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ARTICLE

The Broken Fourth Amendment Oath

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Abstract. The Fourth Amendment requires that warrants be supported by "Oath or affirmation." Under current doctrine, a police officer may swear the oath to obtain a warrant merely by repeating the account of an informant. This Article shows, however, that the Fourth Amendment, as originally understood, required that the real accuser with personal knowledge swear the oath.

That real-accuser requirement persisted for nearly two centuries. Almost all federal courts and most state courts from 1850 to 1960 held that the oath, by its very nature, required a witness with personal knowledge. Only in 1960 did the Supreme Court hold in *Jones v. United States* that a warrant could rely upon hearsay. *Jones* radically altered criminal investigations. But the decision rested entirely on policy preferences, ignoring text, original meaning, and rich contrary precedent.

This Article argues that we should return to the original understanding that the oath requirement bans thirdhand accounts. Remarkably, this is the first comprehensive study to consider whether the oath requires personal knowledge.

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Introduction

The Fourth Amendment requires that warrants be supported by "Oath or affirmation."[1] Under current doctrine, the person who witnessed the incriminating facts need not swear under oath that those facts are true. Instead, that witness can inform a police officer, who may in turn seek a warrant by simply repeating the information as hearsay under oath. This officer's oath attests not that the underlying facts are true, but rather that "it's true someone told me these incriminating facts." Upon this oath, a magistrate may issue a warrant that authorizes the police, for example, to arrest someone or break into a home and search for drugs. So ruled the Supreme Court with little fanfare in 1960.[2]

We have so internalized this strange interpretation of "oath" that a typical lawyer, judge, or professor who reads the Fourth Amendment finds herself emphasizing words such as "unreasonable" and "probable cause."[3] When she arrives at "Oath or affirmation," by contrast, she swallows these meaningless terms so as to move quickly to the ones that interest her. After all, she knows that the Court long ago rendered the oath an empty formality.

But this Article shows that the Fourth Amendment, as originally understood, required that the oath be sworn by the real accuser, the victim, or another witness with personal knowledge.[4] The oath requirement banned hearsay. This Article reminds us that the words "Oath or affirmation" appear in the Fourth Amendment text, that they hold great meaning, and that their original meaning, once recovered, could revolutionize current police practice. Rarely does originalism open such a wide path toward progressive police reform.

Even before the original state and federal constitutions, criminal law had long required an oath for warrants. Colonial practice uniformly involved the real accuser swearing the oath in person.[5] We can see this from contemporary criminal law treatises and justice-of-the-peace manuals, which described the real accuser, almost always the victim, swearing the oath.

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1. U.S. CONST. amend. IV.
2. Jones v. United States, 362 U.S. 257, 269 (1960), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).
3. Law school casebooks, for example, devote minimal attention to the oath requirement. *E.g.*, JOSHUA DRESSLER, GEORGE C. THOMAS III & DANIEL S. MEDWED, CRIMINAL PROCEDURE: INVESTIGATING CRIME 189-246 (7th ed. 2020) (devoting only one case note to the oath requirement in a broader discussion of the Warrant Clause).
4. I will use "oath" and "swear the oath" as shorthand to refer to the Fourth Amendment's entire "Oath or affirmation" requirement.
5. *See infra* Part II.B.

Court cases until the mid-twentieth century confirmed this understanding, regularly holding warrants obtained on thirdhand information unconstitutional.[6] During the first half of the twentieth century, the majority of state supreme courts and federal courts of appeals banned thirdhand accounts. The Supreme Court endorsed this rule in 1932.[7] As Justice Bradley wrote in an 1877 opinion while riding circuit, the Fourth Amendment does not allow an "official accuser" to relay facts.[8] Rather, the "magistrate ought to have before him the oath of the real accuser."[9]

Manuals, treatises, and courts required the real accuser to testify for several reasons. First, the very concept of *oath* included the requirement of personal knowledge. The oath promoted truth by imposing upon the witness the possible penalty of perjury, as well as the prospect of a false swearing before God. Founding-era sources often saw a witness seeking a warrant under oath as analogous to a witness testifying under oath at trial.[10] Second, the warrant process occurred before a magistrate who was required to carefully examine and assess the witness to ensure the truth of the allegations.[11] Third, if the person seeking the warrant lied or was mistaken, she could be held accountable via perjury charges or via civil liability for trespass, malicious prosecution, or false imprisonment.[12] These purposes of the oath requirement could only be achieved if the real accuser swore the oath. As the Seventh Circuit put it in 1918, personal knowledge ensured that there were "consequences for the accuser to face."[13]

But in the mid-twentieth century, the Supreme Court displaced this understanding in *Jones v. United States*, holding that police or other officers could swear the oath to obtain a warrant based on hearsay.[14] Today, an officer can obtain a warrant based upon an unnamed informant's statement as long as the officer can allege some facts demonstrating that the informant is reliable. This formalistic expedient allows an officer to truthfully repeat under oath what she was told, even if the original source was lying or mistaken.

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6. *See infra* Part IV.A.

7. *See* Grau v. United States, 287 U.S. 124, 128 (1932) ("A search warrant may issue only upon evidence which would be competent in the trial . . . ."), *abrogated by* Brinegar v. United States, 338 U.S. 160 (1949).

8. *In re* Rule of Ct., 20 F. Cas. 1336, 1337 (Bradley, Circuit Justice, C.C.N.D. Ga. 1877) (No. 12,126).

9. *Id.*

10. *See infra* Part II.C.

11. *See infra* Part II.B.2.

12. *See infra* Part II.D.

13. Veeder v. United States, 252 F. 414, 418 (7th Cir. 1918).

14. 362 U.S. 257, 269 (1960), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).

