Probable Cause and Common Sense: A Reply to the Critics of *Illinois v. Gates*

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PROBABLE CAUSE AND COMMON SENSE:
A REPLY TO THE CRITICS OF ILLINOIS
V. GATES

Joseph D. Grano*

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Common sense, of course, is not the only thing a system of
law relies on. It is not a substitute for knowledge. It cannot
compete with “expertise.” But it is common sense which deter­
mines the relevance and weight of knowledge in specific
situations.**

INTRODUCTION

In legal jargon, whether the police may lawfully arrest or search usu­
ally depends on whether they have “probable cause.”" Unfortunately,
at least for those who relish bright-line mechanical rules, the Supreme

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** S. HOOK, COMMON SENSE AND THE FIFTH AMENDMENT 17 (1957).
1. Certain searches and seizures, however, are permitted without full probable cause. See,
Court has never precisely defined this elusive concept. The Court has said that probable cause to arrest exists when the police have reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an individual has committed a crime. This definition, however, fails to "structure" analysis for the trained legal mind.

The police may obtain reasonably trustworthy information in two ways. First, they may observe criminal activity, such as a shooting, or facts and circumstances from which they draw an inference of criminal activity. When inferences must be drawn, the probable cause question under the above definition is whether the reasonably cautious person would draw the same inferences from the observed facts. Second, the police may receive information from other individuals. Sometimes informants report facts from which an inference of criminal activity may be drawn, but more often they give direct reports of crime, like "Jones has narcotics in his house" or "Smith is the person who committed an unsolved crime." In these latter instances, the probable cause question depends only on whether the informant's report constitutes "reasonably trustworthy information." More simply, the question is whether the reasonably cautious person would find the informant's report worthy of belief.

To the gratification of legal minds that thrive on structure, the Supreme Court in Spinelli v. United States developed a two-pronged test to evaluate the trustworthiness of an informant's report. Stripped to its essentials, the test permitted police to rely on an informant's tip only if they could demonstrate both that the informant was credible and that the information was reliable.

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2. Brinegar v. United States, 338 U.S. 160 (1949). The precise statement reads, "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Id. at 175-76 (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).


4. For example, police may witness an exchange of items and infer from all the circumstances that a sale of narcotics has occurred. See, e.g., Vale v. Louisiana, 399 U.S. 30 (1970).

5. For example, an informant may report suspicious behavior, but whether the behavior creates probable cause to arrest or search, or even reasonable suspicion to stop or frisk, will have to be determined. See, e.g., People v. Rivers, 42 Mich. App. 561, 202 N.W.2d 498 (1972) (repeated reports of men remaining parked in front of a residence); see also United States v. Bell, 457 F.2d 1231 (5th Cir. 1972) (witnesses described behavior of defendant, but question remained whether that behavior provided probable cause to believe the defendant had participated in a robbery).

ble and that he obtained his information in a reliable way, such as by personal observation. As Justice White explained in his *Spinelli* concurrence, the test's two prongs were independent, for a dishonest informant may fabricate personal observation, while an honest informant, one not fabricating, may report a casual rumor. With informants from the criminal milieu, the police often satisfied the credibility or veracity prong by indicating that the informant had provided reliable information on previous occasions; similarly, they could easily satisfy the basis of knowledge prong when the informant personally observed the reported information.

Of course, the police could not always easily satisfy both prongs. Difficulties arose, for example, when informants failed to disclose how they had obtained their information and when informants lacked a previous track record. Nevertheless, *Spinelli* indicated that in such cases circumstantial evidence could satisfy the prongs. The Court suggested that a tip rich in detail might support an inference that the informant had obtained his information in a reliable way. As Justice White explained, detailed information "is not usually the subject of casual, day-to-day conversation." Moreover, police corroboration of significant aspects of the tip could support an inference that the informant was credible, for as Justice White again explained, with some misgiving, when an informant "is right about some things, he is more probably right about other facts . . . ." Understandably, the Court lacked a litmus test for ascertaining the amount of detail and corroboration sufficient to establish probable cause, and, as *Spinelli* itself illustrates, these issues generated intense disagreement. Nevertheless, the two-pronged test structured the evaluation of detail and corroboration.

7. Actually, the test was more complicated, because the credibility or veracity prong had two "spurs." See 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.3(a), at 502 (1978); *The Supreme Court, 1982 Term*, 97 Harv. L. Rev. 70, 178 & n.12 (1983).

For purposes of this article, this intricacy need not be elaborated.

8. 393 U.S. at 424. See also Kamisar, *supra* note 3, at 556-57.

9. See 1 W. LaFave, *supra* note 7, § 3.3(a), at 502.

10. 393 U.S. at 416-17.

11. Id. at 427 (White, J., concurring).

12. Id. at 417-18.

13. Id. at 427 (White, J., concurring). Justice White expressed misgiving about the proper role of corroboration because verification of innocuous detail cannot, at least as a matter of logic, tell us whether the informant has been truthful in the critical, incriminating part of the tip. *Id.* at 426-27.

14. Justices Black, Fortas, and Stewart dissented in *Spinelli*. Justice Fortas observed that the Court unanimously believed that police surveillance could salvage an otherwise defective informant's tip. The majority and dissenters differed, he maintained, over whether it had done so in this case. 393 U.S. at 438 (Fortas, J., dissenting). Fortas charged the majority with evaluating the warrant affidavit as though it were "an entry in an essay contest." *Id.* Justice Black thought the warrant affidavit sufficient "for anyone who does not believe that the only way to obtain a search warrant is to prove beyond a reasonable doubt that a defendant is guilty." *Id.* at 431 (Black, J., dissenting).

*Spinelli* also spawned dispute about the proper role of detail and corroboration in probable cause.
From the beginning, the two-pronged test provoked controversy. Last year, in *Illinois v. Gates*, a narrow majority of the Court supplanted the two prongs with a "common sense" test based on the "totality of the circumstances." The Court's opinion referred to probable cause as a "practical," "fluid," "flexible," "nontechnical" concept that does not lend itself "to a neat set of rules" like the "complex superstructure" Spinelli had imposed. Under this new commonsense approach, the two Spinelli prongs are still relevant, but they will not be determinative. No longer separate, independent requirements, Spinelli's two prongs now represent only "closely intertwined issues."

The first burden in defending *Gates* is to demonstrate that the new approach does indeed comport with common sense. Arguably, the two-pronged test itself reflected a commonsense approach for evaluating hearsay. Whenever we receive information from someone else, we either explicitly or implicitly ask whether the person is credible and, if so, whether the person obtained the information in a reliable way. A commonsense approach for evaluating hearsay cannot ignore these rather basic questions. Yet, as I will discuss, common sense may not always require that both these questions have answers.

Part I of this article reviews *Gates*'s actual holding. Although one can view much of the Court's more interesting discussion of the two-pronged test as dicta, the majority and dissenters clearly did not regard...
it as such. The majority and dissenters disagreed, however, not only over the appropriate hearsay test but, more fundamentally, over the nature of probable cause itself. I will argue that one must resolve this more basic disagreement before properly addressing the hearsay issue.

Part II examines probable cause from an historical perspective. In this part, I attempt to demonstrate that both the English common law and the early American views of probable cause were considerably less demanding than that of the Gates dissenters. Part III then argues that the historical conception of probable cause comports with sound policy and common sense. Part III also outlines the ingredients of a commonsense approach to probable cause issues and discusses the ramifications of this approach for the issue of judicial review.

Part IV returns to the issue of hearsay. Here I maintain that Gates correctly abandoned the two-pronged test, for under that test probable cause became a more demanding concept than history or common sense warranted. I argue that although the Spinelli test in the abstract may have reflected a commonsense attitude toward hearsay, it proved defective by failing in certain concrete situations to yield either the analysis or the result of a less structured commonsense approach. By rigidly requiring the same degree of trustworthiness in all circumstances, the test relied too much on logic and not enough on experience to decide what the reasonably cautious police officer would and should do under the circumstances.

The article concludes with a short postscript describing my overall approach to fourth amendment analysis.

I. THE GATES DECISION

On May 3, 1978, police in Bloomingdale, Illinois, a Chicago suburb, received an anonymous letter implicating Lance and Sue Gates as drug dealers. The letter indicated that Sue would periodically drive the family car to Florida and leave it to be loaded with drugs. She would then fly home to Bloomingdale, and Lance would fly down to Florida to pick up the car. The letter predicted that Sue would take such a trip on May 3 and that Lance would fly down to get the car a few days later. It stated that the car would carry $100,000 worth of drugs and that another $100,000 in drugs could be found in the Gateses' basement. Finally, the letter accused Sue and Lance of being friends with big drug dealers and of having bragged about not needing to work.25

After receiving the letter, police investigation disclosed that an Illinois driver's license had been issued to a Lance Gates, who lived in Bloomingdale. The police also learned that "L. Gates" had made an Eastern Airlines reservation to fly to West Palm Beach, Florida, on May 5.

On May 5, federal agents observed Lance Gates arrive in West Palm Beach, take a taxi to a nearby motel, and go to a room registered to Susan Gates. Early the next morning, Lance and an unidentified woman left the motel in a Mercury bearing an Illinois license plate and entered a northbound highway that a person travelling toward Chicago would typically use. The license plate was registered to a car owned by the Gateses.

Without waiting to learn whether the couple's destination was Chicago rather than some tourist attraction like Sea World, the police in Illinois obtained a search warrant for the Gateses' car and their Bloomingdale home. When the couple arrived in Bloomingdale some twenty-two hours later, the police searched their car and home, finding drugs and other evidence. In the Gateses' subsequent trial, however, the court suppressed the seized evidence on the ground that the magistrate had issued the search warrant without probable cause. The Illinois Supreme Court agreed, maintaining that the police affidavit failed to satisfy Spinelli's two-pronged test.

A. Probable Cause and the Two-Pronged Test

Before rejecting Spinelli's approach, the United States Supreme Court conceded that the letter, standing alone, did not provide probable cause. The Court found the letter defective because it failed to provide a basis for concluding that the informant was honest and because it failed to indicate how the informant had obtained the information. From the outset, therefore, the Court's analysis suggested that Spinelli's two prongs would still play a major role in probable cause analysis.

The Court then examined the significance of the police investigation and surveillance. Somewhat inconsistently, it faulted the Illinois Supreme Court for applying the same two-pronged test it had just applied to the letter. The Court suggested that Spinelli's prongs should be viewed not as "separate and independent requirements" but as "closely in-

26. Although the woman turned out to be Lance's wife, the police apparently were not sure of this at the time. See id. at 2326; Kamisar, supra note 3, at 553.
27. The facts are fully set forth in the Court's opinion, 103 S. Ct. at 2325-26.
28. Justice Stevens emphasized this point in his dissent. Id. at 2360 n.3 (Stevens & Brennan, JJ., dissenting). See also Kamisar, supra note 3, at 554 (finding this point persuasive).
29. 103 S. Ct. at 2326.
31. 103 S. Ct. at 2326. Justice White agreed with the majority on this point. Id. at 2348 (White, J., concurring). Because the dissenters obviously agreed with this, the Court was unanimous in concluding that the letter standing alone did not suffice to establish probable cause. Whether this conclusion is as evident as the Court thought may be questioned. See infra text accompanying note 72.
32. 103 S. Ct. at 2326-27.
tertwined issues that may usefully illuminate the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place."

The next section of the Court's opinion further elaborated probable cause as a flexible, commonsense concept. The Court provided several reasons for abandoning the two-pronged Spinelli test. It then fashioned a new test that requires the judge to examine the totality of circumstances, including the informant's veracity and basis of knowledge, to determine whether a "fair probability" exists that evidence of crime will be found. Moreover, the Court provided examples to demonstrate that "a deficiency in one [prong] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability."

Only in the last section of the opinion did the Court concentrate on the facts before it. The Court held that the police corroboration of the informant's predictions that the Gateses' car would be in Florida, that Lance would soon fly to Florida, and that he would then drive back to Bloomingdale "indicated, albeit not with certainty, that the informant's other assertions also were true." Citing Justice White in Spinelli, the Court observed that when an informant proves right about some things, he more probably is right about others. Thus, the Court seems to have concluded that the tip, as corroborated, satisfied Spinelli's veracity prong. Nevertheless, the Court made a lame attempt to suggest otherwise:

This may well not be the type of "reliability" or "veracity" necessary to satisfy some views of the "veracity prong" of Spinelli, but we think it suffices for the practical, commonsense judgment called for in making a probable cause determination. It is enough, for purposes of assessing probable cause, that "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay."

33. Id. at 2327-28.
34. The Court's opinion is written in four sections. Section I provided reasons for not addressing the exclusionary rule issue, even though the Court itself had asked the parties to argue this issue. Id. at 2321-25. Section II set forth the facts and rejected the two-pronged test. Id. at 2325-28. Section III elaborated the reasons for abandoning the two-pronged test. Id. at 2328-34. Section IV analyzed the facts under the new totality of circumstances approach. Id. at 2334-36.
35. Id. at 2332.
36. Id. at 2329-30.
37. See supra note 34.
38. 103 S. Ct. at 2335.
40. 103 S. Ct. at 2335.
This passage, however, only reinforces my point, for it does not imply that probable cause existed without the veracity prong; rather, it implies that the Illinois courts applied this prong too stringently. Despite its disclaimer, the Court's factual analysis seems strikingly similar to that of concurring Justice White, who preferred to find probable cause under the Spinelli test.\[41\]

After discussing the informant's veracity, the Court examined the informant's basis of knowledge, thereby completing its consideration of Spinelli's two prongs. Stressing the "range of details" in the letter, details pertaining to "future actions of third parties ordinarily not easily predicted,"\[42\] the Court concluded that the informant most likely obtained his information from either the defendants or someone else familiar "with their not entirely ordinary travel plans."\[43\] Although the Court stated that the detail may not have been sufficient under Spinelli to warrant an inference that the informant had a reliable source of knowledge,\[44\] its analysis suggests that the Illinois courts demanded too much in applying this prong of the test. Again, that is, the Court's analysis seems indistinguishable from that of Justice White, who found probable cause by applying Spinelli.\[45\]

In short, the opinion's earlier proposition that strength in one prong can overcome a deficiency in the other proved unnecessary both because the Court did not use this analysis in finding probable cause and because Gates, in any event, did not lend itself to such analysis. Gates did not involve unusual strength in one prong and a deficiency in the other but rather, as the Court's analysis makes clear, a modicum of strength in each prong — enough in the Court's view to constitute probable cause. The analysis leaves no doubt that, like Justice White, the majority would have upheld the search even if it had lacked the votes to abandon the two-pronged test.

Although the Court's suggestion that hearsay evidence need not satisfy both prongs seems to be dicta, one cannot overlook the commitment of a majority of the Court to abandonment of the two-pronged test.\[46\]

\[41\] Id. at 2347-51.
\[42\] Id. at 2335.
\[43\] Id. Even if the informant obtained the information from someone else, we need not worry about that person's veracity. The police corroboration satisfied the veracity prong without regard to the actual source of the information. With veracity satisfied — that is, with a basis for concluding that the source, whoever it was, had not fabricated a story — the only remaining issue was whether the source had obtained the information in a reliable way. For a similar explanation, see Spinelli v. United States, 393 U.S. 410, 425-26 (1969) (White, J., concurring).
\[44\] 103 S. Ct. at 2335-36.
\[45\] See supra note 41 and accompanying text.
\[46\] Lower courts, moreover, now are employing the totality of circumstances test. See, e.g., United States v. Sorrells, 714 F.2d 1522 (11th Cir. 1983); United States v. Ross, 713 F.2d 389 (8th Cir. 1983); Leisure v. Florida, 437 So. 2d 751 (Fla. App. 1983); State v. Arnold, 336 N.W.2d 97 (Neb. 1983). It is not always apparent, however, that the result would have been any different
One can only speculate why the Court preferred this comparatively radical step to Justice White’s more moderate approach. Perhaps the majority believed that Justice White’s approach would accomplish little more than the possible conviction of Lance and Sue Gates — arguably an important objective but hardly a justification for exercising certiorari. Indeed, the Court specifically observed that too many variables exist in the probable cause equation to have one factual analysis serve as a useful precedent for another. Just as plausibly, the majority may have wanted to convey that probable cause itself represents a less demanding concept than the dissenting opinions assumed. Justice Stevens’ dissent may have provided some impetus for this desire, for the most vulnerable aspect of his dissent, which I will discuss in the next section, is its implicit assertion that probable cause requires a high degree of certainty.

