests, that it was *convenient but not always necessary* for judges to engage in the probable cause sentryship role. A typical entry read:

*"It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put into writing."*<sup>81</sup>

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81 BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 75, at 372 (emphasis added); accord GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 75, at 479; HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 75, at 699; HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 75, at 462; HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 75, at 450; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 75, at 359–60; *see also* RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 351 (Williamsburg, Va., Alexander Purdie & John Dixon 1774) [hereinafter STARKE, JUSTICE OF PEACE 1774] (*"It is convenient, though not always necessary, that the Party demanding a warrant be first examined on Oath."* (emphasis added)).



Six of these included this guidance at the same time as they elsewhere suggested a sentryship role.<sup>82</sup> Inclusion of these apparently contradictory guidelines in the same works is significant because the most ready means to reconcile them is to treat the sentryship role as *optional*—consistent with a plain text analysis below<sup>83</sup>—rather than mandatory. Additionally, all six of these American justice manuals relied upon *Hale's Pleas of the Crown*. It also contained the convenient-but-not-necessary language, stating in numerous editions that:

“It is convenient, tho not always necessary, to take an information upon oath of the person that desires the warrant, that a felony was committed, that he doth suspect or know J. S. to be the felon; and if suspected, then to set down the causes of his suspicion.”<sup>84</sup>

This guidance even appeared in a version published about a decade after the Fourth Amendment's adoption, as well as in the first American edition published in 1847!<sup>85</sup> The highly influential *Hale's Pleas of the Crown*<sup>86</sup> thereby similarly indicated that a sentryship role was optional. So did other English treatises.<sup>87</sup> All of this is extremely sig-

82 The discrepancy existed both between the search warrant and arrest sections of the same work, compare *supra* note 81, with *supra* notes 75–76 and accompanying text (STARKE, JUSTICE OF PEACE 1774, *supra* note 81, is the one exception that appears to have included the convenient-but-not-necessary guidance without elsewhere suggesting a sentryship role), as well as within the arrest sections of the same work, with contradictory guidance (such as “justices are judges of the reasonableness of the suspicion” or that justices “should be well satisfied of the reasonableness of the accusation” before granting “warrants for felony . . . on probable grounds of suspicion”) often appearing a mere paragraph or two away, and sometimes on the very same page, cf. BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 75, at 372; GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 75, at 480; HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 75, at 700; HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 75, at 462; HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 75, at 450; PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 75, at 360.

83 See *infra* Part II.B.3.

84 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 582 (1st Am. ed., Phila., Robert H. Small 1847) (emphasis added) [hereinafter HALE'S PLEAS OF THE CROWN 1847]; accord 1 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 582; 1 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 582.

85 1 HALE'S PLEAS OF THE CROWN 1847, *supra* note 84, at 582; 1 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 582.

86 For a discussion of the influence that *Hale's Pleas of the Crown* had in America, see *supra* notes 61, 77–78 and accompanying text.

87 The English version of Richard Burn's justice manual contained substantively similar guidance in editions published both before and after the Fourth Amendment's adoption: “It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded, and that examination put in writing.” 2 RICHARD BURN & JOHN BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 389 (18th ed., London, T. Strahan & Z. Woodfall 1793); 2 RICHARD BURN & JOHN BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 389 (16th ed., London, A. Strahan & W. Woodfall 1788); 4 RICHARD BURN, THE JUSTICE OF THE

nificant given limitations at the time on legal research<sup>88</sup> and American judicial training.<sup>89</sup> In light of these limitations, American justices of the peace probably relied heavily upon these American justice manuals,<sup>90</sup> and to a lesser extent upon English treatises,<sup>91</sup> when look-

PEACE, AND PARISH OFFICER 367 (15th ed., London, W. Strahan & W. Woodfall 1785); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 381 (14th ed., London, W. Strahan & M. Woodfall 1780); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 340 (13th ed., London, W. Strahan & M. Woodfall 1776); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 332 (12th ed., London, W. Strahan & M. Woodfall 1772); 4 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 329 (11th ed., London, W. Strahan & M. Woodfall 1770); 4 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 272 (10th ed., London, H. Woodfall & W. Strahan 1766); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 553 (8th ed., London, H. Woodfall & W. Strahan 1764); 3 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 444 (7th ed., London, E. Richardson & C. Lintot 1762); 3 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 427 (6th ed., Henry Lintot 1758) (apparently published in London); RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 725 (3d ed., Henry Lintot 1756) (apparently published in London); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 547 (2d ed., Henry Lintot 1756) (apparently published in London); 2 RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER 508 (Henry Lintot 1755) (apparently published in London). Professor Taslitz calls Burn's justice manual "the most influential of the eighteenth century." ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1869, at 48 (2006). The convenient-but-not-necessary guidance also appeared in another English treatise. THOMAS PEARCE, THE COMPLEAT JUSTICE OF THE PEACE, AND PARISH OFFICER 219 (Henry Lintot 1756) (apparently published in London) ("It is convenient, though not always necessary to ground a warrant, to take an information upon oath, that a felony was committed, and that the informant suspects or knows *J.S.* to be the felon; and if suspected, then to set down the cause of suspicion . . .").

88 FRIEDMAN, *supra* note 61, at 33, 102; Conley, *supra* note 24, at 263; J.L. High, *What Shall Be Done with the Reports?*, 16 AM. L. REV. 429, 430 (1882); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1297 (1985). In the Framers' era there was a "relative paucity of books," publication of case reports was modest, and no effective organizing system for them existed until West's Key Number System was devised in the last quarter of the 1800s. Robert C. Bering, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH. L. REV. 9, 20-24 (1994) (chronicling the rise of West's system); Thomas A. Woxland, "Forever Associated with the Practice of Law": *The Early Years of the West Publishing Company*, 5 LEGAL REF. SERVS. Q. 115, 116, 118-20 (Spring 1985).

89 FRIEDMAN, *supra* note 61, at 125-26 ("Judges varied in quality and qualification, from place to place, and according to their position in the judicial pyramid. . . . There were lay judges both at the top and the bottom of the pyramid."); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 113 (1921) ("Until the Revolution in most of the colonies it was not considered necessary or even expedient to have judges learned in the law."); *see also infra* notes 112-13, 117 and accompanying text (regarding lax legal training and low barriers to entry into the legal profession).

90 SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 23, at 131; Davies, *Fictional Originalism*, *supra* note 7, at 280. *See generally* Conley, *supra* note 24. Conley opines that "unlike their English counterparts who had access to a multitude of different law books on a variety of

ing into something like search warrant procedure in the new nation. *Judges who followed this convenient-but-not-necessary guidance often would have felt justified in not monitoring probable cause at all prior to issuing warrants.*

One possible objection to my argument is that I have not been careful enough in my reading of the American justice manuals or *Hale's Pleas of the Crown*. This objection emphasizes that the American justice manuals that include the convenient-but-not-necessary guidance do so only while discussing warrants in the *arrest* context. In doing so, these American works were following the same convention used in *Hale's Pleas of the Crown*, which also included the convenient-but-not-necessary guidance only in a chapter devoted to arrests. The more directly applicable *search warrant* sections of all these works *did* indicate a sentryship role.<sup>92</sup> This objection asserts that judges presented with a search warrant application would have sought guidance from the *search warrant* sections of these works, and followed the instructions therein that suggested a probable cause sentryship role, while ignoring the contrary guidance from the arrest sections. The premise of this objection is that a sharp distinction would have been made during the Framers' era between the law applicable to arrest warrants versus search warrants.

This objection falters because its premise is flawed. It is certainly true that differences existed in the common law applicable to arrests versus searches. But, with respect to the probable cause sentryship issue, I can discern no reason why the law applicable to warrants would have differed depending upon whether an arrest or search was

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topics for reference, the American justices [of the peace] relied on their manual as their primary source of legal reference." *Id.* at 265.

The importance of these justice manuals and the guidance they provided on warrant procedure can also be demonstrated by comparison to "commonplace books" and their consistent lack of guidance on the subject. In the Framers' era, legal training, combined with the difficulty of conducting legal research, encouraged the personal production and use of commonplace books. These were notebooks into which lawyers-in-training, as well as lawyers and even judges, entered "points of law found in any source," including from first-hand courtroom observation. PAUL M. PRUITT, JR. & DAVID I. DURHAM, *COMMONPLACE BOOKS OF LAW: A SELECTION OF LAW-RELATED NOTEBOOKS FROM THE SEVENTEENTH CENTURY TO THE MID-TWENTIETH CENTURY 5-10* (2005); Surrency, *American Legal Literature*, *supra* note 61, at 214. I have examined numerous commonplace books, and have yet to find any addressing arrest or search and seizure law in general, or warrant procedures specifically.

91 SURRENCY, *AMERICAN LAW PUBLISHING*, *supra* note 23, at 165; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 299 n.66 (1969); Joyce, *supra* note 88, at 1297.

92 See *supra* notes 74-80 and accompanying text.

at issue. After all, the Fourth Amendment's Warrant Clause imposes the same probable cause requirement upon both arrest and search warrants.<sup>93</sup> This suggests that during the Framers' era no sentryship distinction would have been drawn between the procedural guidance applicable to warrants, irrespective of whether it originated in the arrest or search portions of a legal text.<sup>94</sup>

A litigant's argument in *Money v. Leach*<sup>95</sup> provides some support for this view. It was part of the famous Wilkes dispute, and as such was very well known.<sup>96</sup> The plaintiff challenged a search and seizure

93 I make this point at a high level of abstraction, while cognizant that in specific circumstances probable cause is not always treated similarly in the arrest versus search warrant context. See, e.g., *United States v. Watson*, 423 U.S. 411, 432 n.5 (1976) (Powell, J., concurring) ("The probable cause to support issuance of an arrest warrant normally would not grow stale as easily as that which supports a warrant to search a particular place for particular objects.").

94 Commentators on this manuscript raised several reasons why probable cause sentryship may have differed in arrest and search warrant procedure, but I find these reasons unconvincing.

One suggestion was that delay was a concern in the arrest context because felons could flee prior to being apprehended, but not a concern in the search context since contraband cannot run away. This suggestion fails to account for the consistent governmental concern, both in the Framers' era and in more contemporary cases, that contraband might be removed prior to execution of a warrant. See *infra* notes 200–01 and accompanying text. My position might be criticized as failing to draw a necessary distinction between customs or regulatory searches (where delay was a noted concern in the Framers' era) and searches for stolen goods. But I doubt this is a sufficient distinction upon which to justify categorically different sentryship duties in arrest versus search warrant procedure, particularly given that customs search warrants were issued in the same manner as warrants for stolen goods. See *infra* note 124.

Another suggestion was that in the Framers' time the popular concern was with the government's search power, whereas the government's arrest power was generally not controversial, thus justifying more stringent sentryship in search warrant procedures than in the arrest context. I cannot fully discount this suggestion, though the argument I make immediately below regarding *Money v. Leach* offers some evidence against it. See *infra* notes 95–99 and accompanying text.

95 3 Burr. 1742, 19 How. St. Tri. 1001, 97 Eng. Rep. 1075 (K.B. 1765).

96 See *supra* notes 41, 47. The Burrow reporter published *Money v. Leach* in 1771. 1 LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS 294, entry 20 (W. Harold Maxwell & Leslie F. Maxwell eds., John Rees 1989) (2d ed. 1955). Blackstone and Hawkins briefly referred to the case in their treatises. 4 BLACKSTONE, *supra* note 63, at \*288 n.i; 2 HAWKINS 1787, *supra* note 65, at 131 n.2, 138 n.7. The case also was discussed and cited in American cases and treatises. E.g., *Wells v. Jackson*, 17 Va. (3 Munf.) 458 (1811); DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 75, at 47 (referring to it as "the great case"). Additionally, and as Professor Davies has noted, a portion of the case was reported in English and colonial newspapers. Davies, *Original Fourth Amendment*, *supra* note 7, at 564 n.22 (citing BOSTON GAZETTE, OR, COUNTRY JOURNAL, Mar. 26, 1764, at 2, cols. 2–3; LONDON CHRON., Dec. 10–13, 1763 (no. 1084), at 562, col. 2). As such, chances are high that the legal community during the Framers' era would have been familiar with this decision.