Jones was wrong to admit hearsay in warrant applications. It ignored the Fourth Amendment text (never even mentioning the oath requirement); it ignored Founding-era sources entirely; and it largely ignored the dense contrary precedent—state and federal—of the early twentieth century.[15] It relied instead upon an express policy preference: the desire to make it easier for law enforcement to obtain warrants. *Jones* has led to the widespread use of confidential informants and hearsay within hearsay in the warrant-application process. These practices violate the Fourth Amendment's core original protection.

This Article argues that we should restore the original, textual meaning of the Warrant Clause to bar thirdhand accounts and require a real accuser with personal knowledge to swear the oath. The same reasons that animated the personal-knowledge requirement remain salient today: truth, accountability, avoidance of confidential informants, and abhorrence of incursions on liberty by unfounded searches and arrests.

Under this Article's proposed return to the original understanding of the Fourth Amendment, officers seeking warrants must bring informants to testify before magistrates, who must examine them to ensure truth and accountability. This proposal will reduce the pervasive contemporary injustice of confidential informants—who often act for money or leniency in their own cases—falsely accusing others.[16] It will also limit warrants based on questionable third-party reports.

This is the first study to examine the "Oath or affirmation" requirement by exploring Founding-era sources and tracing the requirement's evolution; the first to consider the dense and pervasive case law from the mid-nineteenth century to 1960 requiring personal knowledge; and the first, indeed, to explore carefully how and why the Supreme Court shifted away from the requirement's original meaning in the mid-twentieth century. Finally, it is the first to argue that we should restore that original meaning today.[17]

This Article also seeks to advance a broader goal: restoring the Warrant Clause to its rightful place as a protector against unlawful arrests and, particularly, searches. As it stands, Fourth Amendment scholarship and case law tilt almost entirely toward other aspects of the Fourth Amendment: What counts as a Fourth Amendment search? When are warrants required? What are the exceptions to the exclusionary rule?[18] Today's court cases comprehensively

15. *See infra* Part V.B.

16. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 46-54, 70-72, 85 (2009); RADLEY BALKO, CATO INST., OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 3, 21-25 (2006), https://perma.cc/HQX2-9WAG.

17. *But see infra* note 66 and accompanying text.

18. *See infra* Part I.

address when the warrant clause is *triggered*, but not what it requires once it applies.[19]

Only one scholar has addressed the oath requirement in any depth: Thomas Davies.[20] Davies notes that the oath requires an accuser with personal knowledge, but he renders this judgment primarily in aid of a separate argument concerning *when* warrants are required.[21] Nevertheless, this Article builds upon Davies's careful and deeply researched originalist work.

Warrants are a blessing and a curse. They impose limits on police, but they also authorize police to carry out violently intrusive activity. Arrest warrants effectively authorize as much force as necessary to effectuate the arrest, up to and including deadly force under certain circumstances.[22] These warrants can become a license to kill. Search warrants, meanwhile, authorize officers to break into homes, often at night, heavily armed—activity that, if done by anyone else, would be a serious felony.[23] Founding-era sources treated search warrants authorizing violent home invasions as either completely unauthorized or, at a minimum, subject to the strictest limits because of the potential for injury or death.[24]

Prominent recent cases illustrate how warrants act to authorize force, sometimes deadly force. In Louisville, Kentucky, officers raided Breonna Taylor's home, heavily armed, and almost immediately began firing dozens of shots, killing her.[25] The search warrant that authorized this intrusion was

19. The chief exception involves warrants to search digital devices, which have garnered attention from both courts and scholars. *See, e.g.*, United States v. Ulbricht, 858 F.3d 71, 101 (2d Cir. 2017); Laurent Sacharoff, *The Fourth Amendment Inventory as a Check on Digital Searches*, 105 IOWA L. REV. 1643, 1651-60 (2020).

20. *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

21. *Id.* at 551-56, 650-51, 650 n.287; *see also* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 192-93, 193 n.603 (2007) (discussing the growth of an officer's power to arrest).

22. *See* Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) (finding that police may use deadly force to arrest a person based on probable cause if that person has committed a dangerous felony or poses an immediate danger to others).

23. *E.g.*, United States v. Ramirez, 523 U.S. 65, 70-71 (1998) (holding that police may break into a home to execute a search warrant if there is an exigency). Most states authorize magistrates to issue nighttime warrants under some circumstances, 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.7(b) (West 2021), and the Fourth Amendment does not categorically ban the nighttime execution of a warrant, United States v. Schoenheit, 856 F.2d 74, 77 (8th Cir. 1988).

24. *See infra* Parts II.B.1-.2; *see also* Semayne's Case (1604) 77 Eng. Rep. 194, 195-96; 5 Co. Rep. 91 a, 91 b.

25. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://perma.cc/859Y-CPP4.

based on faulty thirdhand information.[26] The nighttime raid on Anjanette Young in Chicago also involved a search warrant. Police body-camera video shows several heavily armed and aggressive officers surrounding a naked, handcuffed, terrified woman who had just been undressing for bed. Here too, the search warrant was based on faulty thirdhand information from a confidential informant.[27]

Numerous recent investigations have revealed that police often rely on faulty information from confidential informants to obtain search warrants.[28] "The no-knock process often begins with unreliable informants and cursory investigations that produce affidavits signed by unquestioning low-level judges."[29] It often ends with highly militarized SWAT raids, all too frequently invading the wrong house,[30] and disproportionately affecting communities of color.[31]

None of the warrants authorizing these deadly and destructive raids could have legally issued in the Founding era. The Fourth Amendment banned thirdhand reports of informant information for exactly the reason illustrated above: That information is often wrong.