B. Gates as a Reflection of Competing Conceptions of Probable Cause

The Gates opinions advocated several positions. The majority stated that an informant’s tip may provide probable cause without satisfying Spinelli’s two-pronged test. On the facts, the majority found probable cause under the new totality of circumstances test, but it also strongly suggested that it would have found probable cause even under Spinelli. Justice White, in his concurrence, steadfastly adhered to Spinelli and, like the majority, found probable cause. Justices Brennan and Marshall, like Justice White, protested the Court’s abandonment of the Spinelli test. Although their opinion did not discuss the facts, their dissent from the judgment makes clear their disagreement with Justice White’s application of Spinelli. Finally, Justices Stevens and Brennan, in a dissent that did discuss the facts, found no probable cause. Although somewhat unclear, their opinion suggests the absence of probable cause even under the Court’s new test.

One cannot properly choose among these positions without first ad-

under the two-pronged test. See Arnold, supra (specifically finding that the two-pronged test also had been satisfied). In Massachusetts v. Upton, 104 S. Ct. 2085, 2087 (1984) (per curiam), decided after this article was written, the Supreme Court held that Gates “did not merely refine or qualify the ‘two-pronged test’ ” but rather “rejected it.” Thus, as suggested in the text, the Court viewed Gates as establishing a new test for evaluating hearsay in probable cause determinations.

47. 103 S. Ct. at 2332 n.11.
48. See supra notes 37-45 and accompanying text.
49. 103 S. Ct. at 2347-51.
50. Id. at 2351-59 (Brennan & Marshall, JJ., dissenting).
51. Moreover, Justices Brennan and Marshall specifically stated that they agreed with Justice Stevens’ conclusion that there was no probable cause even under the Court’s new test. Id. at 2351.
52. Id. at 2360-62 (Stevens & Brennan, JJ., dissenting).
53. Justice Stevens alluded to the Court’s new test only in a footnote suggesting that both
dressing the broader issue of the degree of certainty that probable cause requires. The evaluation of a hearsay report depends on whether one is applying a reasonable doubt, a preponderance of the evidence, a more probable than not, or merely a substantial possibility standard. Thus, we would find it unthinkable to convict a person merely on an informant’s tip, even one that unmistakably satisfies Spinelli’s two prongs: when belief must be sufficiently certain to preclude all reasonable doubt, evidence must evince more trustworthiness than Spinelli demanded.\(^54\) Similarly, Spinelli’s level of trustworthiness may be inadequate to justify a bindover at the preliminary examination.\(^55\) On the other hand, a street stop, a detention less intrusive than custodial arrest, does not require as great a degree of trustworthiness from hearsay as an arrest demands.\(^56\) When police base contemplated action on hearsay, the trustworthiness they demand of that hearsay inevitably depends on the level of certainty legally required to take the action; this, in turn, depends on the nature of the action itself. The Court, therefore, has put the cart before the horse, for it has been struggling to define a trustworthiness test for hearsay without first defining what degree of certainty probable cause requires.

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of Spinelli’s prongs were defective in this case. He added, “I do not understand how the Court can find that the ‘totality’ so far exceeds the sum of its ‘circumstances.’ ” \(^{Id.}\) at 2362 n.8. See also supra note 51.

\(^54\) The sixth amendment right of confrontation partly reflects a concern that only the most reliable hearsay should be admitted at a criminal trial, and then only if the declarant is unavailable to testify. See Ohio v. Roberts, 448 U.S. 56 (1980) (upholding the admissibility of a witness’s preliminary examination testimony and discussing the restraints on hearsay imposed by the confrontation clause); see also Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 578 (1978) (the confrontation clause “requires the state, wherever possible, to present its evidence against the accused in what is traditionally considered the most reliable form, that of direct testimony in open court”).

\(^55\) Jurisdictions vary in applying the rules of evidence at the preliminary examination. See Y. Kamisar, W. LaFave, J. Israel, Modern Criminal Procedure 997-99 (5th ed. 1980). Some rules explicitly state that probable cause may be based “in whole or in part” on hearsay. See, e.g., Fed. R. Crim. P. 5.1(a). Nevertheless, even in jurisdictions applying such rules, one does not find cases in which a defendant has been bound over for trial on a police officer’s testimony that an anonymous informant, with a reliable track record, reported that he had personally observed narcotics in the defendant’s house. The “probable cause” required to hold a defendant for trial is obviously more demanding than the “probable cause” needed to justify an arrest; were it otherwise, the preliminary examination would fail to remove any weak cases from the system. Because of the more rigorous probable cause standard at the preliminary examination, greater reliability is demanded from hearsay information.

\(^56\) See Adams v. Williams, 407 U.S. 143, 147 (1972). Although this point may seem trivial, not all commentators have recognized it. Cf. The Supreme Court, 1971 Term, 86 Harv. L. Rev. 50, 178 (1972):

Probable cause is determined both by the quantum and content of the information an officer possesses and by the degree of its reliability. The two are nevertheless distinct concepts and a case can certainly be made that the standard of cause to stop should be less than probable cause only in the sense that the officer may stop on less or different information than probable cause would require and not in the sense that he may act on information that is received in a manner less reliable than probable cause would require.
Yet, it also seems evident that members of the Court hold different conceptions of probable cause. Justice Stevens’ dissent in *Gates*, for example, suggests that his disagreement with the majority stems not simply from a different approach to hearsay but, more basically, from a more demanding conception of probable cause itself. Justice Stevens found it important that the informant’s tip had not proved completely accurate: although the informant had reported that Sue Gates would leave the car in Florida and fly back to Bloomingdale, police surveillance disclosed that Lance Gates checked into the motel room registered to Sue Gates and left the next morning with a woman, presumably his wife. Stevens attached significance to this discrepancy because the described modus operandi implied, in his view, that the defendants did not want to leave the alleged $100,000 worth of drugs unguarded in their basement. 57 That they left their home unguarded, Stevens argued, cast doubt on the informant’s claim that drugs were stored there. 58 In addition, Stevens insisted, the discrepancy made the couple’s activities less suspicious. First, the police did not know that Sue Gates went to Florida on May 3; for all they knew, she could have been there a month. 59 Second, the highway that leads to Chicago also leads to several tourist attractions in Florida. 60

Of course, one may quarrel with Justice Stevens about whether the described modus operandi implied that the defendants did not want to leave their home unguarded. As the majority maintained in a footnote, one may question whether the magistrate (or the police) ever recognized this implication, 61 or whether it represented the work of a lawyer who had pored over the warrant affidavit in search of possible challenges. 62 Moreover, as the majority again recognized, Justice Stevens’ argument suggested that the defendants were worried about the drugs in their unguarded home but not about those in their unguarded car in Florida. 63 Finally, without questioning that post-search knowledge cannot provide antecedent cause for a search, one may nevertheless note that the defendants did leave the drugs in their unguarded home. This fact suggests the need for caution before one reads into

What the note’s author overlooked, of course, is that the quantum of evidence required necessarily has a bearing on the rigor with which we will examine hearsay.

57. *Illinois v. Gates*, 103 S. Ct. 2317, 2360 (1983) (Stevens & Brennan, JJ., dissenting). Respected commentators have agreed with Justice Stevens on this point. See 1 W. LaFAVE, supra note 3, § 3.3(f), at 161; Kamisar, supra note 3, at 554.

58. 103 S. Ct. at 2360 (Stevens & Brennan, JJ., dissenting).

59. *Id.* at 2360 n.1.

60. *Id.* at 2360 n.3. See supra note 28 and accompanying text.

61. *Id.* at 2335-36 n.14.

62. This, of course, is one of the costs of the exclusionary rule, for effective lawyers view it as their responsibility to raise all conceivable challenges. This does not explain, however, why law professors seem similarly inclined to second-guess probable cause determinations with such studied analysis. See supra note 57.

63. 103 S. Ct. at 2335-36 n.14.
the informant’s letter the implication that seemed so obvious to Justice Stevens. 64

To quarrel with Justice Stevens on these grounds, however, misses the point. Of more significance is that Justice Stevens, unlike either the majority or Justice White, seized upon possible innocent explanations for the Gateses’ behavior to reject a finding of probable cause. Certainly it was possible that Sue Gates had spent a month in Florida waiting for her husband, and it was likewise possible that the couple had set out early in the morning for Sea World. 65 The likelihood of these possibilities, however, is the important issue. By not discussing their likelihood, the Stevens opinion creates the impression that the mere possibility of innocent explanations is sufficient to defeat probable cause. 66

Perhaps it is unfair to attribute this view to Justice Stevens, for his dissent may suggest only that the information on which the police obtained their search warrant equally supported inferences of innocent behavior and criminal activity. The relevance of this view of the probabilities, however, depends on an assumption that probable cause requires criminal activity to be more probable than not. In mathematical terms, this reading of Justice Stevens’ dissent assumes that probable cause is lacking if criminal activity is forty, or even fifty, percent likely. Such a premise seems clearly implicit in Justice Stevens’ analysis for nowhere does he assert, nor could he do so convincingly, 67 that no substantial possibility of criminal activity existed in Gates.

The majority’s opinion, on the other hand, is consistent with a substantial possibility standard; furthermore, it actually hints that such a standard should govern. At one point, the Court stated that probable cause requires evidence sufficient not for condemnation but only to warrant “suspicion.” 68 Although acknowledging the infeasibility of adopting a numerically precise standard, the Court asserted that probable cause requires “only the probability, and not a prima facie showing of criminal activity . . . .” 69 The Court followed this assertion with a citation to a Model Code of Pre-Arraignment Procedure section

64. Ignoring this fact, Professor Kamisar recently wrote with confidence that the discrepancy “casts doubt on the hypothesis that they [the Gateses] kept a large quantity of drugs in their home and therefore did not want to leave it unguarded.” Kamisar, supra note 3, at 554.

65. Justice White, who concurred in the judgment, conceded these possibilities. 103 S. Ct. at 2349 & nn.23-24.

66. If this is what Justice Stevens meant to suggest, the majority was certainly correct in responding that probable cause “simply does not require the perfection the dissent finds necessary.” 103 S. Ct. at 2335 n.14. See also id. at 2349 (White, J., concurring) (probable cause does not require proof of “certain guilt”).

67. See infra notes 72-74 and accompanying text.

68. 103 S. Ct. at 2330 (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)).

69. 103 S. Ct. at 2330.
that specifically rejects a more probable than not standard. 70 Similarly, the Court stated in a subsequent footnote that probable cause requires "only a probability or substantial chance of criminal activity, not an actual showing of such activity." 71

Under a substantial chance or substantial possibility standard, of course, one can easily defend the majority's finding of probable cause in *Gates*. Initially, one may empirically question whether many letters like that received in *Gates* are fabricated. 72 I do not mean to suggest that the letter standing alone provides probable cause; nevertheless, this question is sobering, because it reveals our reluctance to find probable cause even when our doubts are not grounded in experience. The partly corroborated letter, however, certainly suggests a substantial likelihood, if not an actual probability, that Lance and Sue Gates went to Florida to purchase drugs. Of course, as Justice White conceded, the possibility remained that a vindictive travel agent, knowing of the couple's travel plans, was trying to harass them, 73 but this possibility could coexist with a conclusion that criminal activity was also substantially possible. At the least, the facts make it difficult to maintain that

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The Court added a second citation, "W. LaFave, *Search and Seizure*, § 3.2(3) (1978)." The citation is incorrect, for LaFave's subsections are lettered rather than numbered. The Court, however, may have intended to cite § 3.2(e), for in this subsection Professor LaFave discusses whether probable cause imposes a more probable than not standard. See 1 W. LAFAVE, *SEARCH AND SEIZURE*, § 3.2(3), at 476-93. LaFave also indicates in this subsection that there is much support for the Model Code's position. *Id.* at 480. But see *id.* at 484 (stating "that there is a basis for being more demanding with respect to the existence of criminal activity than with respect to the identity of the perpetrator of a known crime").

71. 103 S. Ct. at 2335 n.13 (emphasis added).

The Court's intimations that probable cause does not impose a more probable than not standard seem quite deliberate. Moreover, they are consistent with a more explicit statement made earlier in the Court's term. *Texas v. Brown*, 103 S. Ct. 1535, 1543 (1983) (plurality opinion) (describing probable cause as "a flexible, common-sense standard . . . merely requiring that the facts available would 'warrant a man of reasonable caution in the belief' . . . that certain items may be useful as evidence, . . . but not demanding any showing that such a belief be correct or more likely true than false"). Given these remarks in both *Gates* and *Brown*, one cannot read the words "probability" and "fair probability," also used in these cases, to mean more probable than not. *See*, e.g., *Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983) (magistrate must decide whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place").

Professor Kamisar puts the matter more strongly than I: "The Court made it fairly clear, I think, that 'probable cause' is something less than 'more-probable-than-not' . . ." Kamisar, *supra* note 3, at 588 (emphasis his).

72. I am grateful to Professor Phillip Johnson of the University of California, Berkeley, Law School for raising this question with me in a telephone conversation.

73. 103 S. Ct. at 2349 (White, J., concurring).
a reasonably cautious person could not have concluded that a substan-
tial possibility of criminal activity existed. 74

*Gates*, therefore, raises the significant issue of whether a substantial possibility standard, or perhaps even a reasonable suspicion standard, suffices for determining probable cause. Two arguments suggest that no more should be required. First, probable cause has historically been a much less demanding concept than Justice Stevens assumed in his *Gates* dissent. Second, policy reasons, grounded in common sense, support a standard significantly lower than the more probable than not standard. Indeed, common sense suggests that probable cause should be a variable concept whose demands depend on the circumstances.

II. PROBABLE CAUSE IN HISTORICAL PERSPECTIVE

The relevance of history in formulating contemporary standards of probable cause may be disputed. In particular, English history may seem inapposite, for the colonists rebelled against English search and seizure practices. 75 Moreover, no evidence exists to indicate that the framers intended to codify for all time a particular conception of probable cause. 76 Nevertheless, the historical background does have contemporary relevance. First, the early understanding of probable cause provides perspective for the current debate. Second, both in England and in the colonies, the advocates of search and seizure protections rebelled not against common law search and seizure practices in ordinary criminal cases but rather against official unwillingness to adhere to the common law rules in politically controversial contexts. In England, the major search and seizure battles arose over the Crown’s use of

74. Professor LaFave suggests that the police should have patiently conducted further investigation such as waiting until they could confirm that the Gateses had indeed returned to Illinois. *I W. LAFAVE*, supra note 3, § 3.3, at 162. This suggestion has its own difficulties. How far should the police have followed the Gateses? Should the police simply have waited at the Gateses’ home? If they did the latter, could the police have immediately searched the Gateses upon their return, or would the circumstances have been insufficiently exigent to justify a warrantless search? Would any of this delay have increased the risk of losing relevant evidence? Assume, however, that LaFave’s alternative investigative procedures are reasonable. This would not prove that the alternative actually employed was unreasonable. The reasonably cautious person’s conclusions cannot be faulted, or at least should not be, as long as they fall within a zone of reasonableness. In this regard, one should recall that the police did not act precipitously but instead obtained a search warrant. LaFave’s real burden, therefore, is to show not that he would have refused to issue the warrant, a burden he has successfully carried, but rather that the magistrate acted outside the zone of reasonableness in concluding that further investigation was not warranted. In my view, neither LaFave nor any of the judges who voted to reverse the issuing magistrate has begun to satisfy this burden. On the issue of judicial review, see *infra* notes 252-86 and accompanying text.


general warrants, which were not supported by probable cause, to enforce both oppressive licensing laws and laws punishing seditious libel. In the colonies, James Otis and others took issue with writs of assistance, which the British used to enforce not only unpopular but, in the colonists' view, illegitimate customs laws. Finally, the English history reflects a view of probable cause that both the framers and the early Supreme Court cases appear to have shared.