(not an arrest), arguing, in part, that no oath supported the warrant. Defendants' answer to the charge was that "there was no occasion . . . for it [i.e., the oath]."<sup>97</sup> What was the authority for this defense of the *search*? The defendants supported their argument with the same convenient-but-not-necessary guidance from an *arrest* chapter in *Hale's Pleas of the Crown*, arguing "it is laid down, that 'it is convenient, though not always necessary to take an information upon oath of the person that desires the warrant.'"<sup>98</sup> At a minimum, this represents an instance in which a lawyer *did not* draw a distinction concerning warrant procedures depending upon whether an arrest or search power was at issue.<sup>99</sup> My guess is that it would not have been much of a stretch for a justice of the peace to similarly equate the sentryship duty in the search and arrest contexts and, after finding the convenient-but-not-necessary language in an American justice manual (or even in *Hale's Pleas of the Crown* itself, though that would have been less likely), to conclude that a probable cause sentryship role was at most optional in the search context, rather than mandatory.<sup>100</sup>

The interpretation I apply to the convenient-but-not-necessary language is provocative, given how dramatically it changes our historical perceptions of probable cause and the judicial role, so naturally it has not gone unchallenged. Numerous commentators on this

97 *Money*, 3 Burr. at 1764, 19 How. St. Tri. at 1025, 97 Eng. Rep. at 1087.

98 The various versions of *Money* all appear to cite to volume 1, page 582 of *Hale's Pleas of the Crown*, though they use two different abbreviations to refer to it, namely "Hale H. P. C." and "Hale P.C." 3 Burr. at 1764, 19 How. St. Tri. at 1025, 97 Eng. Rep. at 1087; *cf. supra* note 84 (quoting convenient-but-not-necessary guidance from same citation to *Hale's Pleas of the Crown*).

99 One commentator on this manuscript questioned the importance of this point, asserting that it was more important that the court ruled against the defendants. This objection does not persuade me because there was no ruling on the specific issue I am addressing here, and the nature of the case was such that the court could have ruled against the defendants while at the same time agreeing with defense counsel that no sentryship distinction existed between search and arrest warrant procedures.

100 Some who are resistant to my view about lax judicial sentryship during the Framers' era may rely upon Hawkins's suggestion that judges could be held liable for issuing warrants upon less than probable cause. *See supra* note 65 and accompanying text; *see also* 2 HAWKINS 1787, *supra* note 65, at 132 ("[H]owever the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone be answerable for it."). I agree that Hawkins's guidance is potentially troublesome. It does not, however, carry the day with me for several reasons. First, it does not appear to be included in other major leading treatises of the era. Second, I am not aware of any evidence that judges ever had such an action brought against them, much less that such an action had ever been successful. As such, I doubt the validity of Hawkins's guidance on this point.

manuscript have quite usefully suggested alternative interpretations, though I have not yet seen evidence that persuades me I am wrong in mine. Importantly, I think most disagreements with me are probably only a matter of degree. Even if one applied a more restrictive interpretation than I do—for example, that this was an exception limited to rare cases—this remains an acknowledgement that warrants could issue in the Framers' era without judges independently assessing probable cause, which is still a significant departure from modern search warrant practice.

Two commentators on this manuscript did offer interesting alternative interpretations that should be given further consideration. One commentator wondered if the convenient-but-not-necessary guidance was meant to convey a message that judges *could* or *should* serve as probable cause sentries, but needed to conduct an inquiry (preferably reduced to writing) only if they were in doubt as to whether probable cause existed. Under this interpretation, judges either could, or were supposed to, engage in probable cause sentryship in all cases, but needed to conduct an inquiry into probable cause only in marginal cases where they needed more information. In this view, the convenient-but-not-necessary language might have conveyed guidance as to how *extensive* the probable cause inquiry should be, rather than serving as a true *exception* to probable cause sentryship.<sup>101</sup>

The other commentator suggested a qualitatively different interpretation than mine, namely that the convenient-but-not-necessary guidance indicated that an *oath* was optional, while a presentation and assessment of probable cause remained mandatory. In this commentator's view, this interpretation is plausible because it accounts for instances in which a search warrant applicant might have been uncomfortable with an oath, such as due to religious qualms.

Though I cannot conclusively reject these alternative interpretations, I do not find them persuasive. Both of these interpretations are grounded in the premise that judges understood the common law to impose upon them a judicial sentryship duty. As I acknowledge above, some evidence for that conclusion certainly exists, especially

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101 As this commentator noted, such an interpretation might help explain why, as discussed below, warrant forms from the era often did not require the applicant to specify the factual grounds supporting probable cause. See *infra* notes 106–11 and accompanying text. The failure to require a recitation of underlying facts in these forms might be explainable if judges understood that the common law imposed upon them a probable cause sentryship duty, which would prompt them to conduct a probable cause inquiry in doubtful cases.

with regard to elites who were well versed in the major English treatises.<sup>102</sup> But quite a bit of evidence undercuts this conclusion, at least in so far as we focus upon the non-elite justices of the peace, whom would have been the judicial officers actually issuing search warrants. For instance, if a judicial sentryship duty with regard to probable cause was widely understood as early as the Framers' era, it is difficult to explain why the Supreme Court was still having to emphasize and provide instruction on this duty as late as 1964.<sup>103</sup>

I am also suspicious of these alternative interpretations because they seem strained. The "optional oath" interpretation, for example, unnaturally divorces the former part of the passage ("[i]t is convenient, though not always necessary, that the party who demands the warrant be first examined on oath") from the latter ("touching the whole matter whereupon the warrant is demanded, and that examination put into writing").<sup>104</sup> Thus, though I admit that interpretations other than mine deserve further investigation, I continue at this point to believe that mine is correct.

## 2. *Legal Forms Often Implied that Judicial Sentryship Was Optional*

Focusing upon justices of the peace, the legal workhorses who actually issued search warrants, rather than upon legal elites like the Framers, leads to more reasons for doubting that aggressive sentryship of probable cause was the norm. Justices of the peace may not have had ready access to major treatises. Rather, it is much more likely that they heavily relied upon justice of the peace manuals.<sup>105</sup> Two types of legal forms in these manuals provide reasons for believing that, during the Framers' era, justices of the peace did not necessarily engage in probable cause sentryship as part of established search warrant procedure. First are the forms that applicants provided to the court in support of requests for the issuance of a search warrant. Second are the search warrants themselves.

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102 See *supra* Part II.A.

103 See *infra* Part IV.

104 It also fails to account for the original formulation of this guidance in *Hale's Pleas of the Crown*, which is arguably clearer in linking the probable cause sentryship issue to the convenient-but-not-necessary guidance. See *supra* note 84 and accompanying text.

105 See *supra* note 90 and accompanying text.

### a. Application Forms for Search Warrants

According to Cuddihy, in the time period around 1789, when the Constitution was adopted and two years before the Fourth Amendment became effective:<sup>106</sup>

Legal treatises, pamphlets, and statutes explicated the usual protocol in detail. In that protocol, the magistrate issued a warrant upon sworn complaint by an informant, that he had grounds to suspect, not believe, that an infraction had occurred. *That the magistrate should intrude as a civil libertarian overseer was not widely assumed.*<sup>107</sup>

Cuddihy believes that the application forms that were used to request search warrants usually required only a general, sworn assertion of suspicion, without requiring that the applicant specify the factual grounds supporting the claimed suspicion.<sup>108</sup> Improved research resources since Cuddihy's study indicate that the evidence is more equivocal than he recognized, though his conclusion appears generally correct.<sup>109</sup>

<sup>106</sup> The Constitution was written in 1787 but did not become effective until 1789. 1 U.S.C. lvi n.1 (2000). The process of adopting the Bill of Rights was completed on December 15, 1791, with Virginia's ratification. COMM'N ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE BILL OF RIGHTS AND BEYOND, 1791–1991, at 7 (Herbert M. Atherton & J. Jackson Barlow eds., 1991); see also 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1201–02 (1971).

<sup>107</sup> 3 Cuddihy Dissertation, *supra* note 7, at 1525 (emphasis added); see also *id.* at 1192 (addressing the earlier period of 1762–1775, Cuddihy similarly concluded that “[t]he general rule was that magistrates neither examined complaints independently to determine their adequacy for warrants nor withheld warrants if the assessment was negative”).

Professor Davies disagrees with Cuddihy's apparent assertion that suspicion was sufficient to obtain a warrant under the common law in the Framers' time. Davies has explained that, as a matter of legal doctrine, arrest and search warrants were to issue under the common law only upon (1) a sworn allegation that a crime actually had been committed “in fact,” rather than upon mere probable cause to believe one had been committed, and (2) probable cause of suspicion as to either who committed the crime or where the stolen property was located. See Davies, *Fictional Originalism*, *supra* note 7, at 368–73.

<sup>108</sup> 3 Cuddihy Dissertation, *supra* note 7, at 1525–27; see also *id.* at 1192–94 (citing numerous pre-Revolutionary probable cause standards enacted by state legislatures or otherwise commonly practiced from state to state).

<sup>109</sup> In conducting research for this Article, I benefited from an advantage that Cuddihy did not enjoy: text-searchable, digitized databases of historic legal texts. Two such databases, which the publisher Thomson-Gale offers on a subscription basis, greatly aided my research. One is the *Eighteenth Century Collections Online* database, which makes available significant legal titles from the eighteenth century. See Gale, *Eighteenth Century Collections Online*, <http://www.gale.com/EighteenthCentury> (last visited Nov. 8, 2007). Another is the *Making of Modern Law* database, which covers legal titles from 1800–1926. See Gale, *The Making of Modern Law*, <http://www.gale.com/ModernLaw> (last visited Nov. 8, 2007). These databases are available through some law libraries, such as those of Touro Law Center (which recently began subscribing to the latter) and Fordham University Law School (which subscribes to both).



In the Framers' era, American search warrant request forms typically called upon the applicant to affirm, in general terms, that he had suspicion. Sometimes they also called upon the applicant to specify the underlying factual grounds supporting such suspicion.<sup>110</sup> But just as often (if not more often) they did not.<sup>111</sup>

110 Search warrant request forms that called for the recitation of facts supporting probable cause uniformly instructed the applicant to "set forth the grounds of suspicion, that they may appear to be reasonable." For example, a typical application form provided:

\_\_\_\_ County, ss.

BE IT REMEMBERED that this \_\_\_\_ day of \_\_\_\_ A B of \_\_\_\_ in the said county of \_\_\_\_ yeoman, in his proper person, comes before, J C, Esquire, one of the justices of the peace in and for the said county, and upon oath maketh complaint, that on the \_\_\_\_ day of &c. [*or as the case is*] divers goods and chattels of him the said A B, of the value of, &c, that is to say, &c. (*describe the articles*) were feloniously stolen, taken and carried away, from and out of the dwelling house of him the said A B, situate at &c. in the county aforesaid; *that he hath just and reasonable cause to suspect, and doth suspect*, that the said goods and chattels, or some part thereof, are concealed in the dwelling house of P R, of, &c. in said county, labourer; for he the said A B upon his oath aforesaid, doth depose and say, that (*set forth the grounds of suspicion, that they may appear to be reasonable,*) and therefore he the said A B prays that justice may be done in the premises.

Before me, &c.

*Form of a Complaint to Obtain a Search Warrant*, in THE ATTORNEY'S COMPANION 435 (Poughkeepsie, N.Y., P. Potter & S. Potter 1818) [hereinafter ATTORNEY'S COMPANION: NEW-YORK 1818] (third emphasis added) (adopted to New York law); *accord Form of a Complaint to Obtain a Search Warrant*, in THE CLERK'S ASSISTANT 236 (Poughkeepsie, N.Y., Nicholas Power & Co. 1805) [hereinafter CLERK'S ASSISTANT 1805] ("Calculated For The Use Of The Citizens Of The United States."); *Form of a Complaint to Obtain a Search Warrant*, in DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 75, at 239; *Form of a Complaint in Order to Obtain a Search Warrant*, in EWING, TREATISE ON JUSTICE OF THE PEACE 1805, *supra* note 75, at 506-07; *Form of a Complaint in Order to Obtain a Search Warrant*, in NEW CONDUCTOR GENERALIS FOR JUSTICES 1803, *supra* note 75, at 405-06.

111 Many search warrant application forms merely required the applicant to make a general declaration that he "hath probable cause to suspect, and doth suspect," without calling for the recitation of the factual grounds supporting suspicion. A typical example of such a form provided:

Strafford. } To the honourable J. P. esquire one of  
the justices to keep the peace in the  
said county.

*Complains.*

In the name and behalf of the state of New hampshire, A. I. of \_\_\_\_ in the county aforesaid, yeoman, that the followings goods, to wit \_\_\_\_ being the property of the said A. I. and of the value of \_\_\_\_ were on the \_\_\_\_ day of \_\_\_\_ by some person or persons unknown, with force and arms, feloniously taken, stolen and carried away, out of the house of the said A. I. at \_\_\_\_ in the county aforesaid, against the law of the land, and that *the said A. I. hath probable cause to suspect, and doth suspect*, that the said goods, or part thereof, are concealed, in the dwelling house of A. O. of \_\_\_\_ in the said county, yeoman. Wherefore your complainant prays that a warrant may issue to search for the said goods in the dwelling house aforesaid, and if the same be found upon the said search, that the said A. O. be apprehended and dealt with as the law directs.