There are potential arguments, rooted in policy, against requiring that the real accuser swear the oath. First, the requirement will make it too hard for law-enforcement officials to obtain warrants, leading them to frequently act without one in the first place. Second, informants with personal knowledge will be afraid to come forward, fearing retaliation or social disapproval. Indeed, Founding-era advocates for law enforcement raised these same objections.[32] This Article addresses these objections. In the end, the Founding generation rejected the above fears in choosing to require particularized warrants, based upon an oath rather than assertions by a government officer, over general warrants. And there are practical methods to protect sources going forward, such as conducting the examination in a closed courtroom or chambers and redacting filed testimony when necessary.

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26. *See infra* text accompanying notes 67-70.

27. *See* Dave Savini, Samah Assad & Michele Youngerman, *"You Have the Wrong Place:" Body Camera Video Shows Moments Police Handcuff Innocent, Naked Woman During Wrong Raid*, CBS 2 CHI. (Dec. 17, 2020, 12:45 PM), https://perma.cc/NZX6-UAKF.

28. *See infra* Part I.C.

29. Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. TIMES (Mar. 18, 2017), https://perma.cc/J2G8-3P5U (to locate, select "View the live page").

30. *See id.*

31. ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 36 (2014), https://perma.cc/G9WW-UC3U.

32. *See infra* text accompanying notes 383-88.

This Article surveys several hundred years of law. During the surveyed period, many overarching goals—including the desire to protect individual liberty against unwarranted searches or arrests—remained the same. But one term and concept changed significantly: hearsay. Founding-era sources excluded thirdhand accounts primarily because the person who originally made the statement was not under oath. The Founding-era treatises used the word "hearsay" to describe thirdhand accounts, but the treatises placed less emphasis on cross-examination than we do today.[33] This Article will therefore use the terms "personal knowledge" and "thirdhand account" when discussing the Founding era. When examining the twentieth century, however, it shifts to "hearsay." By then, courts began to use the term regularly—though primarily as an antonym for personal knowledge.

This Article proceeds as follows. It first considers, in Part I, the current state of oath-requirement law and scholarship. After Part I, the Article moves chronologically. Part II considers the Founding-era sources that invariably described the real accuser swearing the oath. Part III considers the text of the Fourth Amendment and its larger constitutional context. Part IV considers case law in the late nineteenth and early twentieth centuries and the pervasive majority rule expressly requiring a real accuser with personal knowledge. Part V details the Supreme Court's move, in the mid-twentieth century, to allow officers to repeat hearsay from confidential informants. Part VI briefly sketches how the real-accuser rule would work today and responds to potential objections.

I. Contemporary Problems

This Part first considers contemporary case law and how it has eroded what the Founders considered the primary protection of the Fourth Amendment: the Warrant Clause. It next considers how current legal scholarship has often paid scant attention to this clause, and the oath requirement in particular. Finally, it draws on the Breonna Taylor case to illustrate what a host of empirical studies show: Police rely too often on unreliable or nonexistent confidential informants to obtain search warrants, especially in drug cases. Judges never see, examine, scrutinize, or even learn the names of these informants, and yet they issue warrants that too often lead police to invade the wrong address, or the right address for a person who has been falsely accused.

33. *See infra* Parts II.C.3-.4.

A. Current Warrant Case Law

Current doctrine has eviscerated the Warrant Clause in several ways. Qualified immunity allows officers who violate the Warrant Clause to escape civil liability,[34] and the good-faith doctrine means that courts will not exclude evidence obtained in violation of the Warrant Clause if the officer reasonably relied on the faulty warrant.[35] Courts reviewing a magistrate's decision to issue a warrant must pay "great deference" to that decision,[36] and magistrate judges enjoy absolute immunity from suit.[37] As a practical matter, magistrates often spend little time reviewing warrant applications[38]—a median of just over two minutes, according to one major study.[39]

With respect to informants, the law is even more confounding. Once the Supreme Court permitted hearsay in warrant applications,[40] subsequent decisions wandered further and further from principles of truth and accountability. The Supreme Court held that the officer need not, in her affidavit, separate the hearsay from what she personally knows.[41] Other courts subsequently permitted hearsay within hearsay.[42] Under today's law, lying informants are insulated by the officer who actually seeks and obtains the warrant.[43] If the *officer* does not lie and is not reckless in repeating what she was told, then it does not matter that the informant actually lied.[44]

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34. Malley v. Briggs, 475 U.S. 335, 343 (1986) (applying qualified immunity in civil lawsuits to officers who seek warrants); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1340 (2021).

35. United States v. Leon, 468 U.S. 897, 922-23 (1984).

36. Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

37. Pierson v. Ray, 386 U.S. 547, 553-54 (1967).

38. *See* Sack, *supra* note 29.

39. RICHARD VAN DUIZEND, L. PAUL SUTTON & CHARLOTTE A. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 26 (1985) (finding in one city that 10% of warrant applications received one minute or less of magistrate review).

40. Jones v. United States, 362 U.S. 257, 269 (1960), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).

41. United States v. Ventresca, 380 U.S. 102, 109-10 (1965); *see also id.* at 118 (Douglas, J., dissenting) ("Is the belief of this affiant based on personal observation, or on hearsay, or on hearsay on hearsay?").

42. *See, e.g.*, Cochran v. State, 635 S.E.2d 701, 703 (Ga. 2006); 2 LAFAVE, *supra* note 23, § 3.3(d) & nn. 279-83 (collecting cases); VAN DUIZEND ET AL., *supra* note 39, at 55 (noting that the use of double hearsay is widespread in some jurisdictions).

43. Franks v. Delaware, 438 U.S. 154, 171 (1978).

44. *See id.* ("The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.").