A. The English View

1. Statutes and Commentators—The early common law did not require a high level of suspicion to justify an arrest. For example, a statute promulgated in the late thirteenth century under Edward I required town guards to arrest strangers after sunset. The guards were to release the strangers the next morning "if no Suspicion be found," but they were to turn the strangers over to the constable if they found "Cause of Suspicion." Apparently this power of arrest did not suffice to abate robberies, manslaughters, and other felonies, because, almost fifty years later in the reign of Edward III, a supplemental statute required constables, by day or night, to arrest any man who demonstrated an "evil suspicion" of being such an offender. The new statute also required the constables to deliver the arrestees to bailiffs or sheriffs, who were to "enquire of such Arrests, and at the coming of the Justices return their Enquests before them, with that which they have found, and the Causes of the Takings." Thus, an arrest prompted further investigation; it did not reflect an already formed decision to charge the person with a crime.

The early statutes did make some distinctions based upon the level of suspicion justifying the arrest, although in doing so they confirmed

77. J. Landynski, supra note 75, at 20-30; N. Lasson, supra note 75, at 24-50.
78. See 2 Legal Papers of John Adams 140-42 (L. Wroth & H. Zobel eds. 1965), reprinted in 1 B. Schwartz, The Roots of the Bill of Rights 189-90 (1971) (reporting Otis's denunciation of general warrants and his concession that special warrants were legal). See also N. Lasson supra note 75, at 58-60; Quincy, Massachusetts Reports, Appendix 1, 404 (1865).
80. Statute of Winchester, 13 Edw. I, stat. 2, c. 4 (1285). Coke reported that the statute was directed at "roberdsmen," men who patterned their behavior after Robin Hood. 3 E. Coke, Institutes of the Laws of England 197 (1628).
81. Statute of Westminster, 5 Edw. 3, c. 14 (1331). This statute made reference both to the previous statute and to the continued commission of manslaughters, robberies, and felonies.
82. Id.
83. But cf. Mallory v. United States, 354 U.S. 449, 456 (1957) (stating in dictum that "[i]t is not the function of the police to arrest . . . at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause' ").
that arrests did not require a substantial level of antecedent cause. For example, a 1275 statute imposing harsh penalties on those who refused to submit to the common law of the land exempted those prisoners "as be taken of light suspicion." 84 Similarly, a statute denying bail to many prisoners likewise exempted those arrested "of light suspicion." 85 Three hundred years later, however, a superseding statute imposed new restrictions on bail. The statute's preamble complained that judges were too readily releasing prisoners on the excuse that they had been arrested "only for Suspicion of Felony." 86

Throughout the centuries, English statutes continued to rely on the notion of "suspicion." In the late seventeenth century, for example, a statute authorizing search warrants for illegally killed game enabled constables to search, "in such Manner, and with such Power as in cases where Goods are stolen or suspected to be stolen," those places belonging to "suspected Persons." 87 This statute provided that a successful search justified the person's arrest, 88 thus suggesting that "suspicion" inadequate to justify arrest might still warrant a search.

Writing in the seventeenth century, Sir Matthew Hale viewed as settled the authority of a constable lawfully to arrest an individual based on a third party's report that he "suspect[ed]" the individual upon "probable grounds" to be a felon. 89 Anticipating the United States Supreme Court, Hale expressed concern about the reliability of such hearsay reports, but his suggested safeguards were not as elaborate as Spinelli's two-pronged test. Hale indicated that the constable should inquire into the causes and circumstances of such a report so that he could make the third party's suspicion his own. 90

Hale used the terms "suspicion," 91 "probable cause of suspicion," 92 and "reasonable cause of suspicion" 93 interchangeably. It seems evident, however, that Hale used all these terms to indicate that the constable needed some basis for suspecting a particular individual but

84. Statute of Westminster, the First, 3 Edw. 1, c. 12 (1275).
85. Id. c. 15. The exact meaning of this statute is unclear. Stephen read the statute as making bailable those "indicted" on light suspicion, and he was not sure whether persons arrested on suspicion pursuant to a hue and cry could be bailed. 1 J. Stephen, A History of the Criminal Law of England 235 (1883).
86. 1 & 2 Phil. & Mar. c. 12, § 1 (1554); see also 2 & 3 Phil. & Mar. c. 10, § 2 (1555) (requiring the justice of the peace to conduct an orderly examination of all those arrested "for Manslaughter or Felony, or for Suspicion thereof" before committing them to jail).
87. 3 Will. & Mar. c. 10, § 3 (1691).
88. Id.
89. 2 M. Hale, The History of the Pleas of the Crown 91 (1736). Hale's two volume treatise was published posthumously.
90. Id. at 91-92. Hale also indicated that the person with the suspicion "ought to be present" when the arrest is made. Id. at 91.
91. See, e.g., 1 M. Hale, supra note 89, at 582-583; 2 id. at 79, 80-90, 91, 101, 113, 150.
92. See, e.g., 1 id. at 580, 588; 2 id. at 78, 101 ("probably suspected"), 103, 150.
93. See, e.g., id. at 78, 79 ("reasonableness of the suspicion").
not for singling out that individual from the group of all other possible suspects. Hale indicated, for example, that the "probable causes of suspicion" included "common fame" and being with a person who committed a felony.\textsuperscript{94} Hale emphasized, however, that a person arrested only on suspicion might not be bound over for trial, because upon examination the magistrate might acquire cause to discharge him.\textsuperscript{95} Hale did not distinguish between the level of suspicion required for warrantless searches or seizures and those authorized by warrants. Unlike Coke, who had maintained that a magistrate could not issue a pre-indictment arrest warrant,\textsuperscript{96} Hale insisted, irrefutably according to Blackstone,\textsuperscript{97} that a justice of the peace could issue a warrant when an individual under oath "show[ed] probable cause of suspicion."\textsuperscript{98} Hale's description of the common law hue and cry even more

The court also indicated that it was good cause for arrest that the "common fame and voice is that one hath committed" a felony. \textit{Id. See generally} Weber, \textit{The Birth of Probable Cause}, \textit{11 ANGLO-AMER. L. REV.} 155, 162-63 (1982). The court in \textit{Ashley's Case} suggested that the person who held the suspicion had to make the arrest, but Hale indicated that this was true only when a private party arrested another. A constable could arrest on the basis of a third party's suspicion. \textit{2 M. HALE, supra note 89, at 80.} Ultimately, Hale thought that even this restriction on private parties was not that great:

\begin{quote}
But then the case is easily solved, for if a felony be committed, and \( A \) hath probable cause to suspect \( B \) and accordingly suspects \( B \) and acquaints \( C \) with the whole matter, \( C \) upon his having probable cause to suspect \( B \) though he cannot justify the imprisonment of \( B \) as by command of \( A \) that first suspected him, he may justify by his own suspicion; and the like of him that comes in aid of \( A \) to arrest \( B \).
\end{quote}

\textit{Id.} (emphasis in original).

\textsuperscript{94} \textit{1 id. at 588; 2 id. at 80; see also} \textit{2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN} c. 12, §§ 8-14 at 76, listing as sufficient causes of suspicion "common fame of the country" when it had "some probable ground," living as a vagrant, being in the company of a known offender at the time of the offense, "generally at other times keeping company with persons of scandalous reputations," and being found with stolen goods. The following statement of the law occurred in \textit{Ashley's Case}, \textit{12 Coke Rep. 90, 92, 77 Eng. Rep. 1366, 1368 (K.B. 1611)}:

\begin{quote}
If felony be done, and one hath suspicion upon probable matter that another is guilty of it, because that he had part of the goods robbed, and is indigent, or if the party be indicted, or if murder be committed, and one is seen near the place, or coming with a sword or other weapon embrued with blood, or that he was in company of felons, or hath carried the goods stolen to obscure places, or such like things, these are good causes of suspicion; and by reason of this he may arrest the party so suspected.
\end{quote}

\textsuperscript{95} \textit{1 M. HALE, supra note 89, at 581.} Hale indicated that the judge issuing an arrest warrant had to bind the accusing party to prosecute only if the accusation was "positive and express." A suspicion insufficient to support the charge without further investigation, however, could not provide the basis for binding over the accusing party to prosecute, because the accused would not have been given an opportunity to rebut the charge. \textit{Id. See also} M'Cloughan v. Clayton & Riding, \textit{Holt 478, 480, 171 Eng. Rep. 311, 312 (K.B. 1816)} (holding that a constable could arrest "on suspicion upon a reasonable charge of felony" and, without bringing the person to court, could then release him if the suspicion proved groundless).

\textsuperscript{96} \textit{4 E. Coke, supra note 80, at 176-77.}

\textsuperscript{97} \textit{4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND} 290 (1765-69).

\textsuperscript{98} \textit{2 M. HALE, supra notes 89, at 107.} Hale accused Coke of condemning, with little support, the "constant and usual practice" and of stating a view that, if accepted, would "give
graphically illustrates that the requirement of antecedent suspicion was not sufficiently demanding to preclude the arrest of several suspects for a single felony offense. On report of a felony, the constable had an obligation to raise a hue and cry so that a search for the offender could be conducted from town to town. The constable’s obligation existed even when the person reporting the felony could not provide any leads to help identify the offender. In such cases other causes of suspicion could still justify arrests.99

[A]ll that can be done is for those that pursue the hue and cry to take such persons, as they have probable cause to suspect; as for instance, such persons as are vagrants, that cannot give an account where they live, whence they are, or such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they had been, and the like.100

The use of the hue and cry procedure even when the constable was uncertain that a felony had been committed further demonstrates the laxity of the common law suspicion requirement.101

Although probable cause of suspicion thus did not require more than a reasonable basis for suspecting the individual and making further inquiry, the concept still had teeth. Hale made clear that a general warrant upon a complaint of robbery “to apprehend all persons suspected” was void.102 As Blackstone later explained, when a constable obtained a warrant, it was “the duty of the magistrate, and ought not be left to the officer, to judge of the ground of suspicion.”103 Similarly, magistrates could issue warrants to search for stolen goods on “suspicion,”104 but Hale doubted the validity of general warrants “to search all places, whereof the party and officer have suspicion.”105 As Hale expressed it:

[A] general warrant to search in all suspected places is not good,
but only to search in such particular places, where the party assigns before the justice his suspicion and the probable cause thereof, for these warrants are judicial acts, and must be granted upon examination of the fact.

And therefore I take those general warrants dormant, which are made many times before any felony committed, are not justifiable, for it makes the party to be in effect the judge; and therefore searches made by pretense of such general warrants give no more power to the officer or party, than what they may do by law without them.  

2. Judicial Opinion— The eighteenth century English cases that perhaps most influenced the framers of the American Constitution involved general warrants. In *Money v. Leach*, for example, the Earl of Halifax, one of the King's Secretaries of State, issued a warrant authorizing his messengers to search for the "authors, printers and publishers" of an allegedly libelous publication. The warrant failed to specify the person or persons to be arrested, and only after the warrant had issued did one of the messengers receive information that the plaintiff, Leach, had printed the particular paper. The messengers arrested Leach and searched his house, but the Secretary subsequently discharged him because it appeared that he had not printed the libelous paper. Leach subsequently won a suit for damages, and the messengers then appealed. Responding to this appeal, Lord Mansfield first observed that the common law did not permit warrantless arrests in cases like this. Second, relying on Hale, Mansfield noted that general warrants were contrary to the common law. Mansfield conceded that common usage could make law, but he found that although general warrants had previously been used, they had been the practice of only

106. *Id.* at 150. This last sentence suggests that some power to search could be exercised without a warrant. A defective warrant, however, could not provide a justification that otherwise would not have existed. The next two cases in the text involved situations in which a lawful search could not have been conducted without a warrant. See infra notes 108-26 and accompanying text.

107. See N. LASSON, supra note 75, at 45-46 & n.114.


110. Nathan Carrington told the defendants that a printer, whose name he did not disclose, informed him that plaintiff Leach had printed the paper in question. *Id.* at 1748, 97 Eng. Rep. at 1078-79.

111. *Id.* at 1749, 97 Eng. Rep. at 1079.

112. *Id.* at 1766, 97 Eng. Rep. at 1088. Because no authority for the defendants' actions existed outside the warrant, the warrant's validity was at issue. See supra note 106. As it turned out, the judges decided the case on a narrower ground, thus rendering the comments about general warrants dicta. 3 Burr. at 1767-68, 97 Eng. Rep. at 1088-89.

a "particular office." Nothing in Lord Mansfield's opinion suggests disapproval of the common law's reasonable suspicion standard; on the contrary, Mansfield specifically said that a jury should determine the existence of "a probable cause or ground of suspicion." Similarly, *Entick v. Carrington*, perhaps the most famous of the English cases, involved a warrant specific as to the person to be arrested but general as to the items to be seized. This warrant, also issued by the Earl of Halifax, identified Entick as the author of several seditious writings. It commanded Halifax's messengers to seize both Entick and all his books and papers, the latter to be examined by the Secretary. Executing the warrant, the messengers made a thorough search of Entick's dwelling, broke open boxes, chests and drawers, and seized at least two hundred pamphlets and printed charts. Upon subsequent examination, the Secretary's assistant found insufficient cause to charge Entick with a crime. Entick then brought a suit against the messengers for damages.

Lord Camden's opinion in *Entick* touched on several issues. Toward the end of the opinion, he suggested that a search for evidence, as opposed to one for stolen goods, was simply impermissible, even in ordinary felony cases. Recognizing the possibility of overstatement in this claim, he insisted nevertheless that such searches should be disallowed as unnecessary at least in libel cases. In earlier sections of his opinion, however, Lord Camden had more narrowly complained about the warrant's lack of particularity. He contrasted the Secretary's general warrant, which required seizure of all papers for subsequent examination, with warrants issued under an earlier Licensing Statute, which permitted seizure only of "suspected libels."
Similarly, he contrasted general warrants with search warrants for stolen goods:

[I]n 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 misbehavior. —To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all. 122

Like Lord Mansfield in Leach, Lord Camden did not discuss the level of cause needed to justify an arrest or a search. He did say at one point, however, that if the Secretary's warrant was found valid, "the secret cabinets and bureaus" of everyone would be subject to search whenever the Secretary thought it appropriate "to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." 123 This sentence, however, cannot be read as challenging the common law's reasonable suspicion standard, for Lord Camden was careful to adhere to precedent even when he vehemently disagreed with it. 124 Rather, this sentence, read in context, makes it clear that the general warrant, or perhaps any warrant for papers, whether general or special, 125 posed the problem. Under the common law, reasonable suspicion permitted a seizure of the person or a limited search for and seizure of goods; under the Secretary's search warrants, by contrast, no lock or door could be left unbroken, for "nothing is left either to the discretion or to the humanity of the officer." 126

The eighteenth-century libel cases failed to disturb the common law conception of probable cause as Hale had described it. This became evident in subsequent criminal cases. In Samuel v. Payne, 127 decided in 1780, the complainant Hall accused the plaintiff of stealing some laces, which he claimed were in the plaintiff's house. On the basis of this accusation, a justice of the peace issued a search warrant. Although the constable failed to find the stolen laces, he nevertheless arrested the plaintiff. In a subsequent suit for damages after his discharge, the

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122. Id. at 1067.
123. Id. at 1063.
124. The first question before the Court was whether the secretary had statutory authority to issue warrants. After spending considerable time examining this question, Lord Camden expressed the view that such authority had been improperly assumed. Id. at 1045-58. Nevertheless, precedent upheld the Secretary's authority, and Lord Camden and his brothers reluctantly concluded that they had "no right to overturn those decisions." Id. at 1058-59.
125. See supra notes 119 & 120 and accompanying text.
126. 19 How. St. Tr. at 1064. Lord Camden expressly recognized that the common law permitted a constable to arrest, even kill, a person suspected of felony, but he insisted that other safeguards, not present in the search for papers, reduced the likelihood of abuse. Id. at 1065 n.*.
plaintiff maintained that the constable had the burden of proving that a felony had actually been committed. Writing for the court, Lord Mansfield, who had denounced general warrants in *Money v. Leach*, disagreed. When a person charges another with a felony, Mansfield wrote, "it would be most mischievous that the officer should be bound first to try, and at his peril exercise his judgment on the truth of the charge." Mansfield insisted that when such a complaint is made, the officer does his duty by taking the person accused before a magistrate, who can commit or discharge him.

Samuel *v. Payne* quickly became a leading English case. In *M'Cloughan v. Clayton & Riding*, the court relied on it to sustain a constable’s search of an individual who had been accused of stealing a coat. The accuser, Riding, presented no evidence to support his suspicion, and the constable’s search in fact proved fruitless. Nevertheless, the court observed that a constable can apprehend "on suspicion upon a reasonable charge of felony." The court added that having found his suspicion groundless, the constable was entitled to release the defendant without bringing him before a magistrate.