February 2, 1792.

A. I.

The prevalence of legal forms that failed to demand the details underlying a probable cause claim is crucial because legal forms likely dominated search warrant practice. Given the often-rudimentary legal training lawyers received in the period,<sup>112</sup> and the low barriers to entry into the profession,<sup>113</sup> there is every reason to believe that lawyers heavily relied upon these legal forms.<sup>114</sup> Extensive judicial reliance was also likely given the restricted nature of legal research in the decades following Independence<sup>115</sup> and that American judges from the period often lacked meaningful legal training.<sup>116</sup> These are im-

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On the same day the said A. I. made oath to the truth of the above complaint by him subscribed, before me.

J. P. *justice of the peace.*

*A Search Warrant, with the C[omplaint, in BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, supra note 75, at 468–69 (second emphasis added); accord Complaint for a Search Warrant, in 7 DANE'S AMERICAN ABRIDGMENT 1824, supra note 74, § 2, at 244 n.\*; Complaint on Theft, and Request for a Warrant to Search, in SAMUEL FREEMAN, THE MASSACHUSETTS JUSTICE 167 (Boston, Mass., Isaiah Thomas & Ebenezer T. Andrews 1802) [hereinafter FREEMAN, MASSACHUSETTS JUSTICE 1802]; Complaint on Theft, and Request for a Warrant to Search, in SAMUEL FREEMAN, THE MASSACHUSETTS JUSTICE 153 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1795) [hereinafter FREEMAN, MASSACHUSETTS JUSTICE 1795]; Complaint That Property Has Been Stolen, and Prayer for a Warrant to Search Therefor, in JEREMIAH PERLEY, THE MAINE JUSTICE 264 (Hallowell, Me., Goodale, Glazier & Co. & C. Spaulding 1823) [hereinafter PERLEY, MAINE JUSTICE 1823]; see also Form of a Complaint and Search Warrant, to Search for Counterfeit Money and Securities, in DAVIS, TREATISE FOR JUSTICES 1824; supra note 75, at 217–18 (“[H]as reasonable cause to suspect and doth suspect.”); A Complaint and Warrant to Search for Stolen Goods, in THOMAS G. FESSENDEN, THE AMERICAN CLERK'S COMPANION, AND ATTORNEY'S PROMPTER 284 (Brattleborough, Vt., John Holbrook 1815) [hereinafter FESSENDEN, AMERICAN CLERK'S COMPANION 1815] (“[H]ath good reason to suspect, and doth suspect.”).*

It is quite striking that these application forms apparently were considered adequate, although others of that period, *see supra* note 110, called for specifying the underlying facts. It is also remarkable that the conclusory formulation these forms used (“hath probable cause to suspect, and doth suspect”), which called for mere assertions that probable cause existed, remained acceptable well into the last century. *See infra* note 192 and accompanying text; *see also infra* notes 194–95 and accompanying text.

- 112 *See* FRIEDMAN, *supra* note 61, at 318–19 (“For a fee, the lawyer-to-be hung around an office, read Blackstone and Coke and a miscellany of other books, and copied legal documents. If he was lucky, he benefited from watching the lawyer do his work, and do it well.”); LAPIANA, *supra* note 74, at 38 (“Not every American lawyer, however, met the standards of the intellectually oriented elite. . . . The vast majority studied law only through apprenticeship and were never exposed to systematic instruction in the science of principles.”).
- 113 *See* Friedman, *supra* note 61, at 304–09, 315–18 (“[T]he doors to the profession were at all times relatively open. Control over admission to the bar was loose, to say the least. Legal education was not very stringent.”).
- 114 *See* SURRENCY, AMERICAN LAW PUBLISHING, *supra* note 23, at 138 (explaining that lawyers found it convenient to use legal forms); Surrency, *American Legal Literature*, *supra* note 61, at 207 (“The sale of statutes and legal forms was a large part of the printer’s business.”).
- 115 *See supra* notes 88, 90.
- 116 *See supra* note 89.

portant points because it is likely that all those who would have been engaged in the quotidian legal machinery of search warrant application and issuance—the lay people, customs officers, and even lawyers who might have applied for search warrants, as well as the justices of the peace to whom they applied—would not have been the elites of the legal profession.<sup>117</sup>

In trying to identify the state of common law legal practice (as opposed to doctrine) in the Framers' time, it is important to acknowledge that legal publications from the era often contained contradictions. One volume called for specifying the underlying facts supporting a probable cause assertion in one suggested application form, but not in another.<sup>118</sup> And it is common to find application forms that did *not* require the specification of underlying facts in volumes that elsewhere suggested a judicial sentryship role.<sup>119</sup> This is in

117 Professor LaPiana hints at this point when he writes, in the context of discussing early efforts to limit entry into the legal profession, that:

The desire to distinguish trained advocates who were worthy to appear before the highest courts from mere attorneys, or, more disparagingly, *pettifoggers*, whose *mechanical knowledge of forms and pleading fitted them, at most, for appearances before lay justices of the peace*, burned brightly in the hearts of trained lawyers throughout the Revolutionary and antebellum periods. John Adams carried on a personal crusade against the lowly tribe.

LAPIANA, *supra* note 74, at 44 (citation omitted) (emphasis added). LaPiana helpfully reprints a young law school graduate's personal "definition of a pettifogger":

Pettyfoggers are those who without any preparatory study enter our lower courts with a few snatches of what they call *law* picked up at the Corners of Streets. These they rant & rave—quibble upon words—stammer & quarrel & raise often not a petty fog, but a great one—to the total eclipse of Common Sense & the discomfiture of justice.

*Id.* at 44–45 (citation omitted) (quoting Diary of Aaron Barlow Olmstead 211 (on file with the New-York Historical Society, Misc. Microfilms, reel 14)).

My point that justices of the peace usually would not have been part of the legal elite stands, even though they probably were respected members of the community. Davies notes that in our early history "a magistrate (usually the justice of the peace) was expected to be a man of stature and sound judgment," and that "the office of justice of the peace was reserved for 'men of means and standing.'" Davies, *Original Fourth Amendment*, *supra* note 7, at 654 & n.296 (quoting David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 354 (1996)). Davies also notes Forte's assertion that "'appointment as justice of the peace was an essential emblem of a man's membership in the political and financial elite.'" *Id.* at 654 n.296 (quoting Forte, *supra*, at 351). Though justices of the peace may well have been part of the "political and financial elite," they likely were *not* part of the *legal* elite. Indeed, as Forte acknowledges, justices of the peace were "[n]ormally . . . men untrained in the law." Forte, *supra*, at 354.

118 Compare the citations to DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 110, with *supra* note 111.

119 Compare the citations to 7 DANE'S AMERICAN ABRIDGMENT 1824, *supra* note 111, with *supra* note 74, or the citations to BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 111, with *supra* notes 75–76.

addition to other discrepancies.<sup>120</sup> These discrepancies leave us in a state of ambiguity that I doubt can be conclusively resolved. But, as I have already suggested, a likely result is that the non-elite lawyers and justices of the peace who directly engaged in warrant procedure would have resolved these uncertainties by treating sentryship as optional rather than mandatory.<sup>121</sup>

### B. Search Warrant Forms

As is true today, the content of search warrants during the Framers' era did not allow for meaningful verification that the issuing judge had inquired into the specific facts supporting a probable cause assertion. Warrants today are not required to say anything about probable cause.<sup>122</sup> They tend at most to declare only that probable cause exists, without specifying the underlying facts supporting it.<sup>123</sup> Similarly, the practice in the Framers' era was that American search warrants at most asserted the general existence of adequate suspicion. A common formulation in these warrants was to state that the applicant "hath probable cause to suspect, and doth suspect," while uniformly failing to detail the supporting facts.<sup>124</sup>

120 See, e.g., *supra* notes 81–82 and accompanying text, and *infra* note 176.

121 See *supra* note 83 and accompanying text.

122 See FED. R. CRIM. P. 41(e)(2) (omitting any mention of probable cause from required contents of a warrant). This was not always the case. The original version of Rule 41 required each warrant to "state the grounds or probable cause for its issuance." FED. R. CRIM. P. 41(c) (1946), *reprinted in* 18 U.S.C. ch. 21A at 1979–80 (1950). This requirement had replaced an identical statutory mandate. See 18 U.S.C. § 616 (1944); see also 18 U.S.C. §§ 611–616 (1950) (indicating withdrawal of § 616 because its contents "are now covered by Rule 41 of the Federal Rules Of Criminal Procedure"). The requirement was eliminated on the basis that it constituted "unnecessary paper work" because "[a] person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued." FED. R. CRIM. P. 41 advisory committee's notes on the 1972 amendments.

123 See, e.g., *Petition for Writ of Certiorari at \*26a, Groh v. Ramirez*, 540 U.S. 551 (2004) (No. 02-811), 2002 WL 32101201 (Nov. 22, 2002) (providing an example of a modern search warrant, which stated: "I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premise above-described and establish grounds for the issuance of this warrant").

124 One typical example of a Framing-era search warrant form provided:

County of \_\_\_\_\_ ss. To any Constable of &c.

Whereas A B of \_\_\_\_\_ in the said county, yeoman, hath this day made complaint upon oath, before me, J C Esquire, one of the justices of the peace in and for the said county, that on &c. certain goods and chattels of him, the said A B to wit: \_\_\_\_\_ have, by some person or persons unknown, been feloniously stolen, taken and carried away out of the dwelling house of him, the said A B at \_\_\_\_\_ aforesaid, in the county aforesaid: and that he the said A B *hath probable cause to suspect, and doth suspect* that the said goods and chattels, or some part thereof, are concealed in

One difference in modern versus Framers'-era search warrant procedural standards provides an important reason for doubting that

the dwelling house of P R, of \_\_\_\_\_ in the said county, labourer; These are therefore in the name of the people of the state of New York, to authorise and require you, the necessary and proper assistance, to enter in the day time, into the [said] dwelling house of the said P R, at \_\_\_\_\_ aforesaid, in the county aforesaid, and there diligently to search for the said goods: and if the same, or any part thereof, shall be found upon such search, you are to bring the goods so found, and also the body of the said P R before me, or some other of the justices assigned to keep the peace in and for the county aforesaid, to be disposed of and further dealt with according to law.

Given under my hand and seal at, &c.