Informants often supply information, including false or misleading information, in exchange for payments or leniency—seriously undermining their credibility.[45] Scrupulous officers should disclose to magistrates the fact that their informants are being paid or promised leniency.[46] And yet some jurisdictions uphold warrants even where officers omit from the application that the informant has been paid, has been granted leniency, or has a criminal history.[47]

The defendant is not entitled to know the identity of the informant, get any type of discovery on that question, or otherwise probe whether the real accuser who provided the underlying purported facts lied, was seeking revenge, or was otherwise unreliable.[48] True, the officer is supposed to allege facts showing the informant is reliable, but a bare-bones assertion that the officer has relied on the informant before can suffice.[49]

When the Supreme Court has not eroded the Warrant Clause, it has ignored it. This disregard of the Warrant Clause contrasts with the careful attention the Court has paid in the last 100 years to the Unreasonableness Clause and the exclusionary rule.[50] But the exclusionary rule serves only to deter wrongful conduct,[51] and it does nothing to hold the real informant accountable. It only addresses bad searches after the fact, and it cannot undo the harm caused by a wrongful search or arrest—including the violence and death that can result. The same can be said for the Unreasonableness Clause generally.

Moreover, the content of the Court's exclusionary-rule cases in recent years has increased the potential for harm. The Court has sharply limited the scope of the exclusionary rule, calling it a tool of "last resort," in part on textualist and originalist grounds.[52] As the Court has observed, the text of the

45. NATAPOFF, *supra* note 16, at 46-54, 70-72.

46. *See, e.g.*, Hockman v. State, 487 S.E.2d 102, 104 (Ga. Ct. App. 1997) (holding that an officer "should" disclose payments made to an informant, but that omitting this information does not necessarily invalidate the warrant).

47. *E.g.*, Molina *ex rel.* Molina v. Cooper, 325 F.3d 963, 970 (7th Cir. 2003); United States v. Wold, 979 F.2d 632, 634 (8th Cir. 1992); Wise v. State, 570 S.E.2d 656, 659 (Ga. Ct. App. 2002).

48. *See* McCray v. Illinois, 386 U.S. 300, 313-14 (1967).

49. *See* Sack, *supra* note 29 (describing no-knock warrants granted based on misleading and boilerplate claims by officers that their informants are reliable).

50. Recent Supreme Court cases such as *Riley v. California*, 573 U.S. 373 (2014), *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and *Davis v. United States*, 564 U.S. 229 (2011), exemplify the Court's predominate focus on searches, on the question of *when* warrants are required, and on the exclusionary rule.

51. *Davis*, 564 U.S. at 236-37.

52. *Id.* at 237 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

Fourth Amendment does not provide for exclusion,[53] and the Founding era had no such rule.[54] These observations are true, but the Court ignores originalism when it simultaneously erodes the Fourth Amendment protections that the Founding era did expressly supply in the Warrant Clause—including the oath requirement.

B. Current Scholarship

Current scholarship similarly pays less attention to the Warrant Clause[55] than it does to the Unreasonableness Clause's definition of a "search"[56] and the exclusionary rule.[57] The predominant scholarly debate throughout the twentieth century involved the relationship between the Unreasonableness and Warrant Clauses of the Fourth Amendment, and whether the measure of an unreasonable search should be that it lacks a warrant.[58]

Scholars engaged in this debate responded to the marked increase in warrantless searches and arrests in the twentieth century,[59] and their work has

53. *Id.* at 236 ("The Amendment says nothing about suppressing evidence obtained in violation of [its] command.").

54. Utah v. Strieff, 136 S. Ct. 2056, 2060-61 (2016) (noting that a trespass lawsuit was the Founding-era remedy for a Fourth Amendment violation); United States v. Leon, 468 U.S. 897, 906 (1984) (limiting the scope of the exclusionary rule based in part on "an examination of [the Fourth Amendment's] origin and purposes"); Collins v. Commonwealth, 824 S.E.2d 485, 488-89 (Va. 2019) (noting that the Supreme Court had recently limited the exclusionary rule because it "recogniz[ed]" that, at the time of the Founding, the "exclusionary rule . . . did not exist" (quoting Collins v. Virginia, 138 S. Ct. 1663, 1676 (2018) (Thomas, J., concurring)).

55. Practice treatises do provide ample consideration of the Warrant Clause to aid practitioners who seek, grant, or attack warrants in court. *See, e.g.*, 2 LAFAVE, *supra* note 23, at ch. 4. But these treatises generally accept *Jones*'s allowance of hearsay without challenge. *See id.* §§ 3.2(d), 3.3(f).

56. *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 & n.7 (2016) (canvassing scholarship criticizing the "reasonable expectation of privacy" concept); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 504-07 (2007).

57. As a very rough measure, a search in Westlaw's law journal database for "Fourth Amendment search" yielded 4,235 hits on December 30, 2021. A search for "Warrant Clause" yielded 1,625 on the same date. But the articles provided by the latter search almost entirely ask whether the reasonableness of a search should be measured by the Warrant Clause, and not what the Warrant Clause otherwise requires.

58. *See* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1185-93 (2016) (collecting scholarship); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 409-10 (1995); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762 (1994); Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 984-85 (2011).

59. The Supreme Court's decision in *Carroll v. United States*, 267 U.S. 132, 149 (1925), to allow police to search cars without a warrant set the course for much of the twentieth century.

great relevance to understanding the Fourth Amendment. Although some scholars during this period observed that the Founders likely viewed the Warrant Clause as the more important clause,[60] the realities of police practice led them to focus more on *when* a warrant is required than on *what* it requires once requested.