From a contemporary American perspective, some of the English cases are truly remarkable. In *Lawrence v. Hedger*, for example, a watchman arrested the plaintiff at ten o’clock one night on a London street when he failed to account for a bundle he was carrying. Although no theft had been reported, all three judges upheld the arrest. One judge, citing *Payne*, expressed bewilderment that the arrest had been challenged: "And in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion." Similarly, in *Beckwith v. Philby* a constable made an arrest after a farmer pointed out a man resting near a bridge with a bridle and saddle on his back. Although the man explained that he was returning from having sold a horse at a nearby market, the constable believed the man was either stealing or about to steal a horse. The court concluded that the constable had reasonable cause to make the arrest.

130. *Id.*
133. *Id.* at 482, 171 Eng. Rep. at 313 (citing *Payne*).
134. *Id.* at 480, 171 Eng. Rep. at 312.
135. *Id.; see also supra* note 94 and accompanying text; *accord* Davis *v. Russell*, 5 Bing. 354, 130 Eng. Rep. 1098 (C.P. 1829).
136. 3 Taunt. 14, 128 Eng. Rep. 6 (C.P. 1810).
139. *Id.* at 638-39, 108 Eng. Rep. at 586. It is worth noting that the constables (the one
The law did not differ in search warrant cases. In *Jones v. German* an individual named Wood stated under oath that he had "just and reasonable cause" to believe that his butler, Jones, whom he had just discharged after five years of service, was stealing his property. In support of this accusation, Wood indicated only that Jones had refused to let him inspect several boxes that he had just packed. On this complaint, the defendant magistrate issued a warrant. Although some of Wood's goods were found when the warrant was executed, Wood did not press charges. Jones, however, sued the magistrate, claiming that he had illegally issued the search warrant. Citing *Entick v. Carrington*, Jones complained that the magistrate issued the warrant without an allegation that goods had actually been stolen, and he also complained that the warrant did not specify the goods that were the object of the search. The court, however, concluded that the magistrate had sufficient information to issue the warrant. One of the judges explained that a search warrant is valid when "the fair intent to be collected from the information is that the party has reasonable grounds to suspect that the goods have been feloniously dealt with."

who arrested the plaintiff and the one who took him to the guard house) prevailed even though no felony actually had been committed. The court indicated that a constable, unlike a private person, could arrest on reasonable cause to believe a felony had been committed. This is consistent with Hale's view but not consistent with the contemporary view expressed by Professor LaFave. See supra notes 70 & 101.

American police face the recurring question of how to respond to suspicious situations, and American courts are not always as generous as their English counterparts have been. In *Campbell v. United States*, 273 A.2d 252 (D.C. 1971), for example, police approached two men, one carrying a television, the other a screwdriver. As the police approached, the man holding the screwdriver dropped it. When the officer handed the screwdriver back to the man, he denied that it was his. In response to questioning, the other man indicated that he had just purchased the television from his cousin, who had dropped the men off about a block away. The officers then took the men to the station for further investigation, and shortly thereafter they received a report of a housebreaking at an address only twenty-five feet from where they had confronted the men. *Id.* at 253. In reversing the defendants' conviction, the court held that the arrest, which occurred before the housebreaking report, was not based on probable cause. The court explained that the police did not know a crime had been committed, and the responses concerning the screwdriver and cousin were "at most suspicious." *Id.* at 254-55.

140. [1897] 1 Q.B. 374 (C.A.).

141. The application for the search warrant was based on this sworn information:

   Wood . . . on oath maketh complaint that he hath just and reasonable cause to suspect . . . that . . . Jones . . . has in his possession certain property belonging to . . . Wood, and . . . that . . . Jones has been in his employ for five years and is now under notice to quit, and that he has requested . . . Jones to allow him to search several boxes which . . . Jones has had packed ready to be taken away, but which he refuses to be looked through.

   *Id.* at 375.

142. *Id.* at 376.


The case of *Elsee v. Smith*, 1 Dow. & Ry. 97 (K.B. 1822), is also informative. Smith sued Elsee for falsely and maliciously causing a magistrate to issue a warrant. Elsee defended by argu-
Three hundred years after Hale, English judges still use such terms as "reasonable suspicion," "reasonable and probable cause," and "reasonable and probable cause for suspicion" interchangeably. Although English courts have not defined these terms precisely, the cases demonstrate beyond cavil that the terms have never been used to connote anything close to a more probable than not requirement. Indeed, in a recent opinion, Lord Devlin categorically rejected a prima facie standard and reiterated the appropriate test as one of reasonable suspicion, the test the common law has always used. Suspicion, Devlin added, is "a state of conjecture or surmise when proof is lacking." Emphasizing the contrast between reasonable suspicion and a prima facie case, Devlin stated further that "suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end." This view, of course, is consistent not only with Hale but also with the thirteenth-century statutes that authorized the arrest of suspicious persons. Throughout English history, the requirement of "probable cause of suspicion" has meant only that the police must have a reasonable basis for concluding that further investigation of the individual is warranted. The English standard has always reflected a belief that the individual's interest in security and privacy must defer to the public good when reasonable suspicion has been aroused.

B. The American Approach

Evidence exists that the first Congress, which proposed the Bill of Rights as amendments to the Constitution, shared the common law view that probable cause required only a focused suspicion. In 1789, for example, just a couple of months before the congressional resolution proposing the Bill of Rights, Congress passed a statute that permitted officials "to enter [and search] any ship or vessel, in which they shall have reason to suspect any goods, wares, or merchandise that the magistrate was at fault for issuing the warrant, for Elsee had alleged only that he had reason to suspect that certain trees had been stolen from the King's forest and that these trees were in plaintiff's possession. Elsee maintained that the magistrate should not have acted without a "perfect allegation that the offence had been committed." The court disagreed, unanimously holding that a magistrate may lawfully issue a search warrant on suspicion that property has been stolen. A different rule, one judge wrote, would create a risk that felonies would go undetected. "

144. See, e.g., McArdule v. Egan, 150 L.T.R. 412, 414 (C.A. 1933) (using all these terms). The court also spoke of "good probable and reasonable cause for suspicion." Id. at 414.

145. Hussien v. Chong Fook Kam, [1969] 3 All E.R. 1626, 1630 (P.C.) (describing "reasonable suspicion" as the test the common law has employed for many years).

146. Id. at 1630.

147. Id. Devlin added that this does not mean the police will always arrest when reasonable suspicion exists; rather, it means they have discretion.

148. See supra notes 80-86 and accompanying text.

149. See supra note 92 and accompanying text.
subject to duty shall be concealed.” The same statute required a search warrant for the entry and search of houses and other buildings, but it permitted officials to obtain a warrant when they had “cause to suspect” that such goods would be found. Moreover, Congress used identical terminology in similar statutes passed in 1790, after the Bill of Rights had been submitted to the states, and in 1799, after the fourth amendment had been adopted. Congress apparently saw no difference between the probable cause requirement in the fourth amendment and the “reason to suspect” and “cause to suspect” standards employed in these statutes.

Just as significantly, the first Congress in 1791, in a statute imposing duties on imported and domestic distilled spirits, authorized judges upon “reasonable cause of suspicion” to issue search warrants for fraudulently concealed spirits. These warrants allowed government officials to “enter into all and every such place or places in which any of the said spirits shall be suspected to be so fraudulently deposited . . . ” The fourth amendment, which permits warrants to issue only upon “probable cause,” became effective the same year as this statute. This further supports the view that the first Congress saw no inconsistency between the fourth amendment’s probable cause requirement and the common law’s requirement of reasonable suspicion.

The Supreme Court’s first probable cause decisions dealt with forfeiture claims and malicious prosecution suits, not with searches and seizures under the fourth amendment. Nevertheless, these cases are appropriate to consider because no reason exists to believe that the Court would have approached the constitutional concept any differently. The forfeiture provisions in the 1789 statute, the same statute that permitted searches based on “reason to suspect,” required the plaintiff claiming the seized goods or suing for damages to carry the burden of proof; officials who wrongfully seized goods were immune from damage actions as long as “there was a reasonable cause of seizure.” The 1799 statute, which continued to use the earlier standard for searches, again placed the burden of proof on such plaintiffs, but only after the government showed “probable cause”

150. Act of July 31, 1789, § 24, 1 Stat. 29, 43 (emphasis added). Congress passed a resolution submitting the Bill of Rights to the states in September, 1789. See 1 Stat. 97 (1789).
151. Act of July 31, 1789, § 24, 1 Stat. 29, 43.
154. Id. (emphasis added).
155. “[A]nd no warrants shall issue, but upon probable cause. . . .” U.S. Const. amend IV.
156. See supra notes 150-51 and accompanying text.
157. Act of July 31, 1789, § 27, 1 Stat. 29, 43-44.
158. Id. § 36 at 47-48.
159. See supra note 152 and accompanying text.
for its action. Thus, it appears that Congress used these various terms interchangeably, but more importantly, as indicated below, this is how the Court understood them. Likewise, the malicious prosecution cases are relevant because the probable cause needed to justify a prosecution was arguably greater, and certainly not less, than that required to support a search and seizure.

In *Locke v. United States*, a claimant of seized goods maintained that the probable cause requirement in the 1799 statute meant that the government had to prove a prima facie case of forfeiture. Chief Justice Marshall, writing for the Court, disagreed:

> It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure *made under circumstances which warrant suspicion*. In this, its legal sense, the Court must understand the term to have been used by Congress.

Marshall did not cite any authority for this "accepted" meaning of probable cause, but it clearly comports with what we have seen was the common law meaning of the term.

In *Wheeler v. Nesbitt*, a malicious prosecution case, the defendants obtained a warrant for the plaintiff's arrest after alleging that he had stolen four horses. The plaintiff brought suit after the court acquitted him of the charge on evidence showing that he lawfully owned the horses. The Court indicated that the plaintiff had the burden of demonstrating lack of probable cause. The Court added that probable cause existed if the defendants had "reasonable grounds for believing" the plaintiff guilty of the crime. The Court upheld the trial judge's instruction that probable cause "was the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the

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160. Act of March 2, 1799, § 71, 1 Stat. 627, 678. A somewhat similar provision in the same statute, however, immunized defendants from damages when there was "a reasonable cause of seizure." *Id.* § 89, at 696.
161. 11 U.S. (7 Cranch) 339 (1813).
162. *Id.* at 348 (emphasis added).
164. 65 U.S. (24 How.) 544 (1861).
165. *Id.* at 546-47.
166. *Id.* at 550.
person charged was guilty of the crime for which he was prosecuted."

In Stacey v. Emery, another forfeiture case, the Court indicated that the terms reasonable cause and probable cause could be used interchangeably:

\[\text{The authorities we have cited speak of "probable" cause. The Statute of 1799, however, uses the words "reasonable cause of seizure." No argument is made that there is a substantial difference in the meaning of these expressions, and we think there is none. If there was a probable cause of seizure, there was a reasonable cause. If there was a reasonable cause of seizure, there was a probable cause. In many of these reported cases the two expressions are used as meaning the same thing.}\]

The Court also indicated in another section of the opinion that probable cause meant only a "reasonable ground of suspicion."

Although Carroll v. United States is best known for establishing the so-called automobile exception to the warrant requirement, the case is also significant because of what it reveals about the Court’s view early in this century of the fourth amendment’s probable cause requirement. On September 29, 1921, federal undercover agents attempted to purchase whiskey from the defendants in Grand Rapids, Michigan. The defendants left the meeting place to obtain the whiskey, but they never returned. On October 6, the same agents observed the defendants in the same car on a highway between Grand Rapids and Detroit, but they were unsuccessful in attempting to follow them to

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167. Id. at 551-52. See also Brown v. Selfridge, 224 U.S. 189 (1912). Compare the English cases discussed supra notes 136-39 and accompanying text.

168. 97 U.S. 642 (1878).

169. Id. at 646. Some of the confusion noted by the Court regarding appropriate terminology stemmed from different wording in two sections of the statute that appeared to cover the same point. Compare Act of March 2, 1799, § 71, 1 Stat. 627, 678 (burden of proof shall lie on claimant “only where probable cause is shown for such prosecution”) with id. § 89 at 696 (claimant cannot recover damages if “there was a reasonable cause of seizure”). See also supra note 160. The Court in Stacey focused on § 89 of the statute.

170. 97 U.S. at 645 (quoting Munns v. Dupont, 17 F. Cas. 993 (C.C.D. Pa. 1811) (No. 9,926)). The full statement is that probable cause is a “reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.”

Dicta in the The Appollon, 22 U.S. (9 Wheat.) 362, 374 (1824), suggested that probable cause did require some focused suspicion. While taking judicial notice of the fact that the ship in question was seized from waters notorious for smuggling, the Court, through Justice Story, said that the question of probable cause “must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources.” No such evidence was presented.


172. For criticism of this exception to the warrant requirement and of Carroll's reasoning, see Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 AM. CRIM. L. REV. 603, 638-46 (1982).
Detroit. On December 15, the agents again saw the defendants in the same car on the same highway, this time travelling toward Grand Rapids. The agents stopped the car, searched it, and discovered contraband liquor.\(^{173}\) The Court found probable cause, noting that the defendants were the same persons who had previously offered to furnish the officers whiskey, that they were together in the same automobile, and that they were coming from Canada, a known source of illegal alcohol.\(^{174}\)

One can, of course, criticize *Carroll's* finding of probable cause.\(^{175}\) Unlike the English cases examined above, which involved either an accusation from a third party or some suspicious behavior by the person arrested, *Carroll* found probable cause even though the defendants had done nothing immediately before the search to warrant suspicion that they were then carrying contraband whiskey. The officers could not even have known whether the defendants were coming from Detroit, for they did not expect to observe them on the highway.\(^{176}\) Conceivably, the defendants had agreed to purchase whiskey for the agents two months earlier, but they had not delivered. Moreover, as the dissent recognized, this one event could not have justified a search every time the officers observed the defendants on the highway.\(^{177}\) It seems doubtful, therefore, that the common law reasonable suspicion standard justified the officers' conduct.\(^{178}\) The point, however, is not that *Carroll* was correctly decided on its facts but that the Court viewed probable cause as a less demanding concept than it is often viewed today. To this limited extent, *Carroll* accurately reflected the common law's conception of probable cause.

A similar conception of probable cause is evident in the result, if not in the language, of *Brinegar v. United States*.\(^{179}\) This case is especially significant because it contains the Court's most frequently quoted statement on the meaning of probable cause.\(^{180}\) Two federal

\(^{173}\) 267 U.S. at 134-36, 160. See also id. at 171-74 (McReynolds, J., dissenting).

\(^{174}\) The partners in the original combination to sell liquor in Grand Rapids were together in the same automobile they had been in the night when they tried to furnish the whisky to the officers, which was thus identified as part of the firm equipment. They were coming from the direction of the great source of supply for their stock to Grand Rapids where they plied their trade. That the officers, when they saw the defendants, believed that they were carrying liquor, we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so.

267 U.S. at 160.

\(^{175}\) See Black, A Critique of the *Carroll* Case, 29 Colum. L. Rev. 1068, 1087-89 (1929).

\(^{176}\) The distance between Detroit and Grand Rapids is over 150 miles. After unexpectedly confronting the defendants on the highway, the officers stopped them only 16 miles outside of Grand Rapids. 267 U.S. at 134, 160.

\(^{177}\) Id. at 174 (McReynolds, J., dissenting).

\(^{178}\) See also supra note 170.

\(^{179}\) 338 U.S. 160 (1949).

\(^{180}\) See supra note 2 and accompanying text.
officers from the Alcohol Tax Unit observed the defendant in Oklahoma driving a car that appeared to be "weighted with something." The defendant was driving in a westerly direction, about five miles west of the state line, on a highway that led from Joplin, Missouri, toward the defendant's home in Oklahoma. Although the officers had not observed the defendant cross the state line, their suspicions were aroused. One officer had arrested the defendant five months earlier for illegally transporting liquor. Moreover, on at least two occasions in the preceding six months, the officer had also observed the defendant loading large quantities of liquor into a vehicle in Joplin, perfectly legal conduct as long as the liquor was not brought into Oklahoma, a dry state. Beyond this, the officers claimed that Joplin was a "ready source" of liquor and that the defendant had a reputation as a liquor hauler. Finally, although the Court put this fact aside, the defendant accelerated his speed when he observed the officers on the highway.