*Search Warrant on the Above Complaint*, in ATTORNEY'S COMPANION: NEW-YORK 1818, *supra* note 110, at 436 (emphasis added); *accord Form of a Search Warrant*, in BURN'S JUSTICE OF THE PEACE ABRIDGMENT 1773, *supra* note 75, at 324; *Search Warrant on the Above Complaint*, in CLERK'S ASSISTANT 1805, *supra* note 110, at 237; *Forms, &c. for Search Warrants*, in DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 75, at 215–16; *Search Warrant on the Above Complaint*, in DAVIS, TREATISE FOR JUSTICES 1824, *supra* note 75, at 239–40; *Form of a Search Warrant on the Above Complaint*, in EWING, TREATISE ON JUSTICE OF THE PEACE 1805, *supra* note 110, at 507; *A Complaint and Warrant to Search for Stolen Goods*, in FESSENDEN, AMERICAN CLERK'S COMPANION 1815, *supra* note 111, at 284–85; *Search Warrant Forms*, in FREEMAN, MASSACHUSETTS JUSTICE 1802, *supra* note 111, at 296–97; *Search Warrant Forms*, in FREEMAN, MASSACHUSETTS JUSTICE 1795, *supra* note 111, at 269–70; *Form of a Search Warrant*, in GRIMKE, SOUTH CAROLINA JUSTICE OF PEACE 1810, *supra* note 75, at 400; *Form of a Search Warrant*, in HENING, NEW VIRGINIA JUSTICE 1820, *supra* note 75, at 623–24; *Form of a Search Warrant*, in HENING, NEW VIRGINIA JUSTICE 1799, *supra* note 75, at 416 (general warrant); *Form of a Search Warrant*, in HENING, NEW VIRGINIA JUSTICE 1795, *supra* note 75, at 405; *Form of a Search Warrant*, in HITCHCOCK, THE ALABAMA JUSTICE 1822, *supra* note 75, at 409; *Form of a [S]earch Warrant*, in FRANCOIS-XAVIER MARTIN, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 281 (Newbern, N.C. 1791) (no publisher listed) (adopted to North Carolina law); *Form of a Search Warrant on the Above Complaint*, in NEW CONDUCTOR GENERALIS FOR JUSTICES 1803, *supra* note 75, at 406; *Form of a Search Warrant*, in PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 75, at 316–17; *Warrant*, in PERLEY, MAINE JUSTICE 1823, *supra* note 111, at 264–65; *Search Warrant*, in PRECEDENTS FOR THE USE OF JUSTICES OF THE PEACE 10 (Reading, Pa., George Getz 1822) (adopted to Pennsylvania law); *Search Warrant*, in STARKE, JUSTICE OF PEACE 1774, *supra* note 81, at 160; *Form of the Warrant for Entering Suspected Houses*, in STARKE, JUSTICE OF PEACE 1774, *supra* note 81, at 337–38 (regulatory search warrant concerning tobacco); *Form of the Warrant to Go on Board a Ship, &c. in Search of Uninspected Tobacco*, in STARKE, JUSTICE OF PEACE 1774, *supra* note 81, at 338; *Form of a Search Warrant*, in STARKE, JUSTICE OF PEACE 1774, *supra* note 81, at 352; *Warrant to Search for Stolen Goods, and Apprehend the Felon*, in A COLLECTION OF ENGLISH PRECEDENTS, RELATING TO THE OFFICE OF A JUSTICE OF PEACE 36, in THE YOUNG CLERK'S VADE MECUM: OR, COMPLEAT LAW-TUTOR (N.Y., H. Gainé 1776) [hereinafter VADE MECUM]; *see also A Search Warrant, with the Complaint*, in BURN'S AMERICAN JUSTICE ABRIDGMENT 1792, *supra* note 75, at 468–69 (omitting any mention of suspicion); *Warrant to Search for Stolen Goods*, in A COLLECTION OF ENGLISH PRECEDENTS, RELATING TO THE OFFICE OF A JUSTICE OF PEACE 34, in VADE MECUM, *supra* (general warrant stating that complainant “hath informed me”). The vast majority of these examples, which relate to warrants for stolen goods, are applicable to the regulatory context as well because customs search warrants were issued in the same manner as warrants for stolen goods. *See* PARKER, CONDUCTOR GENERALIS FOR JUSTICES OF THE PEACE 1801, *supra* note 75, at 374.

judges during the earlier period served as probable cause sentries. Modern procedures provide a reliable mechanism for determining whether a judge independently and appropriately assessed probable cause prior to issuing a warrant, but no comparably reliable procedure existed during the Framers' era. Modern practice requires the preservation of the detailed facts provided to the judge in support of a probable cause claim (commonly in the form of an affidavit or recorded testimony), which in conjunction with the warrant provides the mechanism through which a search target can assess whether the search was properly allowed and conducted.<sup>125</sup> Though there is a bit of authority that a comparable procedure was available during the Framers' era, it is likely that in many cases only a less reliable, wholly post hoc inquiry was available. Dane's abridgment indicates that applications were "usually annexed" to the warrant,<sup>126</sup> and that the "good and certain cause" supporting the search "ought to be found in" the application.<sup>127</sup> But, as discussed above, very often these application forms did not call for the underlying facts to be specified.<sup>128</sup> Even the suggested application form found in Dane's abridgment itself omits these specifics!<sup>129</sup> Thus, justices of the peace reviewing these search warrant applications often lacked the necessary information to scrutinize probable cause, unless they took the initiative to obtain it orally from the applicant prior to issuing the requested warrant.

Whether judges did so is open to more debate than has generally been recognized. This point is easy to miss because of the instinctive tendency to locate in historical material that which we are predisposed to finding. It is natural for us to presume that in the Framers' era judges meaningfully assessed probable cause, including in the civil-search arena. After all, civil-search legislation from this period often required warrants, and conditioned the issuance of those warrants upon suspicion.<sup>130</sup> And, of course, the Fourth Amendment explicitly requires probable cause before a warrant can issue,<sup>131</sup> and trea-

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125 FED. R. CRIM. P. 41(d); *see also* *Franks v. Delaware*, 438 U.S. 154, 165 (1978); *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). This preservation requirement helps justify the repeal of a previous mandate that the warrant specify the facts supporting probable cause. *See supra* note 122.

126 7 DANE'S AMERICAN ABRIDGMENT 1824, *supra* note 74 § 2, at 245 n.\*.

127 *Id.* § 4, at 247.

128 *See supra* note 111 and accompanying text.

129 *See id.* (citing 7 DANE'S AMERICAN ABRIDGMENT 1824, *supra* note 74, among other sources).

130 *See supra* note 56.

131 *See supra* note 1.

tises in the Framers' era had articulated a judicial sentryship ethic.<sup>132</sup> Given the Fourth Amendment jurisprudence with which we are most familiar, in which judges have played a probable cause sentryship role since at least the mid-1900s,<sup>133</sup> it is tempting to presume that judges have occupied this role since the nation's founding. This is particularly so if one believes that, during the earlier era, only complainants having personal information could apply for and obtain warrants (a proposition about which I have doubts),<sup>134</sup> which should have made it easy for judges to orally inquire into the facts underlying a probable cause claim.

A supposition that judges would have orally inquired is premised upon a belief that judges understood and accepted that the law imposed a probable cause sentryship role upon them. Only if this is so would they have felt compelled to orally question an applicant who had not otherwise provided details supporting a probable cause

<sup>132</sup> See *supra* Part II.A.

<sup>133</sup> See *infra* notes 192–95 and accompanying text.

<sup>134</sup> Professor Davies adheres to this proposition. Davies, *Original Fourth Amendment*, *supra* note 7, at 650–51. His support for this assertion comes from a brief passage in *Hale's Pleas of the Crown*. Davies, *Original Fourth Amendment*, *supra* note 7, at 651 n.289. The passage states that warrants to search for stolen goods “are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do sh[ow] his reasons of such suspicion.” 2 HALE'S PLEAS OF THE CROWN 1736, *supra* note 62, at 150; accord 2 HALE'S PLEAS OF THE CROWN 1800, *supra* note 62, at 150. American treatises and justice manuals, often citing Hale, commonly reiterated this same or similar language. See *supra* notes 74–78 and accompanying text. I am not persuaded that these passages offer sufficient support for Davies's conclusion, for several reasons.

Although Davies's conclusion is plausible, it is not clear to me that during the Framers' era one could have “probable cause to suspect” only from personal knowledge. Davies's conclusion presumes that “probable cause” was given the same interpretation during the Framers' era as we give it today. However, there is reason to doubt this. Evidence indicates that during this earlier period “probable cause” was given a much laxer interpretation, under which it more closely correlated to a mere hunch or belief, than to its generally more demanding modern interpretation. Compare *infra* notes 153–59 and accompanying text, with *Nathanson v. United States*, 290 U.S. 41, 47 (1933) (rejecting “mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances” as basis for issuing customs warrant), and *Byars v. United States*, 273 U.S. 28, 29 (1927) (holding inadequate assertion that warrant applicant “has good reason to believe and does believe” that defendant possessed contraband). Thus, there is reason to believe that in the Framers' era a complainant validly could have sworn an “oath” that he had “probable cause” while at the same time lacking the sort of supporting facts that we would expect today. This would have enabled a complainant to obtain a search warrant while lacking any meaningful personal knowledge. If this is correct, it suggests that Davies might be mistaken in claiming that only direct personal knowledge was sufficient during the Framers' era (while hearsay evidence can be sufficient today). Davies, *Original Fourth Amendment*, *supra* note 7, at 650–51.

claim. But, for reasons I have already explained,<sup>135</sup> and others I will set forth below, justices of the peace presented with search warrant applications easily could have concluded that they did not have an absolute duty to engage in probable cause sentryship.

### 3. Plain Text

A plain text analysis of the secondary legal literature casts further doubt on the sentryship thesis. From this perspective, the strongest evidence that judges monitored probable cause in the search context derives from the passages indicating that a search warrant applicant had to “show” or “assign” his reasons for suspicion.<sup>136</sup> But for sentryship adherents there is room for discomfort here. Is it really clear that these sources are *mandating* that judges adopt a sentryship role, as opposed to *implying* that such a role is proper or perhaps merely *suggesting* such a role? It is somewhat odd that an affirmative judicial duty to inquire into the facts underlying probable cause was never expressly and cleanly stated.

Also, focus upon the soft language that dominates this material. This weak language, dominated by the subjunctive tense of words like “ought,”<sup>137</sup> or merely suggestive language like “it is fitting”<sup>138</sup> or “cannot well be too tender,”<sup>139</sup> easily (and perhaps naturally) may have caused judges to believe that probable cause sentryship was an *optional* rather than mandatory role for them to play. Much like today, these words and phrases may have merely suggested a course of action rather than conveying a mandatory imperative. For example, though it is possible to attribute a mandatory meaning to “ought,” a more natural interpretation is to treat it as equivalent to the merely suggestive “should.”<sup>140</sup> In terms of usage during the Framers’ era,

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135 See *supra* Parts II.B.1–2.

136 See *supra* notes 74–79 and accompanying text.

137 See *supra* notes 62, 70, 72, 74 and accompanying text.

138 See *supra* notes 62–63, 70 and accompanying text.

139 See *supra* notes 65, 80 and accompanying text.

140 It is possible for “ought” to be used in a mandatory sense, but this is not its most natural meaning, which is that “ought” is more equivalent to “should.” Compare WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1020 (1989) [hereinafter WEBSTER’S DICTIONARY 1989] (listing, under the entry for “ought,” only “must” as a synonym), *with id.* at 944 (stating, under definition of “must,” that “ought” is “weaker than MUST”); see also *Hannon v. Myrick*, 111 A.2d 729, 731 (Vt. 1955) (“‘Ought’ and ‘should’ are synonyms. They express obligation.”) (citation omitted). Given these various shades of meaning, it is best to interpret “ought” as mandatory only when an unusual context so demands. *E.g.*, *Life Ass’n of Am. v. St. Louis County Bd. of Assessors*, 49 Mo.



there is good reason to believe that, like today, neither “ought” nor phrases like “it is fitting” normally expressed compulsion.<sup>141</sup>

We can have some confidence that during the Framers’ era “ought” was not necessarily interpreted as conveying a compulsory or mandatory meaning because the Framers do not appear to have ascribed such a meaning to it. They went out of their way to replace the phrase “ought to” with “shall” when drafting the Full Faith and Credit Clause.<sup>142</sup> The Bill of Rights also gives us abundant reasons for believing that the Framers preferred “shall” over “ought” when expressing an absolute obligation. Over and over again, state conventions used “ought” in proposed amendments they suggested for inclusion in a Bill of Rights, and “ought” also predominated in existing provisions that may have served as models for the amendments, but

512, 519 (1872). I further acknowledge, however, that the mandatory usage has not always been so limited. *E.g.*, *Jackson v. State*, 22 S.W. 831, 839 (Tex. Crim. App. 1893).

<sup>141</sup> Today, “ought” is commonly “used to express duty,” “obligation,” “propriety,” or “appropriateness.” WEBSTER’S DICTIONARY 1989, *supra* note 140, at 1020. This is consistent with its meaning during the Framers’ era. One source indicates that “ought” expresses “duty or obligation of any kind,” including “weaker shades of meaning” such as “expressing what is befitting, proper, correct, advisable, or naturally expected,” as well as that one is “bound or under obligation” or “duty . . . to do it.” 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2018 (1988) (fifth definition at micropage 236). This source provides numerous examples of such usage from the Framers’ era, including examples from 1749, 1812, and 1818, including a 1771 example, “The precedent ought to be followed.” *Id.* If judges during the Framers’ era were instructed that they “ought” to serve as probable cause sentries to the same extent they “ought” to follow precedent, then the sentryship role was not compulsory, but instead merely suggestive, as is the judicial duty to follow precedent. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“*Stare decisis* is not an inexorable command . . .”). See generally Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (reflecting on the role of precedent); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724 (1988) (arguing that *stare decisis* and original understanding are not strict rules).

Dictionaries from the Framers’ era confirm this usage. They define “ought” as being obliged by duty, as well as to “be fit” or “be necessary.” *E.g.*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed., London, J.F. & C. Rivington et al. 1792) [hereinafter JOHNSON DICTIONARY 1792] (unpaginated; see alphabetical listing for “ought”); NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 224 (Hartford, Conn., George Goodwin & Sons 1817) [hereinafter WEBSTER DICTIONARY 1817]. “Fit,” as in “it is fitting,” *cf. supra* note 138 and accompanying text, meant “proper” or “convenient,” while “fitly” meant “properly,” “justly,” “reasonably,” and “conveniently.” JOHNSON DICTIONARY 1792, *supra* (unpaginated; see alphabetical listings for “fit” and “fitly”); WEBSTER DICTIONARY 1817, *supra*, at 128–29. If something is “convenient,” then it is not, of course, compulsory, a point that fits nicely with another part of my argument. See *supra* notes 81–87 and accompanying text.