Only one recent scholar,[61] Thomas Davies, has addressed the "oath or affirmation" requirement of the Warrant Clause. He maintains, as does this Article, that Founding-era sources required the real accuser swear the oath in ordinary criminal cases.[62] The Fourth Amendment rules out confidential informants, he argues, and allows "only *named* complainants."[63]

But Davies makes this point largely in service of broader arguments regarding the Fourth Amendment's application to warrantless searches[64] and the watering down of the standard limiting warrantless arrests.[65] And beyond Davies, no other recent scholars have argued that the oath must come from the real accuser. One obscure and rarely cited monograph from 1965 *did* argue for a return to the personal-knowledge requirement, though it did not consider originalist sources and relied instead on late nineteenth-century court cases.[66]

The Fourth Amendment oath is a topic strangely ignored. This Article invites a new focus on the oath requirement.

C. Confidential Informants and Search Warrants

The 2020 police raid on Breonna Taylor's home illustrates (1) many of the deep pathologies infecting police searches; and (2) the failure of the Warrant Clause to remedy those problems. It also shows how this Article's proposal to require personal knowledge for warrant applications can potentially make a difference.

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60. *E.g.*, Davies, *supra* note 20, at 551; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 43 (1969).

61. Even William Cuddihy, in his comprehensive study of the Fourth Amendment, does not appear to pay direct attention to whether the oath banned hearsay, although he does imply that the oath and particularity go hand in hand to require personal knowledge. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, at 422-26 (2009).

62. Davies, *supra* note 20, at 651 (noting that "only a person who had personal knowledge of an offense" could swear a complaint and obtain a warrant).

63. *Id.*

64. *Id.* at 553-54.

65. Davies, *supra* note 21, at 181-94.

66. STEVEN R. BRODSKY, SEARCH WARRANTS, HEARSAY EVIDENCE, AND THE FEDERAL CONSTITUTION: A CRITIQUE BASED ON CALIFORNIA EXPERIENCE 5, 9-19 (1965).

Breonna Taylor was entirely innocent, of course. In 2020, officers were investigating drug dealing by Jamarcus Glover out of a house far from where Breonna Taylor lived.[67] But officers suspected that they would find drugs, proceeds, or records in Taylor's home as well. The investigating police detective maintained this suspicion in part because Taylor was supposedly "receiving packages" for Glover at her home.[68] How did the detective know this? Thirdhand, from an unnamed source.

In his affidavit to obtain the warrant, the detective swore that an unnamed postal inspector had told him Taylor was receiving Glover's packages.[69] Note that the supposed postal inspector[70] did not come into court to tell the judge directly. Instead, the judge relied upon the detective's thirdhand account to find probable cause and issue the warrant to search Taylor's home.

Based upon this warrant, the police raided Taylor's home around midnight, battering their way inside. Taylor's terrified boyfriend, Kenneth Walker, fired one warning shot at the unknown and unannounced intruders.[71] They respond with overwhelming gunfire, killing Taylor.[72]

The Fourth Amendment, as originally understood, would likely have prevented this raid. Probable cause to search Taylor's home rested on the supposed postal inspector. The oath requirement would have required the postal inspector to testify to the judge directly. We now know that a local postal inspector denies ever having told the detective that Glover received packages at Taylor's home.[73] That inspector obviously would not have testified as portrayed in the warrant affidavit. Indeed, he would likely have testified to what he told reporters: Taylor was not receiving suspicious packages.[74] A

67. Oppel et al., *supra* note 25.

68. Search Warrant & Affidavit at 5, No. 20-1371 (Ky. Cir. Ct. Mar. 12, 2020), https://perma.cc/YH53-NRAR.

69. *Id.*

70. Jason Riley, Marcus Green & Travis Ragsdale, *Louisville Postal Inspector: No "Packages of Interest" at Slain EMT Breonna Taylor's Home*, WDRB.COM (updated Sept. 29, 2020), https://perma.cc/GVT7-AYJ2 (noting that the detective did not talk to Louisville office of the U.S. Postal Inspection Service).

71. Walker stated that he heard no announcement, and roughly a dozen neighbors interviewed also said they heard no announcement. One neighbor gave conflicting accounts. The police say that they announced. Oppel et al., *supra* note 25; Tessa Duvall & Darcy Costello, *Witness Who Said Police Announced Themselves at Breonna Taylor's Apartment Changed Story*, COURIER-J. (updated Sept. 28, 2020, 6:05 PM ET), https://perma.cc/4AZD-BTHC.

72. Oppel et al., *supra* note 25.

73. Riley et al., *supra* note 70.

74. *Id.* An internal investigation has shown that the Louisville Police Department knew Taylor was not receiving suspicious packages. Jason Riley, Marcus Green & Travis Ragsdale, *Internal Investigation: Louisville Police Told No "Suspicious" Packages Sent to*

footnote continued on next page

scrupulous magistrate, in any case, would have refused to issue a warrant based upon the information that remained.

In Chicago, police regularly fail to verify information, including from confidential informants, used to obtain search warrants for nighttime SWAT team raids.[75] The case of Anjanette Young provides a chilling illustration. The Chicago police relied on an unnamed, confidential informant to obtain a nighttime warrant to raid Young's home with a battering ram and around a dozen officers.[76] Body-camera video shows Young naked, handcuffed, and alone, surrounded by menacing, armed officers.[77] She had just undressed, preparing to go to bed.

Police had entered the wrong home because their informant had given a "bad tip."[78] If the informant had been required to testify under oath before a judge, perhaps that informant would not have testified at all, or would have ensured the accuracy of their testimony before giving information that resulted in police sending a SWAT team into someone's home.