In finding probable cause, the Brinegar Court cited not only Carroll but also Chief Justice Marshall's statement in Locke v. United States. In a slight but potentially significant shift in emphasis, however, the Court observed that probable cause since Marshall's time had come to mean more than bare suspicion. Although the Court did not cite the case or cases that had modified Marshall's definition, it insisted that a line must be drawn "between mere suspicion and probable cause." Nevertheless, both the Court's reaffirmation of Carroll and its finding of probable cause on such scant facts make plain that its conception of probable cause did not approach a more probable than not standard. Indeed, although the Court used the term "probability" to indicate something more than "mere suspicion," it still observed that "room must be allowed for some mistakes" in view of the many ambiguous situations that confront the police.

I do not mean to suggest that the Court has never viewed probable cause as a more demanding concept. On the contrary, the Court sug-

181. Id. at 163.
182. Id. at 162-68.
183. Id. at 166 n.7. For information concerning the current significance of flight at the appearance of the police, see 1 W. LaFave, supra note 7, § 3.6(e) at 669-71.
184. 338 U.S. at 175. See supra note 162 and accompanying text.
185. 338 U.S. at 175.
186. The Court did cite cases that discussed probable cause, see id. at 176 n.15, but these cases did not suggest a departure from Chief Justice Marshall's definition. Indeed, the Court cited Stacey v. Emery, 97 U.S. 642 (1878), a case, as already discussed, that adhered to the common law meaning of probable cause. See supra notes 168-70 and accompanying text.
187. 338 U.S. at 176.
188. The Court described Carroll as a close case, but one which it could not conclude had been decided incorrectly. 338 U.S. at 177-78. Given Carroll, the Court concluded that probable cause had to be found on the facts before it. Id. at 164-71, 178.
189. Id. at 176.
190. Id.
gested in *Johnson v. United States*, just one year before *Brinegar*, that probable cause required the police to narrow their suspicions to one particular individual. In *Johnson*, several officers knocked at a hotel room after obtaining probable cause that opium was being smoked there. When the defendant answered the door, the officers stepped inside. When the defendant denied using opium, the officers arrested her and searched her room, thereby finding incriminating evidence. The Court first held that the warrantless search was impermissible, no exigency being present to dispense with the warrant requirement. The government argued, however, that the search of the room was nevertheless valid incident to the defendant’s arrest. In response to this argument, the Court read the government’s brief as conceding that probable cause did not exist until the agents had entered the room and ascertained that the defendant was the sole occupant. The Court then reiterated that the warrantless entry was impermissible.

Much can be said in defense of the Court’s conclusion that the unconsensual, warrantless entry into the room violated the fourth amendment. The Court’s probable cause discussion, however, unfortunately was influenced by the warrant issue. Its suggestion that probable cause to arrest did not exist until the officers learned that the defendant was the sole occupant was inconsistent not only with hundreds of years of common law precedent but also with the views the Court itself had expressed about probable cause since the eighteenth century. Not surprisingly, the Court cited nothing but the

191. 333 U.S. 10 (1948). *Johnson* was decided just one year before *Brinegar*, but it was not included in *Brinegar*’s citation of cases that had purportedly elevated the original meaning of probable cause. See supra note 186 and accompanying text.

192. 333 U.S. at 12.

193. *Id.* at 13-15.

194. *Id.* at 16.

195. *Id.* at 16-17.

196. For a defense of a strict warrant requirement, see Grano, supra note 172.

197. But see the Court’s even stronger statement discussed supra note 83.

In *Henry v. United States*, 361 U.S. 98, 101 (1959), the Court indicated that *Johnson* represented the “high water” mark of the principle that probable cause requires more than “common rumor or report, suspicion, or even ‘strong suspicion.’ ” The Court also said that the early American cases supported this view. The court cited four cases, none of which supported its position. *Id.* at 101 nn.3-5. In *Frisbie v. Butler*, Kirby 213 (Conn. Super. 1787), a magistrate issued a general warrant to search all places and arrest all persons suspected by the complainant. The defendant was arrested under this warrant, convicted of stealing pork, and fined. The appellate court reversed the conviction because the complaint “on which the arraignment and conviction was had, contained no direct charge of the theft, but only an averment that the defendant was suspected to be guilty.” *Id.* at 215 (emphasis added). The court also indicated that it was not even clear that the defendant was suspected of theft instead of mere trespass, “and his being found guilty of the matter alleged against him in the complaint, could be no ground for sentencing and punishing him as for theft.” *Id.* Finally, the court also observed, consistently with the common law, that general warrants were impermissible. *Id.* In short, the case has no holding concerning the required level of suspicion to support an arrest or search.

In *Conner v. Commonwealth*, 3 Binn. 38 (Pa. 1810), a judge relied on common rumor and
government’s purported concession to support this stringent view of probable cause.

Of course, the question remains, especially for those who would charge the Court with the task of keeping the Constitution current with the times,\^\textsuperscript{198} of whether the Johnson view of probable cause is not the better one. I explore this question in the next section.

III. PROBABLE CAUSE FROM A POLICY PERSPECTIVE

A. The Unreasonableness of the More Probable Than Not Standard

The American Law Institute’s Model Code of Pre-Arraignment Procedure authorizes an arrest when an officer has “reasonable cause to believe” that a person has committed a crime.\^\textsuperscript{199} Similarly, the Code permits a judge to issue a search warrant when there exists “reasonable cause to believe” that evidence of crime will be found.\^\textsuperscript{200} As the commentary to the Code’s arrest section explained, the drafters deliberately rejected the term “probable cause” because they did not want to be misunderstood as suggesting that guilt must be more probable than not before an arrest can be made.\^\textsuperscript{201} While the commentary conceded that a more probable than not standard would further assure innocent people against interferences with their liberty, it maintained “that society would and should be unwilling to pay the price in less efficient crime prevention and prosecution which this assurance would entail.”\^\textsuperscript{202}

To illustrate its point, the commentary borrowed a hypothetical from report to issue, on his own initiative, an arrest warrant. A constable who refused to enforce the warrant was indicted and convicted. On appeal, the constable conceded that common rumor could give probability to a charge preferred upon oath, but he maintained that this warrant was defective because the judge had received no sworn testimony. \textit{Id.} at 40. The court held the warrant defective because probable cause was not established by oath. \textit{Id.} at 42-43.

Finally, Grumon v. Raymond, 1 Conn. 39 (1814), held only that a general warrant to search all suspected places and to search and arrest all suspected persons was void, while Commonwealth v. Dana, 43 Mass (2 Met.) 329 (1841), held, despite arguments based on \textit{Entick v. Carrington}, that a search warrant for lottery tickets had been properly issued. Thus, none of these cases supports the argument that probable cause has historically required more than a well-grounded suspicion. Compare the cases cited \textit{supra} note 163.

198. I have considerable difficulty with such a view of the Court’s authority under our constitution. See Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 \textit{Wayne L. Rev.} 1 (1981); Grano, Ely’s Theory of Judicial Review: Preserving the Significance of the Political Process, 42 \textit{Ohio St. L.J.} 167 (1981). Nevertheless, I think it important with respect to the probable cause issue to demonstrate that policy arguments yield the same conclusions as historical arguments.


201. \textit{Id.} § 120 commentary at 292-96. \textit{See also id.} § 210 commentary at 499-501 (rejecting the more probable than not standard for searches).

202. \textit{Id.} § 120 commentary at 294.
the Restatement of Torts. In the hypothetical, A confronts B and C standing over a body, each accusing the other of murder. According to the Restatement, A lawfully can arrest either B or C or both, even though he cannot conclude it more probable than not that one rather than the other committed the crime. Agreeing with the Restatement, the commentary explained that the legality of multiple arrests for a single offense will not be determined under the Code "in terms of the apparent mathematical precision of the 'more probable than not' test, but, rather, the substantiality of the basis for each arrest [will] be considered independently." 

The result comports with common sense, but the Restatement hypothetical is too easy. Imagine, instead, that the police suspect ten persons of a crime but have no way of discriminating among them. Suppose, moreover, that the police are certain, at least as certain as humanly possible, that one of the ten committed the crime. With the available evidence pointing equally to each suspect, the mathematical probability that any one suspect committed the crime is only ten percent. Indeed, for any suspect selected at random from the group, the odds are only ten percent that he is guilty but a whopping ninety percent that he is innocent. Such a probability analysis, however, distorts our perspective. It causes us to overlook the success of the police in narrowing their investigation from the universe of all possible suspects, which may include much of the population, to ten individuals. In a modern, mobile society, this should be seen as a rather significant accomplishment.

Assume now that arresting each suspect would permit further investigation such as interrogation, a face or voice lineup, sampling blood or hair, or taking fingerprints. Or assume that the nature of the

203. Id. § 120 commentary at 295 (quoting Restatement (Second) of Torts § 119, illustration 2 (1965)).
204. Id. at § 120 commentary at 296.
205. But cf. Mallory v. United States, 354 U.S. 449 (1957), where police investigation of a rape focused on the defendant and his two nephews. The three lived in the apartment building where the rape occurred, and they each had features generally resembling those of the rapist. Moreover, the defendant and one of his nephews disappeared shortly after the crime. The police arrested all three, and subsequent interrogation produced a confession from the defendant. The Supreme Court suppressed the confession because the police interrogated the defendant instead of promptly arraigning him, but its opinion suggested that the police should know whom to charge before they arrest. See supra note 83. It has been argued, however, that the Supreme Court did not suggest that the arrest of Mallory was illegal. See Model Code, supra note 199, at § 120 commentary at 295 n.14.
206. For present purposes, it is not important that full probable cause may not be required to justify stationhouse detention for some of these procedures. Cf. Davis v. Mississippi, 394 U.S. 721 (1969) (dictum that stationhouse detention for fingerprints may not require traditional probable cause). Under current law, some of these procedures clearly do require traditional probable cause. See, e.g., Dunaway v. New York, 442 U.S. 200 (1979) (stationhouse detention for interrogation).
Crime suggests that searching the actual offender’s house or car will yield incriminating evidence. The question is whether we may reasonably expect — indeed, require — each suspect to sacrifice some liberty or privacy in order to unmask the offender. I think we can. In constitutional language, I would say that probable cause exists to arrest or search each suspect.

Probable cause determinations balance individual interests against community interests and decide which must yield to the other. The difficulty with the more probable than not standard, and this is unfortunately true of many constitutional doctrines, is that it excessively exalts the individual. By doing so, it absolves the individual of any responsibility for the cooperative community enterprise. Because the more probable than not standard protects the individual virtually until society is prepared to charge him with crime, it flouts the argument that the community may legitimately demand some individual sacrifice in its law enforcement efforts. Its banner instead proclaims that to leave crime unsolved is better than to demand such sacrifice. Even in a society traditionally and properly dedicated to individual rights, such an exaltation of individual interests demands justification.

Legal scholars have constructed various “models” to describe the criminal justice system. These models, often couched in loaded terms, include the due process model, the crime control model, and even the family model. All these constructs may be artificial and perhaps even superficial, but to the extent they serve a purpose, I am suggesting the need for a community model. In thinking about the criminal justice system, we need a renewed commitment to the common law view that the individual cannot live in isolation, oblivious to the community’s needs. One who shares the benefits of community living may legitimately be expected to make reasonable sacrifices on behalf of the community’s efforts to solve and control crime. Such a perspective should inform our analysis of probable cause.

This notion of individual responsibility and obligation makes the arrests or searches in the above hypothetical reasonable. Having narrowed the universe of possible suspects to ten, the community would not be unreasonable in requiring all ten, nine of whom are presumably innocent, to sacrifice some liberty or privacy to solve the crime.

207. Citations here would only be provocative.
course, in a concrete case we might want to know more facts, such as whether alternative investigative techniques are available, but here it suffices to stress, as a general principle, that demanding some individual sacrifice from those suspected of crime is perfectly reasonable.

One may raise slippery slope objections to this argument. What if the police suspect twenty, a hundred, or even a thousand persons? Where do we stop if we do not base probable cause on a more probable than not standard? Obviously, we must stop somewhere, but we need not determine precisely where. Because we cannot quantify the concept of reasonableness, we necessarily can only engage in a commonsense appraisal of the reasonableness of the police activity in question. In the Model Code's words, the basis for each arrest or search must "be considered independently."

A more substantial objection to my argument may be that if we permit police to arrest or search the ten individuals in the hypothetical, we must also permit them to arrest or search any ten people if they can demonstrate a ten percent likelihood of success. Thus, we would have to permit random searches if the police could demonstrate that approximately one out of ten people on city streets unlawfully possesses a concealed weapon or narcotics. This objection lacks merit because its analogy is flawed. Although the probabilities in the original hypothetical and the objection's hypothetical are the same, the situations are distinguishable. In the original hypothetical, the police developed cause to suspect ten specific individuals, and only those ten were asked to sacrifice on the community's behalf. In contrast, this new hypothetical exacts a price from individuals not specifically suspected of wrongdoing. This latter situation conflicts with the fourth amendment's core concern, for above all the framers demanded protection against general warrants and the fishing expeditions that such warrants permitted. Under the fourth amendment, it is one thing to demand some sacrifice of liberty or privacy when suspicion has focused on an individual; it is another to demand such sacrifice when no cause whatsoever exists to believe that the individual, as opposed to anyone else, is involved with crime.

The stronger moral claim for sacrifice when suspicion has attached

209. See infra notes 223-51 and accompanying text.

210. The rejection of any mathematical approach to probable cause is perhaps even more important than rejection of a particular standard. The Model Code's commentary argues that "in the final analysis it is the inappropriateness of testing concrete cases, with their multiple and particular characteristics, against any standard couched in terms of mathematically precise degrees of probability, that has led the Reporters to speak of reasonable cause." Model Code, supra note 199, at § 120 commentary at 296.

211. Id.

212. See generally T. Taylor, Two Studies in Constitutional Interpretation 24-38 (1969); Grano, supra note 172, at 617.
to the individual only partly explains this distinction.\textsuperscript{213} Also of concern in the second hypothetical is the exposure of nearly everyone in society, not just a few individuals, to arrest or search. For most people the potentially greater magnitude of the intrusion would outweigh the government's interest in solving crime. Moreover, because arresting or searching everyone is impractical, the danger of arbitrary selection is apparent. The Supreme Court has stated more than once that control of arbitrary discretion is a fundamental fourth amendment concern.\textsuperscript{214}

The common law cases discussed in the previous section understood this distinction.\textsuperscript{215} Those cases did not approve of arbitrary arrests or searches; on the contrary, the eighteenth-century cases denounced the general warrants that gave officials unfettered discretion to arrest or search.\textsuperscript{216} The common law may not have required much suspicion, but it did require some cause to believe that the particular individual had been involved in crime. Even the thirteenth century nightwalker statutes reflected a belief that travelling after dusk raised a suspicion of felony,\textsuperscript{217} a belief that, although unreasonable today, may have been reasonable then. In assessing either suspicious conduct or a third party's report, the common law required suspicion to point to a specific individual before allowing an arrest or search to be made.

In many cases, of course, the police do not have several suspects. Instead the evidence they have points to a particular individual.\textsuperscript{218} Even

\textsuperscript{213.} In another context, I have argued that no moral impediment exists when the police seek to interrogate a person whom they have arrested on probable cause. Grano, 	extit{Voluntariness, Free Will, and the Law of Confessions}, 65 	extit{Va. L. Rev.} 859, 901-02, 909-19 (1979).

\textsuperscript{214.} Compare United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (fixed checkpoint stops near the border permissible; such checkpoints leave little room for arbitrary discretion) with United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving patrol stops near the border impermissible absent reasonable suspicion). See also Delaware v. Prouse, 440 U.S. 648 (1979) (random traffic stops impermissible absent reasonable suspicion; dictum suggests that fixed roadblock stops for traffic inspections would be different).

\textsuperscript{215.} See supra notes 80-149 and accompanying text.

\textsuperscript{216.} See supra notes 109-26 and accompanying text.

\textsuperscript{217.} See supra notes 80-83 and accompanying text.