<sup>142</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486, 489 (Max Farrand ed., 1911); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33, 59 (1957).

the Framers consistently chose to use “shall.” This evidence is found not only in relation to the Fourth Amendment itself,<sup>143</sup> but also in relation to the First Amendment’s Establishment and Free Exercise Clauses,<sup>144</sup> its Free Speech and Free Press Clauses,<sup>145</sup> and its Assembly and Petition Clauses;<sup>146</sup> the Third Amendment;<sup>147</sup> the Seventh Amendment;<sup>148</sup> and the Eight Amendment.<sup>149</sup>

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- 143 For example, of the six states that proposed amendments concerning search and seizure, four used “ought” (Maryland, New York, North Carolina, and Virginia), only one used “shall” (Pennsylvania), and the sixth (Massachusetts) used an inapposite formulation. *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 232–33 (Neil H. Cogan ed., 1997) [hereinafter *COMPLETE BILL OF RIGHTS*]. Another proposal voiced between two Framers, and which was published in a newspaper, used “shall.” *Id.* at 236. Of nine colonial and state search-and-seizure provisions that preceded the Fourth Amendment, and which may have served as models for it, eight used “ought” while only one used “shall.” *Id.* at 234–35. Despite the pervasiveness of “ought,” the Framers chose to use “shall” in the Fourth Amendment. *See supra* note 1.
- 144 Of the eight states that proposed amendments speaking to these issues, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), two used “shall” (New Hampshire and Pennsylvania), and the remaining two proposals (by Maryland and Massachusetts) used inapposite formulations. *COMPLETE BILL OF RIGHTS, supra* note 143, at 11–13. Nonetheless, the Framers chose to use “shall” in the First Amendment. U.S. CONST. amend. I.
- 145 Of the seven states that proposed amendments speaking to these issues, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), only one used “shall” (Pennsylvania), and the remaining two proposals (by Maryland and Massachusetts) used inapposite formulations. *COMPLETE BILL OF RIGHTS, supra* note 143, at 92–93. Another proposal voiced between two Framers, and which was published in a newspaper, used “shall.” *Id.* at 96. Of seventeen colonial, state, and British free speech and free press provisions that preceded the First Amendment, and which may have served as models for it, eight used “ought,” four used “shall,” and another five used inapposite formulations. *Id.* at 93–96. In spite of the pervasiveness of “ought,” the Framers chose to use “shall” in the First Amendment. U.S. CONST. amend. I.
- 146 Of the six states that proposed amendments relating to these issues (Maryland, Massachusetts, New York, North Carolina, Rhode Island, and Virginia), none used “shall.” Instead, they used formulations such as “every man hath” or “the people have” a “right” to assemble or petition. *COMPLETE BILL OF RIGHTS, supra* note 143, at 139–40. Another proposal voiced between two Framers, and which was published in a newspaper, used “shall.” *Id.* at 143. Of fifteen colonial, state, and British assembly and petition provisions that preceded the First Amendment, and which may have served as models for it, nearly all used “hath” or “have” formulations that were similar to the state proposals. *Id.* at 140–43. Only two (Massachusetts’s *Body of Liberties* and England’s *Tumultuous Petition Act of 1661*) used “shall.” *Id.* at 140, 142. Nonetheless, the Framers chose to use “shall” in the First Amendment. U.S. CONST. amend. I.
- 147 Of the six states that proposed amendments relating to quartering of soldiers, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), only one used “shall” (New Hampshire), and the remaining proposal (by Maryland) used an inapposite formulation. *COMPLETE BILL OF RIGHTS, supra* note 143, at 215–216. Of eleven colonial, state, and British provisions relating to this issue that preceded the Third Amendment, and may have served as models for it, three used “ought,” four used “shall,” and four used in-

Undoubtedly, whether “ought” was perceived to have a different meaning than “shall” during the Framers’ era will be subject to disagreement. Though some commentators agree with my position, Professor Davies strongly disagrees.<sup>150</sup> He argues that any “asserted difference is illusory and the different usages were only stylistic, rather than substantive,” and concludes that “[t]he evidence does not support the assertion that the framers understood ‘ought’ to be less binding or imperative than ‘shall.’”<sup>151</sup> In any case, linguistic arguments do not hinge solely on the correct historical interpretation of “ought” versus “shall.”

Consider too the changes that have occurred in the meaning of words and phrases in our language. There are abundant reasons for believing that the phrase “probable cause” did not mean the same thing during the Framers’ era that it does now. In the period from 1776 through around 1790, when the colonies declared independence and the Framers drafted the Constitution and Bill of Rights,<sup>152</sup> “probable” had widely varying meanings. As Cuddihy points out,<sup>153</sup> it could mean “likely,”<sup>154</sup> “credible,”<sup>155</sup> or even “possible.”<sup>156</sup> From to

apposite formulations. *Id.* at 216–18. The Framers chose to use “shall” in the Third Amendment. U.S. CONST. amend. III.

148 Of the eight states that proposed amendments relating to civil jury trials, four used “ought” (New York, North Carolina, Rhode Island, and Virginia), and the other four used “shall” (Maryland, Massachusetts, New Hampshire, and Pennsylvania). COMPLETE BILL OF RIGHTS, *supra* note 143, at 506–08. However, of the many colonial, state, and British provisions relating to this issue that preceded the Seventh Amendment, and which may have served as models for it, the vast majority used “shall,” while only a handful used “ought.” *Id.* at 508–18. The Framers chose to use “shall” in the Seventh Amendment. U.S. CONST. amend. VII.

149 Of the five states that proposed amendments relating to excessive bail or fines, and cruel or unusual punishments, all of them (New York, North Carolina, Pennsylvania, Rhode Island, and Virginia) used “ought.” COMPLETE BILL OF RIGHTS, *supra* note 143, at 613. “Ought” and “shall” were both widely used in the many colonial, state, and British provisions relating to this issue that preceded the Eighth Amendment and may have served as models for it. *Id.* at 613–17; Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969). The Framers chose to use “shall” in the Eighth Amendment. U.S. CONST. amend. VIII.

150 Professor Davies has quite thoroughly described the disagreement among commentators. Davies, *Original Fourth Amendment*, *supra* note 7, at 676 n.350.

151 *Id.*

152 See *supra* note 106.

153 3 Cuddihy Dissertation, *supra* note 7, at 1527 & n.332.

154 N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London, E. Bell et al. 1721) [hereinafter BAILEY DICTIONARY 1721] (unpaginated; see alphabetical listing for “probable”); WILLIAM CRAKELT, ENTICK’S NEW SPELLING DICTIONARY 294 (London, Charles Dilly 1791); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (3d ed., London, Richard Ware 1740) [hereinafter DYCHE DICTIONARY 1740] (unpaginated; see alphabetical listing for “probable”); JOHNSON DICTIONARY 1792, *supra*

day's perspective, this last definition is remarkable. In legal usage today, "possible" and "probable" are nearly antonyms. When considering, for example, the preponderance of the evidence standard of proof, "possible" means nothing, or virtually nothing. But "probable" means a great deal. It is, indeed, the whole ballgame. The two words, therefore, are defined completely differently.<sup>157</sup> Certainly they are not used to define each other, as they were during the Framers' era. Recognizing these changes in language, Cuddihy concluded that "the Fourth Amendment assumed the least restrictive understanding of 'probable cause' then available, what might now be termed, 'plausible cause' or 'possible cause.'"<sup>158</sup> It seems likely, then, that during the Framers' era the phrase "probable cause" could easily have been equated with a mere unreasoned "hunch," rather than with a reasoned basis for belief grounded in an articulable set of underlying facts. Those resistant to this conclusion should consider the centuries of history that confronted justices of the peace in the Framers' era, in which non-existent or low levels of suspicion had been sufficient to justify governmental intrusions, as well as the often-lax interpretations given to "probable cause" both during the Framers' era and well into the 1900s.<sup>159</sup>

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note 141 (unpaginated; see alphabetical listing for "probable"); WEBSTER DICTIONARY 1817, *supra* note 141, at 251.

155 DYCHE DICTIONARY 1740, *supra* note 154 (unpaginated; see alphabetical listing for "probable").

156 *Id.*

157 BLACK'S LAW DICTIONARY 1166, 1201 (6th ed. 1990); WEBSTER'S DICTIONARY 1989, *supra* note 140, at 1122, 1146. *Black's Law Dictionary* underwent a substantial revision after the 6th edition. Peter Tiersma, *The New Black's*, 55 J. LEGAL EDUC. 386 (2005). More recent editions have dropped the definitions of "probable" and "possible."

158 3 Cuddihy, Dissertation, *supra* note 7, at 1527. Undoubtedly, there is room for disagreement with this conclusion. Professors Taslitz and Davies, for instance, contend that the Framers likely understood the word "probable" in "probable cause" to mean at least "more likely than not." TASLITZ, *supra* note 87, at 49; Davies, *Fictional Originalism*, *supra* note 7, at 379-80 & nn.479-480. For a useful survey of the competing scholarly positions on the meaning of "probable cause" during the Framers' era, see Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 283-89 (2004).

159 BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 117, 129-30, 138 (1991); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 479-93 (1984). In addition to providing extensive historical coverage, Grano discusses *Carroll v. United States*, 267 U.S. 132 (1925), and *Brinegar v. United States*, 338 U.S. 160 (1949), both of which involved warrantless searches, as more recent cases in which "probable cause" was given a relaxed interpretation. In each of those cases, though law enforcement agents had some knowledge that might arouse suspicion, it was months old, and probable cause for the specific searches and seizures was

### III. POST-INDEPENDENCE CIVIL SEARCH STATUTES: UNCERTAINTY REGARDING SENTRYSHIP

In the Framers' era, some civil search statutes either required, or were perceived to require, judges to issue warrants upon information on oath, depriving the judiciary of any discretion with which to monitor prior suspicion.<sup>160</sup> At least with regard to one prominent early federal civil search statute, the 1789 Collection Act, Professor Davies believes that such a reading is incorrect.<sup>161</sup> Nevertheless, solid grounds exist for believing that he is wrong,<sup>162</sup> and even if he is right there is evidence that some statutes were perceived as depriving judges of discretion (even if mistakenly), resulting in the same outcome.

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found to exist based upon little more than observation of the defendants driving on roadways.

160 Cuddihy believes that some statutes required the judiciary to issue warrants upon application. 3 Cuddihy Dissertation, *supra* note 7, at 1193–94, 1351. Professors Maclin and Sklansky agree. Maclin, *Fourth Amendment Complexity*, *supra* note 5, at 952 n.166; Sklansky, *supra* note 6, at 1798–99 & n.359.

161 Davies, *Original Fourth Amendment*, *supra* note 7, at 711–12 n.470.

162 The relevant 1789 Collection Act provision states:

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

Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43 (1861). A plain text argument, emphasizing the mandatory language “shall . . . be entitled to a warrant,” supports the lack-of-judicial-discretion view. Davies takes issue with this approach, arguing that it gives too little attention to the word “if” in the opening phrase “if [the officer] shall have cause.” Davies, *Original Fourth Amendment*, *supra* note 7, at 711–12 n.470.

Though plausible, there are several weaknesses in Davies's position. First, it takes a restrictive view of the implications of explicit discretion-granting language the Framers used a mere two years later in Hamilton's Excise Act of 1791. *See* Act of Mar. 3, 1791, ch. 15, § 32, 1 Stat. 199, 207 (1861) (limiting issuance of search warrants to instances of “reasonable cause of suspicion, to be made out to the satisfaction of [the] judge or justice”). A defender of this Excise Act, in an address to the public, emphasized the discretion it gave to judges, stating:

Neither can the provision which authorizes magistrates in certain cases to grant search warrants be deemed an exception. Here the discretion is not in the officer of the revenue, but in the Magistrate, and even he cannot grant such a warrant, but in consequence of reasonable cause of suspicion made out to his satisfaction . . . .

John Neville, *An Address to the Citizens of Westmoreland, Fayette, and Alleghany Counties on the Revenue Law*, 3 GAZETTE OF THE UNITED STATES 284 (Dec 31, 1791). Second, it mistakenly discounts various reasons, discussed in the text both before and after this note, for believing that judges at the time often may not have actively monitored probable cause prior to issuing search warrants.