A *New York Times* investigation into "dynamic entry" raids uncovered a disturbing pattern: Warrants that lead to raids on the wrong homes or the killing of innocents often rest upon the thirdhand accounts of unreliable informants.[79] CBS 2 News in Chicago conducted a yearlong investigation and discovered that police there "routine[ly]" invade the wrong address based on warrants that, in turn, are based on faulty information from confidential informants.[80] Radley Balko has catalogued the widespread use of SWAT teams in these forcible raids;[81] he too points to warrants that rely upon unnamed, confidential informants giving inaccurate information, often in exchange for rewards and leniency.[82] Alexandra Natapoff similarly demonstrates how government incentives such as leniency, payoffs, and other benefits induce informants to manufacture false or misleading information.[83]

Breonna Taylor's Home, WDRB.COM (updated Oct. 1, 2020), https://perma.cc/8CN8-U8PG.

75. Dave Savini, Samah Assad, Michele Youngerman & Rebecca McCann, *[Un]warranted*, CBS 2 CHI. (updated July 29, 2020), https://perma.cc/4J8T-9KXC (to locate, select "View the live page") (finding and cataloguing more than a dozen such cases).

76. Savini et al., *supra* note 27.

77. *Id.*

78. *Id.*

79. Sack, *supra* note 29.

80. Savini et al., *supra* note 75.

81. BALKO, *supra* note 16, at 4.

82. *Id.* at 3, 21-25.

83. NATAPOFF, *supra* note 16, at 46-54, 70-72, 85.

These problems are not new. The most comprehensive examination of search warrants remains the 1985 study conducted by Richard Van Duizend, L. Paul Sutton, and Charlotte Carter in seven major cities.[84] It concluded that the use of confidential informants was widespread, especially in drug cases,[85] a view confirmed by other studies.[86] It also showed that search warrants are most often sought for drug cases and home searches.[87] The Van Duizend study determined that 75% of warrant applications relying on confidential informants were for drug-related crimes.[88] Rarely did officers subject the informant's information to robust corroboration,[89] and they regularly used boilerplate language to describe the existence and trustworthiness of confidential informants.[90] Informants' identities and reliability were thus "cloaked in standardized legalese."[91] Indeed, one 1992 study reported that officers often used exactly the same boilerplate language about the reliability of informants across affidavits, leading some local judges to conclude (in

84. *See* VAN DUIZEND ET AL., *supra* note 39, at 2-13.

85. *Id.* at 31-34. The study reviewed which sources played the primary role in supporting a warrant application and found that confidential informants were the most common, at 37% on average across the seven jurisdictions surveyed, followed by the affiant's personal observation at 14%. *Id.* at 33 tbl.13.

86. *See* Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 237-39 (2000) (finding that about 88% of warrant applications in San Diego relied at least in part on an anonymous tip or confidential informant and 36.1% of all cases relied "primarily" upon a confidential informant); Michael A. Rebell, Comment, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards*, 81 YALE L.J. 703, 708, 721 (1972) (finding that, in a medium-sized city in Connecticut, 90% of drug warrants relied on a confidential informant in 1968, and 83% in 1969); VAN DUIZEND ET AL., *supra* note 39, at xi-xii (collecting studies, including one finding that 94.2% of drug-case search warrants in Boston were based on confidential informants (citing SHELDON KRANTZ, BERNARD GILMAN, CHARLES G. BENDA, CAROL ROGOFF HALLSTROM, & ERIC J. NADWORNY, POLICE POLICYMAKING: THE BOSTON EXPERIENCE 110 (1979))); BRODSKY, *supra* note 66, at 29 (finding that 81% of the affidavits under review "relied primarily upon" hearsay).

87. VAN DUIZEND ET AL., *supra* note 39, at 27-28 (finding, in a sample of offenses leading to a search warrant, that drug offenses made up 38% of the sample, followed by property crimes at 29%, and that warrants were most often sought for home searches).

88. *Id.* at 33.

89. *Id.* at 34 (finding that 30% of warrant applications relying on confidential informants in the seven major cities did not include corroborating evidence); *see also* Rebell, *supra* note 86, at 712-14 (finding that confidential informants were often unreliable). *But see* Benner & Samarkos, *supra* note 86, at 243 (finding that the San Diego police, in 95.6% of cases that primarily relied on confidential informants, corroborated the information with controlled buys of drugs before seeking a warrant).

90. VAN DUIZEND ET AL., *supra* note 39, at 52.

91. *Id.*

interviews) that these officers could be lying.[92] In one prominent Seventh Circuit case, the officer in question lied about both the reliability of the informant and whether the informant provided the incriminating information at all.[93]

With respect to the oath requirement, the Van Duizend study concluded that the "oath appears to be treated as a procedural formality rather than as a significant protection against false statements."[94] Even hearsay within hearsay was "common practice" in one of the cities studied.[95] A more recent study found double hearsay in half of the confidential-informant cases it examined.[96]

The proposal described below promises to curtail the foregoing deficiencies in seeking and granting warrants. This Article will now present its central argument: that courts as well as legislatures should restore the constitutional requirement that the real accuser swear the oath based upon personal knowledge.

II. The Founding Era

This Part first justifies reliance upon textualism and originalism when examining the oath requirement. It next considers Founding-era sources and the application of the warrant requirement in ordinary Founding-era criminal cases. It then considers other leading Founding-era precedents for the Fourth Amendment: the writs-of-assistance cases in the colonies and the seditious-libel cases in England.

A. Why Textualism and Originalism

Why textualism and originalism? First, the Supreme Court has looked to the original public meaning of the Fourth Amendment for decades[97] and, albeit

92. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 102-06 (1992).

93. United States v. Cortina, 630 F.2d 1207, 1211-12 (7th Cir. 1980).

94. VAN DUIZEND ET AL., *supra* note 39, at 55 ("Even the training materials examined in [two of the major cities] merely mention that the applying officer must be sworn by the judge, without exploring the purpose or consequences of the oath.").

95. *Id.*

96. Benner & Samarkos, *supra* note 86, at 241. The authors also found that 95% of the examined affidavits relying on confidential informants used standard boilerplate language to justify keeping the informant's name secret. *Id.* at 239.

97. Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995); Payton v. New York, 445 U.S. 573, 591 (1980); *see also* Clancy, *supra* note 58, at 988-89 (collecting and categorizing modern cases).

sporadically, for centuries.[98] In doing so, the Court is on firmest ground when it looks to Founding-era sources to determine the plain meaning of a definite textual term,[99] here "Oath." This is not a case of the Court looking to original practice to discern the ambit of an open-ended term such as "unreasonable," "cruel and unusual," or "due process." These are all concepts that invite development in meaning.

In discerning original meaning and practice, the Court starts with the common law[100] and sometimes ends there.[101] It has looked to treatise writers such as Edward Coke,[102] Matthew Hale,[103] William Hawkins,[104] and William Blackstone[105] in doing so.[106] This method makes sense.[107] Just after the passage of the Bill of Rights, lawyers and commentators agreed that many of its provisions, particularly the Fourth Amendment, codified the common law.[108]

98. Carroll v. United States, 267 U.S. 132, 151 (1925); Boyd v. United States, 116 U.S. 616, 626-27 (1886).

99. *Cf.* California v. Hodari D., 499 U.S. 621, 624 (1991) (relying upon Founding-era sources to construe the textual term "seizure"); Ramos v. Louisiana, 140 S. Ct. 1390, 1395-96 (2020) (construing "jury trial").

100. *See Payton*, 445 U.S. at 591.

101. Torres v. Madrid, 141 S. Ct. 989, 995-97 (2021).

102. *E.g.*, 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 177 (London, M. Flesher 1644).

103. *E.g.*, 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 582 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736).

104. *E.g.*, 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS 86 (London, E. & R. Nutt & R. Gosling 3d ed. 1739).

105. *E.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *286-89.

106. *See* Wilson v. Arkansas, 514 U.S. 927, 932-33 (1995); Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (noting that Coke was "read in the American Colonies by virtually every student of the law" (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967))).

107. For example, John Adams, who wrote the Massachusetts constitutional search-and-seizure provision that led in part to the Fourth Amendment, was steeped in Hale, Hawkins, and Coke. BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 51 (1974); Donohue, *supra* note 58, at 1254-57 (cataloguing the extraordinary reliance of the Founding generation upon Coke, Hale, Hawkins, and Blackstone); *id.* at 1269, 1276 (noting that Adams authored the Massachusetts search-and-seizure provision).

108. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1895, at 748 (Boston, Hilliard, Gray & Co. 1833) (noting that the Fourth Amendment was "little more than the affirmance of a great constitutional doctrine of the common law"); *see also* Orin S. Kerr, *Decryption Originalism: The Lessons of* Burr, 134 HARV. L. REV. 905, 925 (2021) (noting that Founding-era lawyers treated the Fifth Amendment as a codification of the common law and relied upon leading common law treatises as authoritative); *cf.* WILLIAM E. NELSON, E PLURIBUS UNUM: HOW THE COMMON LAW HELPED UNIFY AND LIBERATE COLONIAL AMERICA, 1607-1776, at 165 (2019) (observing

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As one early-nineteenth-century lawyer put it during oral argument before the Supreme Court, the common law is "that code from whence we derive all our legal definitions, terms, and ideas, and which forms the substratum of all our judicial systems, of all our legislative and constitutional provisions."[109] Justice-of-the-peace manuals written shortly after the federal and state constitutions were created cite constitutional provisions, but then rely on Hale to construe the relevant clauses.[110]

One of today's leading Fourth Amendment historians, William Cuddihy, has argued that Coke, Hale, and Hawkins often got the law wrong with respect to general and specific warrants. Hale and Hawkins, for example, lacked an "adequate basis in case law and statutes" and handled evidence "flexibly."[111] But Cuddihy nevertheless concedes that their work was extremely influential and recognizes that the Founding generation relied upon Hale and Hawkins as authoritative.[112]

Opponents of originalism argue that the common law was vague,[113] or differed from colony to colony,[114] or is too susceptible to manipulation or cherry-picking of supportive precedents.[115] But when it comes to the Warrant Clause and the oath in particular, the legal sources to which the Framers and ratifiers looked were uniform throughout the colonies, and largely the same as in England.[116]

Opponents of originalism also argue that it calcifies constitutional protections,[117] leaving them narrower than today's institutions might require.[118] But this Article's argument for requiring the real accuser to state the oath both *enlarges* and *restores* individual liberties.

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that, by the early 1700s, "nearly every colony" had received "the common law criminal process").

109. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80 (1807) (argument of Bollman's attorney).

110. *See, e.g.*, RICHARD BURN, BURN'S ABRIDGEMENT, OR THE AMERICAN JUSTICE 357-58 (Dover, New Hampshire, Eliphalet Ladd 1792); HENRY HITCHCOCK, THE ALABAMA JUSTICE OF THE PEACE 406-07 (Cahawba, Alabama, William B. Allen 1822).

111. CUDDIHY, *supra* note 61, at 270-73.

112. *Id.* at 273.

113. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1743-44 (2000).

114. *Id.* at 1795.

115. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 278, 291, 320 (2019).

116. *See infra* Part II.B.

117. *See* Clancy, *supra* note 58, at 987 & nn.43-46 (collecting cases rejecting originalism in favor of evolution to meet modern needs).

118. Sklansky, *supra* note 113, at 1744 (noting that the Supreme Court's originalist approach "may make it harder to argue that Fourth Amendment law should do more to protect

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One might argue that, in spite of originalism, allowing thirdhand accounts to satisfy the oath requirement better matches our current criminal justice system, which prizes efficiency.[119] This Article shows instead that the principles originally animating the real-accuser requirement remain powerful today. As in 1791, our legal system seeks to protect individuals from forcible intrusions, especially violent and deadly nighttime home searches. The real-accuser requirement promotes truth and protects against vengeful or mistaken accusations in the same way now as it did at the Founding. The real-accuser requirement would also reinstall an essential method of accountability for bad searches that today's practice lacks.