\textsuperscript{218.} People v. Marshall, 69 Mich. App. 288, 244 N.W.2d 451 (1976) provides an illustration of this type of situation. The police discovered three bodies in a home, all stabbed to death by someone apparently left handed. Because there were no signs of forced entry, the police theorized that the killer had access to the home. Investigators also found strands of hair not belonging to the victims and traces of sperm over two of the bodies. Suspicion focused on the defendant, who was the son of one victim and the stepson of another. The defendant was left handed, he presumably had access to the house, he had a history of assaultive conduct, he had hair similar to that found at the crime scene, and he had been having loud arguments with his father. In addition, anonymous callers had suggested that he was the killer. On these facts, the police sought to bring the defendant to the station in order to take hair and blood samples, the latter because blood type can be ascertained from sperm.

The prosecutor, believing that probable cause did not exist, obtained a temporary detention order authorizing the desired samples to be taken. On appeal, the court avoided deciding whether such detentions are permissible absent traditional probable cause; it held instead that traditional probable cause was present. \textit{Id.} at 299-302, 244 N.W.2d at 458.
in these cases, the question is whether we should attempt to quantify the probability of the defendant's guilt, as the more probable than not standard suggests, or whether we should simply engage in a commonsense balancing of the interests. Under a balancing approach, of course, the strength of the suspicion would remain an important factor to consider.

The previous discussion suggests that the balancing analysis is more appropriate. We slight the community's interests by insisting that the individual must be protected against intrusion until the police are convinced that he more likely than not is the offender. When, for example, the reasonably cautious person believes that the available evidence points to a particular suspect, when investigative alternatives have been exhausted or appear prohibitive, and when an arrest or search may provide additional evidence to help solve the crime, the community's demand for individual sacrifice may be reasonable. Of course, the sacrifice may be unpleasant, especially if the individual is exonerated, but in evaluating the reasonableness of the police conduct, we should not ignore the individual's obligation to the community's cooperative enterprise.

Finally, situations exist in which the police are not sure that a crime has occurred. In Gates, for example, the police could not be sure that any crime had been or was being committed. While more caution may be appropriate in such cases, the basic analysis should remain the same. Suppose, for example, that an informant in a large city reports that Jones has committed murder and has placed the unnamed victim's body in the trunk of his car. Suppose, further, that the police are not sure whether a murder has occurred, a realistic assumption especially in urban areas with large populations, countless missing persons, and numerous transients. On the face of it, the uncertainty regarding whether a murder occurred does not distinguish this situation from those previously discussed. It may be perfectly reasonable to require Jones to open his trunk well before we can assert with confidence that a dead body more probably than not will be found. This conclusion is consistent with the common law approach that permitted arrests on suspicion pursuant to the hue and cry even when the constable was not sure that a felony had been committed.

219. But see W. LaFAye, supra notes 70 & 101 and accompanying text.
220. See supra notes 101 & 139 and accompanying text. See also Model Code, supra note 199, § 120 commentary at 296:

Since in many cases at the time of an arrest there will be some doubt as to both the commission of the crime and the identity of the offender, and since these two probabilities are usually independent so that the probability as to a particular person's guilt is the product of these two probabilities, there will be few cases which could strictly measure up to a "more-probable-than-not" standard.
The view of probable cause advocated in this section recognizes arrests and searches as legitimate investigative tools, tools to be used not after a crime has been solved but rather in the process of solving crime. It agrees with Lord Devlin that "suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end." Most importantly, unlike the more probable than not standard, it stresses the need to balance realistically the competing interests of the individual and his community. In Lord Mansfield's words, "[m]any an innocent man has been, and may be taken up upon suspicion; but the mischief and inconvenience to the public in this point of view are comparatively nothing. It is of great consequence to the police of the country."

B. The Ingredients of a Balancing Approach to Probable Cause

In rejecting a "multifactor balancing test of 'reasonable police conduct,'" the Supreme Court has suggested that the fourth amendment's requirement of probable cause itself reflects the appropriate balance between the individual's and society's interests. To a large extent this is true, although, as we have seen, there has been a recent tendency to skew the balance in the individual's favor. Properly understood, most probable cause issues should involve only the question of whether the police had a well-grounded suspicion concerning the target of their action. The common law cases certainly did not engage in any elaborate balancing analysis before deciding whether an arrest or a search was legal.

Nevertheless, three considerations suggest that a balancing analysis cannot be altogether ignored. First, even under a relaxed reasonable suspicion standard, some cases will be close, and in deciding close cases, courts cannot help but balance the interests at stake. Second, by tying probable cause to what the reasonably cautious person would do under the circumstances, the Supreme Court has injected balancing into the equation, for the reasonably cautious person behaves by evaluating the totality of circumstances and by balancing the competing interests. Third, the reasonably cautious person will evaluate the same police conduct differently depending not only on the level of antecedent cause but on the perceived need for that conduct.

Fourth amendment analysis offers two methods of balancing. First, courts can establish an appropriate level of required cause by balanc-

221. See supra note 147 and accompanying text.
224. Id. at 208, 213-14.
225. See supra note 2 and accompanying text.
ing the need for a particular investigative technique against the invasion the technique entails. When courts use this approach, they apply the established level of required cause whenever the police employ the particular technique. Thus, temporary street stops for interrogation always require only "reasonable suspicion,"226 while stationhouse detentions for interrogation always require full, traditional "probable cause."227 Second, courts can instead balance the interests by concentrating, as Professor Barrett once advocated, on the facts of each case.228 Under this approach, the same investigative technique may require more antecedent cause in one case than in another.229

In Camara v. Municipal Court230 the Supreme Court employed a balancing analysis and held that the meaning of probable cause may vary in different contexts.231 Subsequently, although relying on Camara's balancing analysis, the Court in Terry v. Ohio232 nevertheless suggested that street stops and frisks simply are not subject to the fourth amendment's probable cause requirement.233 The Court explained that the fourth amendment's warrant clause, which contains the probable cause requirement, does not apply to rapidly unfolding street investigations.234 In a perceptive criticism shortly after Terry, Professor LaFave observed that it would have been more consistent with Camara for the Court to have said that stops and frisks require a different kind of probable cause.235

Professor LaFave, however, rejected as unworkable Professor Barrett's suggestion that reasonableness must be determined on the facts

228. See Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. CT. REV. 46, 63 (1960) (asking whether fourth amendment would "be better served by . . . determin[ing] the reasonableness of [an intrusion] by balancing the seriousness of the suspected crime and the degree of reasonable suspicion [the police possess] against the magnitude of the invasion of the [individual's] personal security and property rights").
229. See also W. Schaefere, The Suspect and Society 25 (1967) ("The Fourth Amendment does not, I submit, preclude us from weighing the extent of the detention against the strength of the evidence that justifies it.").
231. The Court stated that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." Id. at 536-37. The Court held that in the context of housing inspections by the Department of Health, probable cause requires only that "reasonable legislative or administrative standards for conducting an area inspection [be] satisfied with respect to a particular dwelling." Id. at 538.
233. Id. at 20. For citations to Camara, see id. at 21, 27.
234. Id. at 20.
of each case.236 In LaFave’s view, discrete levels of probable cause can be defined for discrete investigative techniques. For street stops, he maintained, probable cause requires a “substantial possibility” of guilt, but for an arrest it requires that guilt be more probable than not.237 Thus, LaFave’s view differed from the Court’s more in characterization than in substance. Ironically both views contributed to the present misconception, so inconsistent with both the English common law and early American views, that probable cause as traditionally defined requires more than a well-focused suspicion.238

The real difficulty, however, is that by positing a system with discrete levels of antecedent cause, both the Court and Professor LaFave implicitly suggested that quantitative evaluations of fact situations are feasible and desirable.239 Moreover, their approach imposed on the reasonably cautious person an unrealistic method of analysis. Reasonably cautious persons, as stated above, do not simply measure facts against some predetermined standard of measurement. Reasonably cautious persons respond to factual complexities and nuances, not to rigid legal rules.240

In real life, the reasonably cautious person would consider several factors in assessing the reasonableness of police conduct.241 First, he or she would want to know the strength of the government’s interest. As Justice Jackson once recognized, roadblock searches to save a kidnap victim are eminently more reasonable than roadblock searches to uncover bootleg whiskey.242 For purposes of judicial review, however, care must be taken not to carry this point too far, lest it enable the

236. Id. at 56-57.
237. Id. at 57, 73-74. See also supra notes 70 & 101 and accompanying text. Professor LaFave did concede, however, that the seriousness of the crime was a case-by-case variable that must not be ignored. Id. at 57-58.
238. Terry provoked widespread concern about the potential for abuse in permitting fourth amendment activity to occur without traditional probable cause. See, e.g., Model Code, supra note 199, § 110 commentary at 262-88. Ironically, however, by employing the common law standard for arrests as the required justification for temporary street detentions, Terry helped to make the traditional requirement of probable cause more rigorous.
239. See supra note 210 and accompanying text.
240. See, e.g., Restatement of Torts § 119 comment j (1934) (maintaining that the “nature of the crime committed, or feared, the chance of the [suspect escaping], the harm anticipated if [the suspect escapes] and if he is arrested” should be considered in determining whether an arrest should be made). See also E. Cahn, Confronting Injustice 11-12 (1962) (describing a reasoning process, “graded pragmatism,” by which “beliefs must be ranked and graded according to the conceived cost that may follow from proceeding to act on them”); G. Sawyer, Law in Society 12 (1965) (maintaining that legal activity exemplifies “the general human necessity for getting on with the business in hand, being content with approximations, committing oneself to a course of action with much less than complete assurance as to its soundness”).
judiciary to nullify criminal laws it dislikes. Narcotics offenses, for example, can be viewed as harmless nuisances or as offenses that are eroding the fabric of society. To a large extent, the judiciary must accept society's judgment, as reflected at least partly in its sentencing laws, about the seriousness of certain offenses. Nevertheless, Justice Jackson's point cannot be ignored, for intuitively we agree that less antecedent cause should be required as the need for the police conduct becomes more urgent.

Evaluating the government's interest involves more than simply comparing kidnapping and bootlegging. When the desired information is readily available through less intrusive means, the community's right to demand individual sacrifice will seem less obvious. For example, the reasonableness of a detention to determine blood type may depend partly on whether the police can just as readily obtain the same information from public records. Similarly, one must consider the likelihood that the intrusion will advance the investigation and ultimate prosecution of the offender. Detaining a suspect to obtain a blood sample, for example, may be unreasonable if the desired information will contribute little to the crime's solution or to proof of guilt at trial.

In assessing the government's interest, the need for immediate action can also be a relevant consideration. For instance, we should give more deference to an officer who has had to make a prompt on-the-scene judgment about the proper course of action. Moreover, it comports with common sense to recognize that less cause should be required when evidence may be lost than when the risk of loss is minimal. Similarly, we do not expect an officer to be as cautious with a report that a murder is in progress as with a report that marijuana plants are being grown. It is not simply that murder is more serious than growing marijuana but, more significantly, that delay or hesitancy with regard to such a murder report could prove disastrous.

The nature of the intrusion is also relevant. Common sense and experience teach that some intrusions are more burdensome than others.


245. See Model Code, supra note 199, § 170 commentary at 480 (discussing reasonableness of detentions for nontestimonial identification purposes without traditional probable cause).


It was clear that the officer had to act quickly if he was going to act at all, and, as stated above, it seems to me that where immediate action is obviously required, a police officer is justified in acting on rather less objectively articulable evidence than when there is more time for consideration of alternative courses of action.
For example, although the case law requires "probable cause" to search either a home or a car, we need no more than common sense to recognize that a search of the former is far more intrusive than a search of the latter. Other things being equal, we would therefore expect the reasonably cautious person to demand more antecedent cause for a house search than a car search, a conclusion the Court in Brinegar seemed to share. 248

In objection to this line of reasoning, it may be argued that fixed standards are needed to provide the police concrete guidelines and to permit the judiciary to engage in judicial review with more confidence. 249 Although this objection has some force, and perhaps its own appeal to common sense, it is not ultimately persuasive. The fiction of discrete quantitative standards of antecedent cause has not produced a body of consistent, easily understood case law, nor should we expect it to. The reason, as I have tried to demonstrate, is that the real life, commonsense judgments of reasonably cautious people cannot be cabined by rigid, antecedent yardsticks. Indeed, I would speculate that while the cases speak the language of categorical rules, many probably reflect the balancing analysis outlined above. I would not be surprised, for example, by an empirical study demonstrating that courts assess probable cause less rigidly when a car rather than a home is involved. 250

The need for clear rules, however, cannot be discounted altogether. As I indicated at the outset, the balancing approach must be considered against the historical background of probable cause as a relatively

248. Brinegar v. United States, 338 U.S. 160, 176 (1949) ("No problem of searching the home or any other place of privacy was presented either in Carroll or here."). Homes and cars are treated differently for purposes of the warrant requirement, but the above statement was made in the context of a probable cause discussion.

249. See Dunaway v. New York, 442 U.S. 200, 219-20 (1979) (White, J., concurring) ("But if courts and law enforcement officials are to have workable rules ... this balancing must in large part be done on a categorical basis — not in an ad hoc, case-by-case fashion by individual police officers."). See also United States v. Place, 103 S. Ct. 2637, 2652 (1983) (Blackmun, J., concurring) ("I am concerned, however, with what appears to me to be an emerging tendency on the part of the Court to convert the Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable."). Professor Amsterdam voiced a similar objection some years ago. Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 393 (1974) (expressing fear that a sliding scale approach to probable cause would convert the fourth amendment into an "immense Rorschach blot"). Amsterdam added,

Under that view, "[r]easonableness is in the first instance for the [trial court] ... to determine." What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

Id. at 394.

250. Cf. 2 W. LAFAVE, supra note 7, § 7.2(d), at 530-34 (suggesting that the particularity requirement is not rigorously enforced in automobile cases).
undemanding concept. Historically, courts have required little suspicion to justify even the most serious intrusions on liberty and privacy. Unless this is kept in mind, balancing may enable courts to hamper law enforcement as severely as the more probable than not test can.

The balancing approach perhaps is most appropriate for the magistrate called upon to issue a warrant. Before the event, the magistrate is in a good position to decide whether an arrest or search should be made or whether other investigative techniques should be employed. Moreover, the impartial magistrate may balance the interests more objectively than a police officer. This provides a strong reason for enforcing a tough warrant requirement, something the Court unfortunately has been loath to do.251 After the event, however, a properly applied balancing test limits the scope of judicial intervention. The proper scope of judicial review in probable cause cases is the topic of the next section.

C. Probable Cause and Judicial Review

Dissenting in Spinelli v. United States,252 Justice Black said, [t]he existence of probable cause is a factual matter that calls for the determination of a factual question. While no statistics are immediately available, questions of probable cause to issue search warrants and to make arrests are doubtless involved in many thousands of cases in state courts. All of those probable-cause state cases are now potentially reviewable by this Court. It is, of course, physically impossible for this Court to review the evidence in all or even a substantial percentage of those cases. Consequently, whether desirable or not, we must inevitably accept most of the fact findings of the state courts, particularly when, as here in a federal case, both the trial and appellate courts have decided the facts the same way.253

Until Illinois v. Gates,254 I had always dismissed Justice Black's remarks as hardly worthy of consideration. Regardless of the issue involved, the Court lacks sufficient resources to review even a fraction of state and federal cases; yet, no one has seriously argued that the Court should abdicate judicial review altogether. I also believed that Justice Black mistakenly described probable cause as a "factual" rather than a legal issue, and that appellate review of the legal issue of probable cause was as appropriate as appellate review of any other legal issue.

251. See Grano, supra note 172.
253. Id. at 433-34 (Black, J., dissenting).
In *Gates*, however, the Court turned sharply in Justice Black's direction. The Court stated with new-found\textsuperscript{255} seriousness that appellate scrutiny of a magistrate's decision should not take the form of de novo review.\textsuperscript{256} It indicated that on appeal the only question should be whether the magistrate had a "substantial basis" for finding probable cause.\textsuperscript{257} Furthermore, the Court, in a footnote, made the provocative statement that because so many variables exist in the probable cause equation, "one determination will seldom be a useful 'precedent' for another."\textsuperscript{258} Professor Kamisar says that this last remark made him "wince," for it immediately reminded him of the difficulties engendered by the voluntariness doctrine that once governed the law of confessions.\textsuperscript{259}

My original beliefs and Professor Kamisar's concerns notwithstanding, both Justice Black in *Spinelli* and the Court in *Gates* correctly perceived the disutility of strict judicial review in this context. As we have seen, probable cause under the Court's own formulation requires an assessment of how the reasonably cautious person might respond to the particular circumstances.\textsuperscript{260} As this article has elaborated, in many instances this assessment requires the decisionmaker to balance the competing interests.\textsuperscript{261} Reasonably cautious people, however, frequently respond to the same facts differently. We know, for example, that on the same evidence one jury may acquit while another may convict, but, except in unusual cases, we are prepared to accept either response as reasonable. On appeal of a jury verdict, the court does not ask whether it would have found the defendant guilty but only whether a reasonable jury could have found the defendant guilty.\textsuperscript{262} Applying this principle to the review of a finding of probable cause, the court should similarly ask only whether the reasonably cautious person could have concluded that probable cause was present. Otherwise, we would have to explain why the standard of review for probable cause is stricter than it is for jury verdicts.