According to Cuddihy, Americans viewed a 1773 British excise case, *Bostock v. Saunders*,<sup>163</sup> as “the controlling British precedent on probable cause.”<sup>164</sup> Professor Davies appears to agree because he correctly notes that Dane’s important 1824 Framing-era abridgment “treated *Bostock* as the American doctrine.”<sup>165</sup> *Bostock* supports the no-discretion thesis because the lead opinion declared that excise commissioners had no discretion to refuse a search warrant that an excise officer requested upon oath:

*I think the commissioners were bound to grant the warrant upon the oath of [the excise officer], and could not form any judgment upon the matter, the commissioners have no power to summon the suspected party or any witnesses, they cannot examine on both sides, so it was impossible for them to judge; if the commissioners had such power it would be nugatory, for the goods would be removed before such examination could be had.—I think the [statute] is compulsive upon the commissioners to grant the warrant to the officer to enter and search, upon his oath of suspicion that teas, &c. are fraudulently concealed; so it points out the very person liable, if any injury be done, and no goods found; . . .*<sup>166</sup>

Davies acknowledges that “[f]raming-era American lawyers were probably familiar with *Bostock*.”<sup>167</sup> This would have further undermined any judicial inclination to scrutinize probable cause claims prior to issuing a requested warrant.

Since Americans viewed *Bostock* as controlling, it was probably more important that the lead opinion declared its no-discretion thesis than whether it was correct on this point. Certainly, there is ample

163 3 Wils. K.B. 434, 95 Eng. Rep. 1141 (K.B. 1773). A different reported version of the same case is also available. See 2 Black. W. 912, 96 Eng. Rep. 539 (K.B. 1773).

164 3 Cuddihy Dissertation, *supra* note 7, at 1195.

165 Davies, *Original Fourth Amendment*, *supra* note 7, at 652 n.294; cf. 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW § 11, at 559 (Boston, Cummings, Hilliard, & Co. 1824) [hereinafter 5 DANE’S AMERICAN ABRIDGMENT 1824] (discussing how the *Bostock* jury granted a £200 verdict against customs officers who conducted an unsuccessful search under a warrant that officers themselves swore out); 7 DANE’S AMERICAN ABRIDGMENT 1824, *supra* note 74, § 2, at 244–46 (same). But see *infra* notes 176–77 and accompanying text (explaining that *Bostock* had been overruled in 1785, and citing one 1801 American treatise that correctly noted this development). For the importance of Dane’s abridgment, see *supra* note 74.

166 95 Eng. Rep. at 1145 (de Grey, L.C.J.) (emphasis added); accord 3 Wils. K.B. at 440. Substantively similar language was attributed to the *Bostock* opinion in different reporters:

In the present case, the commissioners have no general power of investigating the grounds of the information. But *they are bound to act on the oath of the informer*. They have no power to summon evidence, or even the suspected party. Indeed, that would defeat all purposes of searching, for upon such notice the goods would be sure to be removed. . . . *The obliging the warrant to be directed to the informer* points out to the party injured where his remedy certainly lies.

96 Eng. Rep. at 540 (de Grey, L.C.J.) (emphasis added); accord 2 Black. W. at 914–15.

167 Davies, *Original Fourth Amendment*, *supra* note 7, at 652 n.294.

basis to dispute the lead opinion's view regarding discretion. Another justice in *Bostock* opined that "an action might well lie against" the commissioners "if a warrant, like the present, should be granted by them, upon a frivolous, vain and groundless suspicion," though he professed "not [to] give any opinion as to this."<sup>168</sup> Blackstone, now on the bench, expressed a similar opinion, indicating that "I should rather think the commissioners would be liable to an action, if there was not good ground of suspicion laid before them before they granted the warrant, but I give no opinion as to this."<sup>169</sup> Only one justice explicitly disagreed with the lead opinion, writing that "the commissioners . . . have a discretionary power to grant such warrant."<sup>170</sup> His analysis seems more in keeping with the statute's plain language, which provides that upon oath "setting forth the ground of . . . suspicion, *it shall and may be lawful*" for the commissioners or justices to issue a search warrant.<sup>171</sup> Though this language is arguably ambiguous on the discretion issue, it adequately supports the *Bostock* description of the statute, made at least twice in the decision, as providing that excise commissioners "may" grant a warrant.<sup>172</sup> Further, a later British case, *Cooper v. Boot*,<sup>173</sup> clearly disagreed with the *Bostock* lead opinion on the discretion issue. Both *Bostock* and *Cooper* reviewed the validity of a warrant-based excise search conducted under the same statute.<sup>174</sup> In complete opposition to the earlier *Bostock* lead opinion,

168 95 Eng. Rep. at 1145 (Gould, J.); accord 3 Wils. K.B. at 441. A different version of Justice Gould's opinion is reported as: "I should think, if no information could be produced, or only a frivolous one, the commissioner signing the warrant would himself be also liable to an action; but that is not the present case." 96 Eng. Rep. at 540 (Gould, J.); accord 2 Black. W. at 915.

169 95 Eng. Rep. at 1146 (Blackstone, J.); accord 3 Wils. K.B. at 441. A different reported version of the same case omits this precise passage. It reports Blackstone's opinion as being that, apart from houses dealing in excisable goods, "no other houses are liable to be searched at all . . . without good cause of suspicion proved upon oath to the commissioners or justices in whom the law reposes a confidence that they will not wantonly authorise [sic] the officers to enter the houses of the subject." 96 Eng. Rep. at 540 (Blackstone, J.); accord 2 Black. W. at 916.

170 3 Wils. K.B. at 442, 95 Eng. Rep. at 1146 (Nares, J.). The different reports of *Bostock* omit any separate opinion for Justice Nares, indicating only that he was "of the same opinion" as the lead opinion. See 96 Eng. Rep. at 540 (Nares, J.); accord 2 Black. W. at 916.

171 10 Geo., c. 10, § 13 (1723) (Eng.) (emphasis added).

172 The first instance in which "may" is used occurs in Chief Justice de Grey's lead opinion. 3 Wils. at 435, 2 Black. W. at 913, 95 Eng. Rep. at 1142, 96 Eng. Rep. at 539. The second instance occurs in only one version of Justice Gould's concurring opinion, which was reproduced in two reporters. See 3 Wils. K.B. at 441, 95 Eng. Rep. at 1145.

173 4 Dougl. 339, 99 Eng. Rep. 911 (K.B. 1785); see also *Cooper v. Booth*, 3 Esp. 135, 170 Eng. Rep. 564 (K.B. 1785) (different reported version of same case).

174 The statute at issue in both *Bostock* and *Cooper* was 10 Geo., c. 10, § 13 (1723) (Eng.). *Cooper*, 4 Dougl. at 340, 348, 3 Esp. at 136, 144, 99 Eng. Rep. at 912, 916, 170 Eng. Rep. at

the *Cooper* court declared in dicta that a judicial sentryship duty existed.<sup>175</sup>

Nevertheless, because the lead opinion fell in the no-discretion camp, *Bostock* is a powerful indicator that even American judges who took some care to research the issue may have concluded they lacked discretion to monitor probable cause. Importantly, *Bostock* appears to have been considered controlling in America throughout the Framers' era because Dane was citing to it as late as 1824, in spite of *Cooper* having overruled *Bostock* on a separate immunity issue in 1785.<sup>176</sup> Moreover, Professor Davies has identified this, as well as other reasons, for believing that *Cooper* may not have been well known in the United States until after 1831,<sup>177</sup> thus calling into doubt the impact it had in establishing a judicial sentryship duty regarding probable cause during the Framers' era.

565, 567; *Bostock*, 3 Wils. K.B. at 439, 2 Black. W. at 913, 95 Eng. Rep. at 1144, 96 Eng. Rep. at 539 (de Grey, L.C.J.).

<sup>175</sup> See *supra* note 70.

<sup>176</sup> *Cooper* overruled *Bostock* on the issue of whether an excise officer could be held liable for trespass when acting pursuant to a search warrant issued under the officer's own oath (as opposed to a separate claimant's oath). *Bostock* allowed liability. See 3 Wils. K.B. at 439–42, 2 Black. W. at 913–16, 95 Eng. Rep. at 1144–46, 96 Eng. Rep. at 539–40. *Bostock* therefore limited the immunizing effect of a warrant. In *Cooper*, the court acknowledged that its case “appears to be exactly the same with that of *Bostock v. Saunders*.” *Cooper*, 4 Dougl. at 347, 99 Eng. Rep. at 916; accord *Cooper*, 3 Esp. at 143–44, 170 Eng. Rep. at 567 (different reported version of same case). Yet, the *Cooper* court rejected liability: “we cannot bring ourselves to coincide in the [*Bostock*] judgment . . . We think the Excise officer cannot be guilty of a trespass, either in procuring or executing the warrant.” *Cooper*, 99 Eng. Rep. at 916; accord 4 Dougl. at 348, 3 Esp. at 144, 170 Eng. Rep. at 567. “We are all of us therefore of opinion, though against great authority, that for the due execution of a legal warrant the officer cannot be made a trespasser.” *Cooper*, 4 Dougl. at 349–50, 99 Eng. Rep. at 917; accord *Cooper*, 3 Esp. at 147, 170 Eng. Rep. at 568.

Nonetheless, Dane cited *Bostock* as controlling. See *supra* note 165 and accompanying text. This is surprising given that Dane briefly cited and discussed *Cooper* at least twice in other volumes of his abridgment. See 2 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW § 8, at 728 (Boston, Cummings, Hilliard & Co. 1823); 5 DANE'S AMERICAN ABRIDGMENT 1824, *supra* note 165, §§ 5–6, at 580.

<sup>177</sup> Davies has identified reasons for believing that *Cooper*'s first publication was likely no earlier than 1801, and that it was not more widely published until 1831. See Davies, *Original Fourth Amendment*, *supra* note 7, at 561 n.19, 652 n.294.

It must be noted, however, that not only had Dane briefly cited and discussed *Cooper* near the end of the Framers' era, see *supra* note 176, but at least one American treatise during the Framers' era correctly noted in 1801, decades before the publication of Dane's abridgment, that *Cooper* had overruled *Bostock*. 1 ISAAC 'ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 395 (2d Am. ed., Walpole, N.H., Thomas & Thomas 1801). Further, at least one court during the Framers' era noted the overruling. *Simpson v. Smith*, 2 Del. Cas. 285, 291 (Del. 1817).



#### IV. IMPLAUSIBILITY OF EARLY SENTRYSHIP IN LIGHT OF SLOW DEVELOPMENT OF SENTRYSHIP JURISPRUDENCE

One potentially powerful objection to my assertion that judges during the Framers' era often may not have monitored probable cause prior to issuing warrants is that I am giving insufficient attention to the Fourth Amendment itself. This argument would assert that, even if I am correct about the lack of judicial sentryship of probable cause under the *common law*, a fundamental point of the Fourth Amendment was to abrogate this portion of the common law through *constitutional* mandate. And the Fourth Amendment explicitly states that "no Warrants shall issue, but upon probable cause."<sup>178</sup> So, this objection would continue, how could the Framers have been any clearer about *requiring* judicial sentryship of probable cause, as well as their intent to *abrogate* the common law to the extent it had allowed judges to issue warrants without scrutinizing probable cause? Further, numerous colonial and state declarations of rights and constitutional provisions that preceded the Fourth Amendment also implied a probable cause sentryship duty, such as by requiring that "cause," "foundation," or "evidence" be presented before a warrant could issue.<sup>179</sup> Moreover, all of this is in addition to other compelling evidence supporting that, even before the Fourth Amendment, the common law imposed upon judges a duty to be probable cause sentries.<sup>180</sup>

My answer to this objection is that the language in the Fourth Amendment, as well as in the colonial and state fundamental rights provisions, is not actually particularly clear on this point. To say that no warrant shall issue but upon "probable cause," "cause," "foundation," or "evidence" leaves several important questions unanswered. These formulations do not, for example, clearly establish *how* probable cause is to be assured. They also do not necessarily clarify *who* is supposed to assure the existence of probable cause. These omissions are particularly troublesome in light of prevailing practice during the Framers' era. Was probable cause sufficiently "assured" if the person requesting the search warrant was willing to swear, on oath, that it ex-

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178 See *supra* note 1.

179 These predecessors to the Fourth Amendment are helpfully compiled in COMPLETE BILL OF RIGHTS, *supra* note 143, at 234–35.

180 See *supra* Part II.A.

isted, and risk personal trespass liability?<sup>181</sup> Or did an issuing judge have to be independently satisfied that probable cause had been established? Or was it enough that a judge or jury, after an ex post examination, thought probable cause had existed at the time the search warrant had issued?

I do not want to overstate this case, as I do share the opinion that the most natural reading of the Warrant Clause is that it called for judicial sentryship of probable cause. But the point I am making is that it is not clear to me that the same reading would necessarily have prevailed during the Framers' era. To those whose initial impression is to find my uncertainty farfetched, I point to those Framing-era justice manuals (all of them American) and treatises that continued to assert, well after the Fourth Amendment's adoption, that probable-cause sentryship was convenient but not necessary.<sup>182</sup> If the Fourth Amendment was immediately and clearly understood to impose a judicial sentryship duty regarding probable cause, one would expect all these justice manuals and treatises to have taken note of this development, omitting the convenient-but-not-necessary guidance as soon as the Fourth Amendment came into effect. But we know that this did not occur. The Fourth Amendment became effective in December 1791.<sup>183</sup> Yet, American justice manuals continued to include the convenient-but-not-necessary guidance as late as 1810<sup>184</sup> and 1820,<sup>185</sup> and even the first American edition of the highly influential *Hale's Pleas of the Crown* continued to include this guidance when it was published much later in 1847.<sup>186</sup>

The question then becomes whether the judicial sentryship adherents can adequately explain this discrepancy. The answer is that they might be able to. But then again, they might not. A possible, but inadequate, explanation for the discrepancy might be simple editorial incompetence. It could be that the Fourth Amendment was meant to codify a judicial sentryship duty, but the treatises and American justice manuals improperly failed to account for that development and, as a result, did not modify their guidance about

181 The common law imposed trespass liability upon the person who swore out a search warrant if the search proved fruitless. Davies, *Original Fourth Amendment*, *supra* note 7, at 652 & nn.293-94.

182 See *supra* notes 81-87 and accompanying text.

183 See *supra* note 106.

184 GRIMKE, *SOUTH CAROLINA JUSTICE OF PEACE 1810*, *supra* note 75, at 479.

185 HENING, *NEW VIRGINIA JUSTICE 1820*, *supra* note 75, at 699.

186 See *supra* note 84 and accompanying text; *supra* notes 61, 77-78 and accompanying text (regarding how influential *Hale's Pleas of the Crown* was in the new nation).

common law requirements.<sup>187</sup> This explanation's shortcoming is that it fails to account for the impact of this oversight. The guidance the treatises and American justice manuals provided may have been wrong, but the readers probably depended upon, and applied, that guidance. This is particularly so given the educational, training, and research limitations during the Framers' era.<sup>188</sup> If justices of the peace were following the guidance available in American justice manuals, for example, and noticed the convenient-but-not-necessary language, they quite likely would have applied it. If so, one cannot say that judges consistently implemented a universal sentryship duty during the Framers' era.

A different, though also probably insufficient, basis for justifying the discrepancy might be that the Federal Constitution was deemed inapplicable to state common law, which was what the justice manuals discussed.<sup>189</sup> This explanation is attractive from a formalistic standpoint. If federal versus state search-and-seizure jurisprudence were treated as distinct, then the discrepancy would be justified and not represent a contradiction. The problem with this explanation is that search-and-seizure jurisprudence during the Framers' era often was not formalistic. For instance, it was common for litigants and judges in state search-and-seizure decisions from the era to discuss the Fourth Amendment as if it were applicable outside its federal purview.<sup>190</sup> Thus, whether the discrepancy can be adequately explained is far from clear.

Another, and perhaps more troublesome, problem for those who believe that a sentryship ethic was implemented in early practice is that it ignores not only the evolution of probable cause jurisprudence, but also how slowly sentryship jurisprudence developed. If judicial sentryship of probable cause had been as well established upon

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187 There is no doubt that American justice manuals were regularly marketed as necessary updates on *American* law, particularly to record changes from British law, but that a common practice was to merely reprint the substance of earlier works (including British ones) without any meaningful effort to integrate American law. Conley, *supra* note 24, at 263–65 & nn.60–61, 268–82.

188 See *supra* notes 88–90, 112–17 and accompanying text.

189 The Fourth Amendment was not deemed applicable to the states until *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), and did not become more fully applicable until *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

190 *E.g.*, *Patterson v. Blackiston*, 1 Del. Cas. 571, 572 (Del. 1818); *Dale v. Hamilton*, 2 Del. Cas. 216, 219 (Del. C.P. 1804); *Conner v. Commonwealth*, 3 Binn. 38, 40 (Pa. 1810); *Wells v. Jackson*, 17 Va. (3 Munf.) 458, 474–75 (1811). Some of these decisions refer to the Fourth Amendment as the Sixth Amendment due to an anomaly explained *supra* note 12.

the Fourth Amendment's adoption as is often supposed, one would not expect to see an abundant and lengthy development of probable cause jurisprudence related to the sentryship issue. Yet, that is exactly what our law books show.

Probable cause jurisprudence evolved over a long period, slowly at first but then accelerating through the mid-1900s. It was not until over twenty years after the Fourth Amendment was adopted that the Supreme Court attempted to clarify what "probable cause" means in the context of a search, defining it as "less than evidence which would justify condemnation."<sup>191</sup> Fast-forward into the next century, and it is evident that probable cause jurisprudence was still developing. Within a six-year period around 1930 the Court twice had to demand that warrant applications contain sufficient underlying factual detail to allow the judge to independently assess probable cause. In the first case, *Byars v. United States*, the Court held invalid a warrant that had issued only upon the applicant's averment that he "has good reason to believe and does believe" that defendant possessed contraband.<sup>192</sup> Significantly, this is substantively similar to the "hath probable cause to suspect, and doth suspect" formulation that was often found in search warrant application forms from way back in the Framers' era.<sup>193</sup> In the second case, *Nathanson v. United States*, the Court rejected a warrant that had been issued "upon mere affirmance of suspicion or belief."<sup>194</sup> The issuance of these warrants, about 140 years after the Fourth Amendment's adoption, hardly seems consistent with an understood and applied judicial ethic of probable cause sentryship. Even more notably, it was not until 1958 that the Court confirmed in *Giordenello v. United States* that a magistrate confronted with a warrant application "must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause. He should not accept without question the complainant's mere conclu-

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191 *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813). This suggests the possibility that, during the more than twenty intervening years, judges who may have opted to serve as probable cause sentries were applying a less stringent standard, raising the prospect that they may not have acted as meaningful probable cause sentries at all. It is worth noting that *Locke*, a forfeiture case, defined "probable cause" as it was used in a statute. Technically, *Locke* was not a Fourth Amendment case.

Professor Davies believes that, about six years before *Locke*, the Supreme Court had applied a more demanding definition to "probable cause" in the context of an arrest. See Davies, *Original Fourth Amendment*, *supra* note 7, at 706 n.451 (discussing *Ex parte Bollman & Swartwout*, 8 U.S. (7 Cranch) 75 (1807)).

192 273 U.S. 28, 29 (1927).

193 See *supra* note 111.

194 290 U.S. 41, 47 (1933).

sion that the person whose arrest is sought has committed a crime.”<sup>195</sup> And it was not until *Aguilar v. Texas* in 1964 that the Court finally rejected the police practice of merely asserting the existence of “reliable information from a credible person” when probable cause was based upon an informant’s tip, instead insisting that actual facts be provided in support of the search warrant application.<sup>196</sup> If the Fourth Amendment made it so clear that judges were to act as probable cause sentries, why was the Court still having to define this role over 170 years after the amendment’s adoption?<sup>197</sup>

One way to explain why the Court was still answering these questions is to acknowledge that the law confronted judges with conflict-

195 357 U.S. 480, 486 (1958).

196 378 U.S. 108, 109, 113–14 & n.4 (1964). *Aguilar* ruled that an affiant relying upon an informant’s tip must (1) indicate the informant’s basis of knowledge, and (2) provide information permitting the judge to decide whether or not the informant was trustworthy. *Aguilar*, 378 U.S. at 114, *overruled by* *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (adopting totality-of-the-circumstances test). “[T]he government,” however, “need never divulge the identity of the informant.” Thomas, *Madison Rewrites Fourth Amendment*, *supra* note 22, at 1491 (citing *McCray v. Illinois*, 386 U.S. 300 (1967)). For findings regarding the use of confidential informants, some troubling and others more reassuring, see Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 239–44 (2000).

197 A commentator on this manuscript noted that one likely reason for the slow development of federal probable cause jurisprudence was that little Fourth Amendment jurisprudence, as we know it today, existed prior to Prohibition. Undoubtedly, this commentator is correct because Prohibition, which began in 1920 after the Eighteenth Amendment’s ratification and ended with its repeal in 1933, required a mobilization of federal enforcement efforts, including a spike in searches. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 842–43 (2004); Lerner, *supra* note 36, at 986; see also 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, 23–35, 116–71 (2006) (discussing the impact that the Eighteenth Amendment had on Fourth Amendment jurisprudence through *Gambino v. United States*, *Carroll v. United States*, and *Olmstead v. United States*). Indeed, two of the cases upon which I rely, *Byars v. United States* and *Nathanson v. United States*, are both Prohibition cases. See *supra* notes 192, 194 and accompanying text.

While I therefore agree that Prohibition helps explain in part why probable cause jurisprudence developed slowly, this in no way undermines my argument. The very point I am making is that, had the judiciary operated under an established probable cause sentryship ethic since the Framers’ era, cases like *Byars* and *Nathanson* would not have arisen from Prohibition-era law enforcement efforts because judges would not have signed the challenged search warrants.

Another part of the explanation for the slow development of federal probable cause jurisprudence is that the Fourth Amendment was not deemed applicable to the states until 1949. See *supra* note 189. This, however, does not explain the disconnect between claims that an established probable cause sentryship ethic had existed since the Framers’ era and the Supreme Court’s need to issue its 1958 and 1964 decisions in *Giordenello v. United States* and *Aguilar v. Texas*, respectively, see *supra* notes 195–96 and accompanying text.

ing imperatives. To the extent that specific warrants were valued in part because they immunized searchers,<sup>198</sup> judges had an incentive to generously issue such warrants, which would have disinclined them from aggressively gate-keeping during the application process. Additionally, regulatory (not criminal) searches were probably the most common type of governmental search that occurred during the Framers' era.<sup>199</sup> Often the dynamics in the regulatory context would have discouraged judicial sentryship, as all governmental officials involved, including judges, would have worried about delay undermining the warrant application process. Like today, judges then were sensitive to such delay, which could easily have been taken advantage of to abscond with contraband.<sup>200</sup> A prime concern was with the mobility of search targets, such as the risk of a ship sailing away before a search warrant could be successfully obtained.<sup>201</sup> Thus, regardless of elite legal doctrine, non-elite justices of the peace may have encountered, and succumbed to, disincentives to monitoring probable cause as they engaged in search warrant practice.

#### CONCLUSION

Search and seizure law in the Framers' era differed markedly from ours today. Probable cause is central to our conception of the Fourth Amendment and the protections it provides against overweening governmental searches. Perhaps the Framers shared this conception of the Fourth Amendment. Nevertheless, whether probable cause actually played that role during the Framers' era, at least in a similar way as it does today, is certainly debatable. Undoubtedly, rhetoric ex-

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198 Amar, *Writs of Assistance*, *supra* note 7, at 79–80; Amar, *Fourth Amendment*, *supra* note 5, at 771–72, 774, 779; Bradley, *supra* note 28, at 833–38.

199 See Thomas, *Madison Rewrites Fourth Amendment*, *supra* note 22, at 1459 n.36 (“When the Framers thought ‘search and seizure,’ they almost certainly thought ‘customs.’”).

200 See, e.g., *Carroll v. United States*, 267 U.S. 132, 153 (1925); *Cooper v. Boot*, 4 Dougl. 339, 349, 99 Eng. Rep. 911, 916 (K.B. 1785) (“Suppose goods were actually in the house, and that they were taken out just before the warrant was executed. Can it be said that the officer in that case would be a trespasser?”); *Cooper v. Booth*, 3 Esp. 135, 146, 170 Eng. Rep. 564, 568 (K.B. 1785) (different reported version of same case) (“[S]uppose the goods actually in the house when the information was given, and taken out of it just before the warrant was executed, is it possible to say that the excise-officer . . . can be a trespasser?”); *Bostock v. Saunders*, 3 Wils. K.B. 434, 440, 95 Eng. Rep. 1141, 1145 (de Grey, L.C.J.) (opining that excise commissioners should not examine requesting party before issuing warrants because “the goods would be removed before such examination could be had”); *Bostock v. Saunders*, 2 Black. W. 912, 914–15, 96 Eng. Rep. 539, 540 (different reported version of same case) (making a similar point).