\textsuperscript{255} The Court has said this before but generally has failed to act upon it. See, e.g., *Spinelli* v. United States, 393 U.S. 410, 419 (1969); *Jones* v. United States, 362 U.S. 257, 270-71 (1960).

\textsuperscript{256} 103 S. Ct. at 2331.

\textsuperscript{257} Id. at 2331, 2336.

\textsuperscript{258} Id. at 2332 n.11.


\textsuperscript{260} See supra note 2 and accompanying text.

\textsuperscript{261} See supra notes 223-51 and accompanying text.

\textsuperscript{262} See, e.g., *Jackson* v. Virginia, 443 U.S. 307, 319 (1979) (constitutional standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). See also C. McCormick, EVIDENCE 789-90 (2d ed. 1972) (discussing the level of proof required to survive a directed verdict motion).
Viewed from this perspective, the voluntariness confession cases that Professor Kamisar invoked do not furnish an appropriate analogy. Whatever voluntariness means, the voluntariness doctrine does not require courts to examine the likely response of a hypothetical "reasonable person." Instead, as Professor Kamisar has argued, the courts have used the voluntariness test as a tool for approving some police practices and disapproving others. Thus, the voluntariness doctrine has generated almost a per se rule that police use of physical force will render a confession inadmissible. If Professor Kamisar has correctly described the purpose of the voluntariness doctrine, its totality of circumstances test, which renders one case of limited precedential value for another, is inadequate because it cannot clearly separate permissible and impermissible interrogation techniques. The probable cause inquiry, by way of contrast, does not attempt to identify certain police practices as acceptable or unacceptable. Rather, the probable cause inquiry is intended to ascertain only whether the reasonably cautious person would have responded to the particular circumstances by making an arrest or search. We know that arrests and searches are permissible; the probable cause inquiry is designed to tell us only whether the particular facts at hand warranted such police activity. Thus, while we arguably may want "precedent" in the confessions context, the nature of probable cause requires fact-specific judicial decisions that consequently have limited precedential value.

The utility of labeling probable cause a "factual matter," as Justice Black did, is not as clear. Taking this approach, a number of federal courts have held that lower court findings of probable cause must be accepted unless they are clearly erroneous. While this approach generally comports with my analysis, it has the disadvantage of raising questions about both the meaning of "clearly erroneous" and

263. For an argument that this should be part of the inquiry, see Grano, supra note 213, at 896-909.


266. For criticism of the voluntariness test on this ground, see Y. Kamisar, POLICE INTERROGATION AND CONFESSIONS 69-76 (1980). For an argument in defense of a somewhat modified voluntariness test, see generally Grano, supra note 213.


268. In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), the Court said, A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. See also United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981).
the difference between legal and factual issues.\textsuperscript{269} Without attempting to answer these questions, it should suffice to say that findings of probable cause must be accepted unless the reasonably cautious person could have only concluded that probable cause was lacking.

If this approach is followed, appellate reversal of probable cause determinations admittedly will be as infrequent as appellate reversal of jury verdicts. This may appear to undermine, in Justice Brennan's words, "the judiciary's role as the only effective guardian of Fourth Amendment rights."\textsuperscript{270} This objection, however, fails to discriminate between those situations that appropriately demand strict judicial review and those that do not.\textsuperscript{271} For example, whether governmental activity is a "search" within the meaning of the fourth amendment is a judicial question,\textsuperscript{272} and no reason exists for an appellate court to defer to a government official's or a lower court's conclusion that certain activity is or is not a search. Similarly, courts must define the nature and scope of exceptions to the warrant requirement. Appellate courts should not defer on questions such as whether, as a matter of course, entire houses can be searched incident to an occupant's arrest\textsuperscript{273} or whether a warrantless search of a footlocker in police custody is permissible absent exigent circumstances.\textsuperscript{274} On issues such as these, an appellate court may reverse a policeman's or a lower court's conclusions simply because it disagrees with them.

Accordingly, the definition of probable cause should properly remain subject to plenary appellate review. The application of the probable cause standard to particular fact situations, however, cannot profitably be subject to plenary appellate review, because any test that refers to a reasonable person's assessment of the facts inevitably leaves considerable leeway for permissible differences of opinion. An appellate court should

\textsuperscript{269} In the federal habeas corpus context, where state court fact-finding is entitled to a presumption of correctness, the Court has had to struggle with the distinction between findings of pure fact and mixed determinations of law and fact. It has not always done well. See, e.g., Sumner v. Mata, 449 U.S. 539 (1981).

\textsuperscript{270} Illinois v. Gates, 103 S. Ct 2317, 2351 (Brennan & Marshall, JJ., dissenting).

\textsuperscript{271} I once suggested that the distinction made in other areas of constitutional law between strict scrutiny and mere rational basis review perhaps should be applied to fourth amendment issues. See Grano, Supreme Court Review — Foreword: Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement, 69 J. CRIM. L. & CRIMINOLOGY 425, 449 n.219 (1978). The text here is an attempt to put some flesh on that idea. I am suggesting that judicial review of probable cause determinations should employ a rational basis standard rather than a strict scrutiny standard.


not reverse a finding of probable cause merely because it disagrees with the lower court's analysis of the facts.\textsuperscript{275} This argument, however, does not completely dispose of Justice Brennan's objection. As he stated in his \textit{Gates} dissent, we premise much of our fourth amendment law on the belief that a neutral and detached magistrate, not a police officer, should decide whether privacy must yield to the government's desire to arrest or search.\textsuperscript{276} If this view is correct — and I have argued elsewhere that it perfectly captures the fourth amendment's underlying purpose\textsuperscript{277} — then determining who should decide whether an arrest or search will be made is more important than deciding the post-arrest or post-search question of whether probable cause existed. The question of who decides whether probable cause exists is especially apposite in light of Lord Devlin's point that sufficient cause does not mandate that an arrest or search should occur, but rather, it establishes discretion to engage in such activity.\textsuperscript{278} A rigorously enforced warrant requirement would require that a judicial officer, whenever practicable, decide whether that discretion should be exercised. It would have the magistrate, not the police officer, decide whether privacy interests should yield to law enforcement interests or whether the police should investigate further before such individual sacrifice is demanded. Thus, Justice Brennan is correct in stressing the importance of judicial review, but, under the fourth amendment, that review is more appropriate, and more meaningful, if it occurs \textit{before} the event.

Even under a rigorous warrant requirement, however, situations will occur in which obtaining a warrant is impractical. Moreover, police will continue to make warrantless searches and seizures as long as the Court adheres to the view that warrantless felony arrests may be made in public places without regard to exigent circumstances.\textsuperscript{279} Thus, one may argue that the previous paragraph does not fully answer Justice Brennan's concern about limiting the role of judicial review. Unless some form of strict judicial scrutiny occurs after the event, appellate courts will not review the vast number of cases in which the police proceed without a warrant.

Three alternative responses may be made to this objection. First, as long as we permit some fourth amendment activity to occur without a warrant, police will often be required to decide, in the first instance,

\begin{itemize}
  \item \textsuperscript{275} \textit{See supra} note 74.
  \item \textsuperscript{276} Illinois v. Gates, 103 S. Ct. 2317, 2351 (Brennan & Marshall, JJ., dissenting).
  \item \textsuperscript{277} \textit{See Grano, supra} note 172.
  \item \textsuperscript{278} \textit{See supra} note 147 and accompanying text.
  \item \textsuperscript{279} United States v. Watson, 423 U.S. 411 (1976). The Court in \textit{Watson} relied partly on an historical analysis, and its conclusion, whether we like it or not, may have been correct. \textit{See} 2 M. Hale, \textit{supra} note 89, at 85-104. My defense of a strong \textit{search} warrant requirement is based largely on a similar historical analysis. \textit{See Grano, supra} note 172, at 613-21.
\end{itemize}
whether the reasonably cautious person would arrest or search under the circumstances. Moreover, if, as I have argued in this article, probable cause requires a reasonableness analysis that cannot be quantified, the scope of judicial review must necessarily be narrow. Were we to permit plenary judicial review of the officer's judgment, we would not be faithful to the reasonableness test. By its very nature, a reasonableness test leaves considerable room for permissible differences of opinion.²⁸⁰ Such a test deems irrelevant the conclusion a reviewing judge might have reached had he or she been on the street. The judge should only decide whether the officer's conclusion is one that a reasonable person could not have made.

Some may find this first response unacceptable, although objectors should bear the burden of explaining both the importance and profitability of judicial second-guessing. Nevertheless, if this response is unacceptable, a second response would concede the need for plenary review by the trial judge but deny such review to appellate courts. That is, the trial judge could be permitted to act, albeit after the event, as an issuing magistrate. Thus, this approach would provide one level of strict judicial scrutiny, just as occurs in warrant cases.²⁸¹ Once the trial judge decided, however, appellate review would be just as limited as it is in warrant cases. Although this approach has the disadvantage of permitting police judgments to be second-guessed by trial level armchair philosophers, it at least has the advantage of reducing appellate court involvement in cases that, once decided, can have only limited precedential value.

A third response would simply permit judicial review to differ in scope depending on whether the police obtained a warrant. Under this approach, appellate courts would defer to a magistrate's decision to issue a warrant, but every court, from the trial court to the Supreme Court, would give plenary review to probable cause issues in cases not involving a warrant. Arguably, this approach would have the virtue of encouraging police to obtain warrants.²⁸² Nevertheless, I find this approach the least desirable of the three. It is inconsistent, on the one hand, to permit the police to act without a warrant but, on the other hand, to impose a penalty on them for doing so. If we want the police to obtain a warrant, we should directly require that they do so by closing

²⁸⁰. See supra text accompanying note 275.
²⁸¹. One may question whether issuing magistrates engage in any kind of strict judicial scrutiny before approving warrants. See L. TIFFANY, D. McINTYRE, D. ROTENBERG, DETECTION OF CRIME 119-20 (1967) (reporting some evidence that magistrates give more careful attention to requests for search warrants than to requests for arrest warrants). Of course, if magistrates do not take the warrant process seriously, the entire fourth amendment structure, which is built around the warrant requirement, should be reconsidered.
²⁸². Cf. 1 W. LAFAYE, supra note 7, 3.1(c) at 445-46 (indicating that judicial review may be more deferential in warrant cases to encourage use of the warrant process).

In United States v. Leon, 104 S. Ct. 3405 (1984), decided after this article was written, the
the loopholes that currently exist in fourth amendment warrant law.\textsuperscript{283} We should not permit a lower court’s finding of probable cause, “based on the ‘fact-finding tribunal’s experience with the mainsprings of human conduct,’”\textsuperscript{284} to be reversed on appeal unless it exceeds the bounds of reasonableness.

Regardless of the approach taken in cases without a warrant, the appropriateness of limited appellate review when the police have obtained a warrant should be apparent. Accordingly, we should reject Justice Stevens’ dissent in \textit{Gates}, which found probable cause lacking even under the majority’s totality of circumstances test, because it seems to suggest de novo review of the magistrate’s judgment.\textsuperscript{285} The Brennan dissent, however, argued that the majority’s abandonment of the two-pronged test caused it to employ the wrong legal standard to evaluate the facts.\textsuperscript{286} This “legal” question is the subject of the final section of this paper.

\section*{IV. \textit{Gates} Revisited — Probable Cause and the Hearsay Report}

We at last can return to \textit{Gates}’s rejection of \textit{Spinelli}’s two-pronged test for evaluating hearsay sources of probable cause. \textit{Gates}, it will be recalled, indicated that \textit{Spinelli}’s two prongs should be viewed as relevant considerations in a totality of circumstances analysis rather than as separate, independent requirements.\textsuperscript{287} Moreover, the \textit{Gates} Court stated that strength in one prong can overcome a deficiency in the other.\textsuperscript{288} According to Professor LaFave, this assertion is not only

\footnotesize{Supreme Court held that the exclusionary rule should not apply when the police have reasonably relied on a subsequently invalidated search warrant. Although the Court stated that it was leaving the probable cause standard untouched, the holding in \textit{Leon} obviously accomplishes by another route what the Court tried to accomplish in \textit{Gates} when it required appellate courts to give deference to the magistrate’s finding of probable cause. If the Court subsequently extends \textit{Leon} to probable cause cases not involving search warrants, it will achieve through “remedy” analysis what the text is advocating as a matter of substantive fourth amendment law.

\textsuperscript{283} See Grano, \textit{supra} note 172.

\textsuperscript{284} Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962) (quoting Commissioner v. Duberstein, 363 U.S. 278, 289 (1960)).

\textsuperscript{285} See \textit{supra} notes 53 & 56-67 and accompanying text. Justice Stevens criticized the majority for rejecting, “in a fact-bound inquiry of this sort, the judgment of three levels of state courts.” 103 S. Ct. at 2361 (Stevens & Brennan, JJ., dissenting). His point was not well taken. First, the majority rejected the \textit{legal} standard that the lower courts had applied. Second, the lower Illinois courts had reversed the magistrate’s determination that probable cause existed. It was within the permissible scope of judicial review for the Supreme Court to fault the lower courts for not showing proper deference to the magistrate’s findings. In effect, the Court reversed the Illinois courts for applying the wrong standard of judicial review.

\textsuperscript{286} See \textit{supra} note 50 and accompanying text.

\textsuperscript{287} See \textit{supra} notes 23 & 33 and accompanying text.

\textsuperscript{288} See \textit{supra} note 36 and accompanying text.
"dead wrong" but also "totally inconsistent with the Court's prior teachings."\(^{289}\)

Was the Court, as LaFave insists, "dead wrong"? To illustrate its point, the Court provided three examples that are best considered seriatim. In the first example, the hearsay report satisfies *Spinelli*'s veracity prong but not its basis of knowledge prong.

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause.\(^{290}\)

One should note that the Court did not say that probable cause always exists in such cases; it said instead that the informant's failure "thoroughly" to describe the basis of his knowledge should not be an "absolute bar" to a probable cause finding.

In spite of the cautious wording, Professor LaFave maintains that the Court's assertion "simply is not so."\(^{291}\) If the Court is right, LaFave insists, then an honest officer's conclusory statement to a magistrate concerning the location of contraband should likewise suffice.\(^{292}\) The law, however, does not permit this.\(^{293}\) In response to LaFave, it may be initially argued that the law's treatment of the honest police officer perhaps should be reconsidered. Arguably, a conclusory statement from an officer "known" to the magistrate for the "unusual reliability" of his or her predictions should suffice.\(^{294}\) Indeed, even in terms of two prong analysis, it might be perfectly reasonable to infer a reliable basis of knowledge in such cases. If, for example, an informant or a police officer has provided ten reports concerning narcotics, all of them reliable, it may be reasonable to infer that the individual does not report information unless it has been reliably obtained. Such an

\(^{289}\) 1 W. LAFAVE, supra note 3, at 137.
\(^{291}\) 1 W. LAFAVE, supra note 3, at 137.
\(^{292}\) Id. See also 103 S. Ct. at 2350 (White, J., concurring) (arguing that if a statement by an honest informant could furnish probable cause, then the "affidavit of an officer, known by the magistrate to be honest and experienced" must a fortiori be acceptable, because the alternative would be "quixotic").
\(^{293}\) 1 W. LaFave, supra note 3, at 137.
\(^{294}\) In *Spinelli* v. United States, 393 U.S. 410, 424 (1969) (White, J., concurring) (emphasis added), Justice White said,

Indeed, if the affidavit of an officer, known by the magistrate to be honest and experienced, stating that gambling equipment is located in a certain building is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause. *A strong argument can be made that both should be acceptable under the Fourth Amendment*, but under our cases neither is. Compare the same Justice's statement in *Gates*, quoted supra note 292.
Inference seems especially reasonable under a probable cause analysis that asks whether the reasonably cautious person could form a well-grounded suspicion by relying on the report. One has to be rather dogmatic to maintain that reliance on a conclusory tip from a person who has proved reliable ten times is always unreasonable. Yet, in rejecting the Court’s example, this is precisely what Professor LaFave is saying.