201 See 3 Cuddihy Dissertation, *supra* note 7, at 1549.

isted regarding judicial sentryship of probable cause, and this rhetoric may have significantly influenced the Framers and other elites of the legal profession. But evidence suggests that probable cause sentryship may well have been treated quite differently in the lower courts, where non-elites implemented search and seizure law on a daily basis. In the Framers' world, non-elite justices of the peace often may not have consistently acted as aggressive probable cause sentries prior to issuing search warrants.

This conclusion is defensible regardless of one's views on the debate regarding the nature of the judicial function in early America. One side of the debate claims that the judicial function in early America was haphazard, undisciplined, and subject to the vagaries of "frontier justice."<sup>202</sup> Roscoe Pound believed that the "[s]cientific development of American law was retarded and even warped by the frontier spirit surviving the frontier," and that "opposition to an educated well-trained bar and to an independent, experienced, permanent judiciary" resulted from a "lack of interest in universality and fostering of local peculiarities."<sup>203</sup> I cannot imagine how members of this school could believe in a unified and applied judicial sentryship ethic with regard to probable cause. By definition, they believe in a judiciary that often lacked legal training and certainly lacked infrastructure, each of which are fundamental requisites to unified and consistently applied law.

The other side of the debate asserts that, while far from mature, the judicial function during this period sought coherence and rigor by incorporating British common law and adjusting it over time to local realities and in light of the American creed.<sup>204</sup> Given that limitations certainly did exist in legal training and legal research, it is quite likely that American justice manuals played an influential role.<sup>205</sup> For the reasons already discussed in detail above, these justice manuals easily could have undermined any inclination to engage in probable cause sentryship.

The conclusion that judges in the Framers' era may not have consistently acted as probable cause sentries has potentially significant implications for our search and seizure jurisprudence today. These implications concern both Fourth Amendment originalism and the Reasonableness-versus-Warrant Clause debate.

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202 Conley, *supra* note 24, at 257 & n.1.

203 POUND, *supra* note 89, at 118.

204 See Conley, *supra* note 24, at 257 & n.4.

205 See *supra* notes 88–89, 112–117 and accompanying text, and in particular note 90.

As for originalism, there is a macro-level implication and several micro-level implications. On the macro level, my analysis challenges the relationship between originalism and historical evidence. If originalism is our guide, which historical evidence is most important or persuasive? That which reveals the Framers' intent, or that which speaks to actual legal practice at the time? I am grateful to commentators on this manuscript for helping me recognize and think through this issue, though I am not yet prepared to take a position on it. The commentators who have noted this implication have universally indicated a preference for intent over actual practice, and my inclination is to agree with them. But I am troubled by a notion that the Framers' intent is conceptually separable from the legal practices that they tolerated. In terms of originalism, my position at this point is not that practice can, or should, trump intent. My concern is that I have qualms about whether intent can be easily separated from practice: how meaningful is it to rely upon an abstract notion of intent that is divorced from the actual legal practices that the Framers tolerated?

On the micro-level, the implications of my analysis differ depending upon one's views as to the current state of constitutional search and seizure law. For those like Davies who believe that judges during the Framers' era were expected to act as aggressive probable cause sentries,<sup>206</sup> the presentation here challenges the relevance of legal doctrine. By contrast, originalists who believe that the probable cause requirement should be lax, or at least highly flexible, may take comfort in my analysis. But I suspect it will put many originalists to the test of their faith. Abundant reasons exist to believe that, at least in practice, search warrants could be obtained in the Framers' era upon a mere, unexamined assertion that probable cause existed. If so, many originalists will have to confront the possibility that their favored analytical method may not lead to the results they prefer.

Further, if we are to take the Supreme Court's interest in Fourth Amendment originalism seriously,<sup>207</sup> the historical understanding of suspicion and probable cause presented here raises fundamental issues. Would the Court really be willing to return to a world in which

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206 See *supra* notes 59–60 and accompanying text.

207 Several commentators have questioned the usefulness of this endeavor, as well as whether the Court is sincere about it. E.g., Davies, *Fictional Originalism*, *supra* note 7, at 247; Davies, *Original Fourth Amendment*, *supra* note 7, at 550; Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 896 (2002); Sklansky, *supra* note 6, at 1739.



constitutional search and seizure jurisprudence differed so radically from the system we have erected? Returning to such a meaning of probable cause would constitute a revolutionary change in today's Warrant Clause jurisprudence, testing the mettle of the originalists.

My historical analysis can also be interpreted as harmonizing what many believe is current practice with our history. Numerous commentators on this manuscript believe that current Warrant Clause jurisprudence is, at most, comprised of demanding rhetoric that affords little protection in reality. These commentators take the position that, while contemporary Warrant Clause jurisprudence may have occasionally mouthed a duty of aggressive judicial sentryship, in the trenches, magistrates practice the moderate or lax versions of sentryship.<sup>208</sup> If these commentators are correct, my analysis shows that the

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<sup>208</sup> It is certainly possible to discern tension between some of the Supreme Court's pronouncements concerning an aggressive sentryship requirement and indicators that judges might or might not be following this guidance. An example of such a pronouncement is that magistrates must exercise independent judgment and not simply accept a warrant applicant's conclusions. *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

Some indicators could be interpreted as showing that judges are embracing this role. For instance, low success rates on motions to suppress could be consistent with judges engaging in aggressive sentryship during the warrant application process since the higher level of scrutiny early in the process could help avoid constitutional infringements. Some data show such rates. One report concluded that "[t]he exclusionary rule affects only a relatively small percentage of arrests and searches," SPECIAL COMM. ON CRIM. JUSTICE IN A FREE SOC'Y, AM. BAR ASS'N CRIM. JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS 8 (Nov. 1988), and quoted an Assistant Prosecutor's opinion that "[v]ery few" motions to suppress are granted, *id.* at 16. The report also concluded that "[a]dding together data on each of the stages of felony processing . . . we find that the cumulative loss resulting from illegal searches is in the range of 0.6% and 0.8% to 2.35% of all adult felony arrests," and recounted a survey finding that "roughly three quarters of the judges and defense lawyers polled claim that 10% or less of the suppression motions filed are successful." *Id.* at 17. Another study in San Diego found a 0% success rate for motions to suppress over a given period. Benner & Samarkos, *supra* note 192, at 264.

On the other hand, the San Diego study reported results consistent with a high degree of judge-shopping when police applied for search warrants, *id.* at 226-28, which raises the prospect that police favor judges who engage in lax sentryship. Another report found that magistrates in one locale spent an average of "two minutes and forty[-]eight seconds" per warrant application, with the median being "two minutes and twelve seconds." RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 26 (1985). Though it is possible for judges to engage in aggressive sentryship so quickly, the short time period does provide some reason for doubting that this is occurring.

One commentator voiced a related criticism that, even if judges today exercise aggressive sentryship, the end result is that the public still lacks sufficient protections due to the excessive deference to law enforcement interests that is evident in Fourth Amendment jurisprudence. Prime examples of such deference include exceptions to the warrant requirement, such as the good faith doctrine that was recognized in *United States v.*

state of search and seizure law today can be seen as consistent with what it was during the Framers' era: at best a rhetorical flourish that often can have little substance, with warrants commonly issuing upon something more akin to "possible cause" rather than "probable cause."

If probable cause sentryship during the Framers' era often took this weak form, this has implications for how originalism informs the Reasonableness-versus-Warrant Clause debate today. Advocates for greater Fourth Amendment protections often focus upon suspicion and probable cause,<sup>209</sup> especially as the Supreme Court expands the scope of allowable warrantless and even suspicionless searches.<sup>210</sup> In doing so, these advocates usually favor the Warrant Clause approach. One problem with these efforts is that they often are at odds with the Fourth Amendment's text, which is actually quite enigmatic when it comes to suspicion and probable cause.<sup>211</sup> Nowhere does the text even mention suspicion. The Reasonableness Clause contains no reference to suspicion of any kind. Instead, the concept is only im-

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*Leon*, 468 U.S. 897 (1984), the search incident to arrest doctrine as applied in *United States v. Santana*, 427 U.S. 38 (1976), in which the Court vindicated officers' seizure of heroin that spilled out of a bag as a result of a struggle with the defendant after a warrantless entry into a home, and the plain view doctrine as applied in *Ker v. California*, 374 U.S. 23 (1963), in which the Court approved of officers' seizure of marijuana after a warrantless entry into a home to conduct a warrantless arrest.

Davies makes a somewhat similar point in arguing that modern decisions have gone a long way towards emasculating the Framers' Warrant Clause. He argues, for example, that *Illinois v. Gates*, 462 U.S. 213 (1983), significantly relaxed the Framers' probable cause standard. See Davies, *Fictional Originalism*, *supra* note 7, at 379–82; see also *supra* note 60.

209 *E.g.*, Maclin, *Central Meaning*, *supra* note 22, at 201 ("The constitutional lodestar for understanding the Fourth Amendment is not an ad hoc reasonableness standard; rather, the central meaning of the Fourth Amendment is distrust of police power and discretion."); Thomas, *Remapping Criminal Procedure*, *supra* note 22, at 1831 (arguing that "the probable cause requirement has an independent role to play," beyond reasonableness, in protecting individual rights).

210 *E.g.*, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (approving suspicionless drug testing of all precollegiate public school students who participate in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (approving suspicionless drug testing of precollegiate public school student athletes); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding a highway sobriety checkpoint program); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (approving suspicionless drug testing of certain customs officials); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (approving suspicionless drug testing of some railroad employees); *Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding the warrantless search of a mine); *United States v. Biswell*, 406 U.S. 311 (1972) (upholding the warrantless search of a firearm dealer); *Colonnade Catering Co. v. United States*, 397 U.S. 72 (1970) (upholding the warrantless search of a liquor establishment).

211 See *supra* note 1.

licitly addressed through probable cause, which is explicitly mentioned only in the Warrant Clause. But, at least from an historical perspective, probable cause appears to be a much weaker protection than many Warrant Clause adherents have previously acknowledged. As this Article explains, the probable cause protections that Warrant Clause adherents prefer, which are grounded in aggressive judicial sentryship, appear at odds with an historical understanding of probable cause, in which it is likely that sentryship took an aggressive form only inconsistently at best, and may have often ranged from lax to essentially non-existent.

Another problem with continuing to emphasize probable cause or suspicion is that they are anachronistic prescriptions. It is true that they are consistent with the common law, and constitutional, development of search and seizure law. The Framers lived in an extremely limited regulatory world. Emphasizing probable cause or suspicion for the most part worked well in this context. The state's limited regulatory reach continued to exist to a great degree until the New Deal. But, after the advent of the modern regulatory state, the old prescription no longer works. This approach was designed for a common law world of limited government that no longer exists. We now live in a nation with pervasive regulation, both statutory and regulatory, which permeates most aspects of our daily lives. To impose a probable cause or prior suspicion requirement in this context would emasculate many desirable regulatory regimes.<sup>212</sup> Professor Amar avers to this point when he writes that a "probable cause" test for stolen goods cannot be a *global* test for all searches and seizures" because "often government will properly want to search for or seize such things with advance notice—inspecting restaurant food for contamination, or wires for electrical safety, or cars for emissions, or in a thousand other cases."<sup>213</sup> This demonstrates one of the gravest flaws of a Warrant Clause preference rule: it cannot work in a regulatory world confronting diverse civil search needs. This is a topic I will continue to explore in future articles.

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212 Arcila, *supra* note 11, at 1240–46.

213 Amar, *Writs of Assistance*, *supra* note 7, at 64; see also Amar, *Terry & Fourth Amendment*, *supra* note 7, at 1105 ("[S]urely persons who pass through metal detectors at airports . . . are Fourth Amendment 'persons' . . . but this should not trigger an inflexible rule of warrants or probable cause, or even individualized suspicion.").

## APPENDIX

Below is a bibliography of the American justice of the peace manuals of which I am aware.<sup>214</sup> For completeness in terms of identifying American legal sources that justices of the peace were likely to have consulted, I have included Dane's abridgement, as well as one American digest. (For a brief acknowledgement that these were considered to be distinct forms of secondary legal literature, see *supra* note 23.)

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214 A legend that explains how I became familiar with these American justice manuals is provided below.

<sup>f</sup> Indicates that I personally reviewed the justice manual. As explained above, I restricted my review of American justice manuals to those published between 1787-1825 in an effort to focus upon those manuals that were most likely available during what I have defined as the "Framers' era" for purposes of this Article. See *supra* note 8.

• Indicates that Professor Davies identified the justice manual in his articles, *Fictional Originalism* or *Original Fourth Amendment*, *supra* note 7.

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