In defense of LaFave’s position, one may object that in warrant cases at least, magistrates rather than police officers should determine probable cause.295 The above analysis, however, does not preclude the magistrate from making this decision. The magistrate must examine the informant’s or the officer’s past history and decide, in light of that history, whether the current report is sufficiently believable to justify an arrest or a search. We know from our experiences in life that we sometimes rely on conclusory statements from “unusually reliable” people. LaFave has given us no reason to doubt what our experience teaches, for he has not demonstrated that the magistrate, acting as a reasonably cautious person, would necessarily apply a mechanical two-pronged test whenever deciding that a well-grounded suspicion existed.

Of course, if an unusually reliable police officer reports only his or her own conclusions, the magistrate always can ask for more information, a luxury that does not exist when police present the magistrate with an informant’s tip. This may provide a basis for distinguishing between the unusually reliable informant and the unusually reliable police officer, for the reasonably cautious magistrate may ask for more detail when that detail is readily available. Thus, even if LaFave is correct about the inadequacy of conclusory statements from “honest” police officers, he has failed to refute the Court’s example of the “unusually reliable” informant.296

In the Court’s second example the hearsay report again satisfies the veracity prong but not the basis of knowledge prong.

[I]f an unquestionably honest citizen comes forward with a report of criminal activity — which if fabricated would subject him to criminal liability — we have found rigorous scrutiny of the basis of his knowledge unnecessary.297

296. If it seems quixotic that more is demanded of a police officer than an informant, see supra note 292 & 294, the difference is explained by the practicability of obtaining more information from the affiant-officer when he or she has firsthand knowledge. In Gates, of course, neither the magistrate nor the police could have demanded more from the unknown informant.
297. 103 S. Ct. at 2329.
The Court then cited *Adams v. Williams*\(^{298}\) in support of this proposition.

Professor LaFave correctly notes that *Adams* was a stop and frisk case that did not evaluate traditional probable cause requirements.\(^{299}\) LaFave's comment that *Adams* is "woefully short on analysis"\(^{300}\) may also be right, at least with regard to the short shrift the majority gave the facts.\(^{301}\) Finally, LaFave properly observes that although a declaration against interest may tell us something about the declarant's veracity, it tells us nothing about the declarant's basis of knowledge.\(^{302}\) None of this proves, however, that the reasonably cautious person would never rely on such a declaration from an "unquestionably honest citizen" to form a well-grounded suspicion of criminal activity. As I indicated in discussing the Court's first example, one has to be rather inflexible to maintain such a position. The Court's example withstands LaFave's attack if such a report would sometimes satisfy the reasonably cautious person.

The Court's third example is perhaps the most provocative.

> Even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case.\(^{303}\)

As in the other examples, the Court did not say that probable cause must be found in all such cases. Nevertheless, Professor LaFave finds this example "bizarre."\(^{304}\) He bases his concern on an informant's ability to fabricate detail and personal observation and correctly insists that detail cannot help establish veracity.\(^{305}\)

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299. 1 W. LAFAVE, *supra* note 3, at 137.
300. *Id.* at 137 & n.22.11 (citing 3 W. LAFAVE, *supra* note 7, at § 9.3(e)). In the cited section of his text, LaFave relies heavily on the criticism of *Adams* expressed in *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 179-80 (1972). See 3 W. LAFAVE § 9.3(e) at 102. For criticism of the argument in this Note, see *supra* note 56 and accompanying text.
301. The majority in *Adams* said that "[t]he informant was known to [the police officer] personally and had provided him with information in the past." 407 U.S. at 146. The dissent reported, however, that the informant had previously given the officer one report of homosexual activity in the local railroad station, a report that the officer was not able to confirm when he checked it out. *Id.* at 156 (Marshall & Douglas, JJ., dissenting).
302. 1 W. LAFAVE, *supra* note 3, at 137. See also *supra* note 8 and accompanying text.
303. 103 S. Ct. at 2329-30.
304. 1 W. LAFAVE, *supra* note 3, at 137.
305. *Id.* at 138. Justice Harlan, who authored *Spinelli*, basically agreed with this assertion, but he was a little more tentative.

[It might be of significance that the informant had given a more than ordinarily detailed description of the suspect's criminal activities. Although this would be more probative of the reliability of the information, it might also permissibly lead a magistrate, in
LaFave's criticism, of course, assumes the need to satisfy two independent prongs. We should ask, however, whether the reasonably cautious person would ever rely on a detailed tip from a person with some motive to lie. Consider, in this regard, these facts. Police arrested two individuals, Leisure and James, for a burglary that occurred just minutes before. Although Leisure remained silent, James admitted guilt and implicated Leisure in the crime. James also indicated that he had observed in Leisure's apartment several specified valuables, which Leisure boasted he had stolen in a previous burglary. Finally, James stated that Leisure had instructed his girlfriend, James's sister, to destroy these items if Leisure failed to return from the present crime.306

If we evaluate these facts from a Spinelli perspective, we see that James claimed a reliable basis of knowledge, but unfortunately we know nothing about his honesty.307 Worse, James may have had some motive to lie, because displaying a willingness to cooperate could help curry favor with the authorities. We might attempt to discount his motive to lie by arguing that James must have realized that he would hurt his relationship with the police by sending them on a wild-goose chase, but this is not fully persuasive. After all, James may deliberately have established the groundwork for a subsequent explanation by adding the detail about Leisure’s instructions to his girlfriend. Thus, the veracity prong remains problematic, because we are left with “some doubt” about James’s motives.

Although some might hesitate to act on the basis of James’s report, the relevant question is whether the reasonably cautious officer or magistrate necessarily would find probable cause lacking. The answer should be obvious. It belies our life experiences to insist that the reasonably cautious person could not have a well-grounded suspicion that Leisure kept stolen goods in his apartment. Similarly, it betrays a terribly skewed perspective to insist that a reasonable person could only conclude from these facts that Leisure’s privacy interest in his apartment necessarily outweighed his community’s interest in trying to recover stolen goods. Our common sense precludes us from defending such an intransigent position.308

Consider, now, a more troubling case. A social worker received an anonymous phone call at suppertime reporting that two children, who

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306. Leisure v. State, 437 So. 2d 751 ( Fla. App. 1983). The police immediately “seized” Leisure’s apartment and then obtained a warrant to search it.

307. Id. at 753.

308. Relying on Gates, the Florida Court of Appeals concluded “that under the totality of circumstances, the police had probable cause to believe evidence of criminal activity could be found inside appellant’s apartment.” Id.
lived with Calvin Boggess but had different last names, may have been battered. The caller stated that one of the children was limping, that he had seen bruises on this child, and that he believed the child might need medical attention. Moreover, the caller said that he knew the Boggesses fairly well and that Mr. Boggess had a bad temper. The social worker who received the call reported it to another social worker who, along with a policeman, went to Boggess’s house. Although he was told about the call, Boggess refused to let the two into his house to observe the children.

Imagine, for a moment, that you are the officer. What should or would you do when Boggess refuses to let you enter? Under Spinelli’s test, this case is even more difficult than the one involving Leisure and James, because here both prongs are arguably deficient. The informant claimed that he personally observed only some bruises, not any beating. Moreover, the informant did not give any basis for his suspicion that one of the children possibly needed medical attention. In any event, even if we infer personal observation, the veracity prong remains unsatisfied.

My unscientific sampling of lawyers and law professors suggests that reasonable people differ in their responses to this fact situation. Some want more corroboration before concluding that a forcible entry is proper. Others, however, want to enter immediately after Boggess’s refusal to cooperate. Some, like me, vacillate back and forth. If my survey is accurate, the two prong deficiency does not prevent some reasonable people from concluding that an immediate search is reasonable. For these people, the two-pronged test itself would be unreasonable as applied to these facts.

It may now be helpful to modify the facts. Assume that the caller had said the the injured child was lying on the floor, semi-conscious and bleeding profusely. Assume, furthermore, that everything else remains exactly the same. Certainly these modified facts would increase our willingness to permit immediately entry, yet from a two-pronged perspective nothing whatsoever has changed. Because the quantity of detail is no greater than in the original report, we would still find it difficult to infer a reliable basis of knowledge. In any event, the new detail provides nothing to rescue the deficient veracity prong. Yet, I feel confident in stating that on these modified facts many more reasonable readers (hopefully most) would be prepared to make a forcible entry.

309. I have deliberately refrained from indicating whether any children in fact were battered. Hindsight knowledge, either way, can too easily influence analysis. Thus, you as reader are no more enlightened than the officer at the door.

310. The facts before my modification are taken from State v. Boggess, 115 Wis. 443, 340 N.W.2d 516 (1983). For what it is worth, the social worker and police officer entered and found
This example should illustrate that the reasonably cautious person does not always require Spinelli's two prongs to be satisfied before an arrest or a search can be made. Rather, as I have argued throughout this article, the reasonable person examines the totality of circumstances and balances the competing interests. The need for immediate action is always a relevant consideration in probable cause analysis, and it remains relevant when hearsay is being used to establish probable cause. Similarly, the gravity of harm, in my example the possible loss of a child's life, is always relevant, and it too remains relevant when hearsay is involved. Finally, the intrusiveness of the contemplated action remains relevant in hearsay cases. An entry into a home is a serious intrusion, but an entry to examine two children is not as intrusive as an entry to rummage through closets and drawers.

If a commonsense balancing of interests is appropriate in cases not involving hearsay, it is equally appropriate when hearsay is involved. The only difference in hearsay cases is that we must factor the likelihood of unreliability into the analysis. In short, the reasonable person has to discount the harm that the arrest or search seeks to avoid by the perceived likelihood of a false report; this discounted harm must then be measured against the harm that will result from the contemplated intrusion. This analysis should not be expressed mathematically, because reasonable people (who are not economists) do not normally assign numerical values to harms and risks, and, even if they did, they would surely differ on what numbers to assign. Yet, in a rough and imprecise way, such a balancing analysis is exactly what common sense dictates. Under a commonsense approach, the reasonably cautious person would factor into the probable cause evaluation a necessarily imprecise judgment about the hearsay report's reliability. He or she would not apply a rigidly defined reliability test that rejects hearsay altogether.

one child, aged five, with part of his lip missing and with bruises on both legs, from the ankles to the thighs, and on his arms, from the elbows to the wrists. The child, who limped when he walked, also had hair missing from his head. The other child also had bruises. In a somewhat confusing opinion that failed to keep separate the probable cause and search warrant issues, the court upheld the warrantless entry.

311. See supra notes 245-47 and accompanying text.
312. See supra notes 241-43 and accompanying text. The Wisconsin Supreme Court found both considerations mentioned in the text relevant. "The totality of circumstances in this case must . . . be evaluated within the context of a possible emergency situation, which, by its very nature, involves potentially serious consequences if immediate action is not taken, and necessarily demands a prompt assessment of the information that is available." 115 Wis. at 455, 340 N.W.2d at 523.
313. See supra text accompanying note 248.
314. As I have previously indicated, post-search judicial review should recognize that reasonable people can reasonably disagree over such assessments. See supra notes 252-86 and accompanying text. But see infra note 315.
whenever one of the commonly used prongs of reliability cannot be satisfied.\textsuperscript{315}

In criticizing Gates, Professor LaFave observed that common sense requires attention to both veracity and basis of knowledge.\textsuperscript{316} Common sense does require attention to these indices of reliability. Common sense, however, does not require the elevation of these indices into talismanic tests that must be satisfied in every case. Professor LaFave's vehement criticisms notwithstanding, it is Spinelli's rigidity, not Gates's flexibility, that defies common sense and thereby "makes a mockery of the Fourth Amendment's probable cause requirement."\textsuperscript{317}

\textbf{Postscript — A Note on the Fourth Amendment}

Early in this century, the Supreme Court adhered to the view that Bill of Rights protections applied to the states only if they were "of the very essence of a scheme of ordered liberty."\textsuperscript{318} Under this approach, the Bill of Rights had little application to the states. States were not required to furnish even basic protections like the right to trial by jury and the right of a person not to be compelled to become a witness against himself, because one can imagine a free society, one with ordered liberty, that does not recognize such rights.\textsuperscript{319} One cannot, however, imagine a free society without some protection against unreasonable searches and seizures. By definition, a society that permits its police to search or arrest whenever and whomever they please is not a free society. Not surprisingly, therefore, the Supreme Court

\textsuperscript{316.} I W. LaFave, supra note 3, at 138.

\textsuperscript{317.} Id. (criticizing Gates).


The Court had to modify its inquiry to make these Bill of Rights protections applicable to the states. It began asking whether a particular procedure "is necessary to an Anglo-American regime of ordered liberty." 391 U.S. at 149 n.14.
applied the fourth amendment's "core" protections to the states well before it required the states to abide by most other provisions in the Bill of Rights.320

The fourth amendment, therefore, should be viewed along with a few other safeguards, such as the first amendment's protection of political speech,321 as a bulwark of civil liberty and of freedom itself. Even recognizing this, however, the task remains of identifying the conduct that the fourth amendment proscribes as unreasonable. Over the past few years, I have been attempting to develop a comprehensive outlook on fourth amendment issues. I have criticized Supreme Court decisions that by narrowly defining the word "search" have totally immunized very intrusive governmental behavior from judicial review.322 Likewise, I have criticized Supreme Court decisions that have permitted police to make warrantless searches in the absence of exigent circumstances.323 This article in no way is inconsistent with these previous criticisms; on the contrary, it completes the basic structure of a comprehensive approach toward the fourth amendment.

I still believe that all governmental activity that intrudes upon informational privacy should be brought under the fourth amendment's umbrella. I believe that, whenever practicable, these intrusions should be subjected to the scrutiny of a neutral, disinterested magistrate before the intrusion occurs. This article has addressed the evidentiary burden that the government must carry before such an intrusion should be permitted. I have argued that the government's burden should not be defined at so high a level that it impedes legitimate law enforcement interests. We need not interpret the fourth amendment's probable cause requirement to leave us so secure against encroachments by government that we are left insecure against predatory behavior by our fellow citizens, behavior that also may destroy our liberty, our pursuit of happiness, and sometimes our very lives.324 I have attempted to demonstrate that neither history nor common sense compels such a restrictive view of the probable cause requirement.


321. The Court recognized early in this century that the constitution proscribed to some extent the ability of states to punish speech. See, e.g., Gitlow v. New York, 268 U.S. 652 (1925). Freedom of speech and protection from arbitrary arrest and search are perhaps the quintessential hallmarks of a free society.

322. See Grano, supra note 271, at 428-44.

323. See Grano, supra note 172, at 638-50.


We should know something is terribly wrong when, for example, almost everyone in a city neighborhood seems to know that a certain residence is being used for narcotics transactions
The fourth amendment approach I advocate would constitutionally deny government the unrestricted license it presently possesses to inspect an individual's bank records\textsuperscript{325} or to ascertain all of the persons an individual has called on the phone.\textsuperscript{326} Like the search of one's private cabinet, this governmental activity intrudes upon our informational privacy, and it should be subject to fourth amendment control. The most appropriate control would be to subject such governmental activity to the fourth amendment's warrant requirement. With this accomplished, we would be adequately protected by a standard permitting such intrusions when the government can demonstrate a focused, well-grounded suspicion that it would find evidence of criminal activity. This standard would prevent arbitrary governmental conduct, like conduct employed purely for harassment purposes or as part of a fishing expedition, the prevention of which lies at the "core" of the fourth amendment's concerns.

My past criticisms of the Court have been directed at many decisions written or joined by Justice Rehnquist. In \textit{Gates}, however, Justice Rehnquist's majority opinion was absolutely correct. Although it may be anathema to some, I think it appropriate to conclude this article with these apt words from Justice Rehnquist's opinion:

"Fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is achieved neither by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of government authorities. The task of this Court, as of other courts, is to "hold the balance true"...\textsuperscript{327}

\textsuperscript{325} United States v. Miller, 425 U.S. 435 (1976) (examination of an individual's bank records is not a fourth amendment search).

\textsuperscript{326} Smith v. Maryland, 442 U.S. 735 (1979) (use of pen register to detect numbers dialed from residential phone is not a search).