B. Ordinary Criminal Cases

When discussing search and arrest warrants in the Founding era, this Article initially focuses on warrants to search for stolen goods, as well as arrest warrants for ordinary crimes such as theft, robbery, and assault. These examples not only represent paradigmatic criminal cases,[120] but they also became the model in both England and its American colonies for what the common law required by way of warrants. By the 1760s, these common law requirements had become elevated to fundamental law, even constitutional law,[121] in the minds of many.[122] The Founding generation viewed the common law limits for warrants in ordinary criminal cases as the touchstone for the Warrant Clause and its state constitutional predecessors.[123]

Like today, ordinary criminal cases in the Founding era in both England and colonial America usually began with an arrest based upon an accusation, leading to the suspect's bail or confinement pending indictment and trial.[124] But unlike today, victims almost entirely drove the investigation of ordinary

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against racial discrimination or the abusive dissemination of lawfully collected information").

119. *See* Missouri v. Frye, 566 U.S. 134, 144 (2012) (noting that the criminal justice system is a system of pleas, and that one purpose of this system is to "conserve valuable prosecutorial resources"); Vernonia Sch. Dist. 47J v. Acton *ex rel.* Acton, 515 U.S. 646, 661 (1995) (noting that one factor in the Fourth Amendment analysis for drug testing is efficient law enforcement).

120. *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 35-36 (1986).

121. *See infra* Part II.E.

122. 4 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735-1776, at 116 (2018); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30-32 (enlarged ed. 1992) (noting that "Sir Edward Coke [was] everywhere in the literature" and Blackstone and Camden "became standard authorities"); Donohue, *supra* note 58, at 1252-57.

123. *See, e.g.*, *infra* note 374 and accompanying text.

124. *See* Davies, *supra* note 20, at 641; 4 BLACKSTONE, *supra* note 105, at *286.

crimes such as burglary, theft, and robbery.[125] Professional police did not exist, and constables and sheriffs rarely looked into these occurrences.[126] As a result, in the vast majority of cases, the victim sought the warrant.[127] Based on this structure, the Founding generation likely understood that those with firsthand knowledge would apply for warrants. The role of justices of the peace (JPs) furthers that understanding.

In general, a JP was a county-level judge who oversaw many preliminary aspects of a criminal case. He issued search and arrest warrants.[128] He held preliminary hearings to take sworn depositions from the accuser and other witnesses, and an unsworn statement from the accused himself.[129] The JP also set bail, committed defendants, and bound over witnesses for trial.[130] For misdemeanors and minor felonies, he (along with other JPs) conducted the trial;[131] for serious felonies, he sent the case and his depositions to a higher court for further proceedings.[132]

JPs were central to the warrant-issuing process. Hale noted that "the greatest part" of issuing warrants "is dispatched by justices of the peace."[133] These justices were sometimes lawyers, but they were more often important community laypersons.[134] They heavily relied, therefore, upon the numerous

125. *E.g.*, BEATTIE, *supra* note 120, at 8 ("Cases were initiated for the most part only when the victim complained to a magistrate."); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 11-12 (2003) (emphasizing that victims initiated investigations); *see also* CYNTHIA B. HERRUP, THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND 72-85 (1987).

126. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 21, 67 (1993).

127. Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377, 381-84 (2011).

128. 4 BLACKSTONE, *supra* note 105, at *287.

129. *Id.* at *293.

130. *Id.* at *293-97.

131. *Id.* at *268-69.

132. *Id.* at *267-68.

133. 2 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 107 (W.A. Stokes & E. Ingersoll eds., Philadelphia, Robert H. Small 1st Am. ed. 1847); *see also* 4 BLACKSTONE, *supra* note 105, at *287 (noting that warrants are granted "ordinarily by justices of the peace"); WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, IN THE COMMONWEALTH OF VIRGINIA 402 (Richmond, Virginia, T. Nicolson 1795) (justifying a separate title for search warrants because of "the frequent applications" made to justices of the peace).

134. Joseph Horrell, *George Mason and the Fairfax Court*, 91 VA. MAG. HIST. & BIOGRAPHY 418, 428 (1983); THOMAS SMITH, DE REPUBLICA ANGLORUM 103-04 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583); 4 BLACKSTONE, *supra* note 105, at *279; JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776), at xxvi-xxvii (1944) (noting that laymen largely made up the ranks of JPs); 3 WILLIAM E. NELSON, THE COMMON LAW IN

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justice-of-the-peace manuals published in England and throughout the colonies. These manuals, in turn, greatly influenced the Framers and ratifiers (along with the treatises authored by Coke, Hale, Hawkins, and Blackstone), many of whom were either JPs themselves, such as George Mason[135] and George Washington,[136] or had these volumes in their libraries, such as John Adams[137] and James Madison.[138]

The English treatises and the American JP manuals do not exclude thirdhand accounts from the warrant process explicitly. But they prescribe a process that requires a real accuser or a witness with personal knowledge. The next several Subparts develop this argument.

1. Evolution to warrants

The evolution of the power of JPs to issue warrants helps us understand why Founding-era JPs would likely require the real accuser to swear the oath. The story begins in the early sixteenth century. According to Coke, the common law of that time did not permit search or arrest warrants before an indictment for ordinary crimes,[139] and it certainly did not permit warrants that authorized breaking into a house.[140] Such warrants were disallowed because they relied upon a "bare surmise."[141] Coke's characterization of an individual accusation, which was perhaps unsworn, contrasted with a grand-jury indictment upon sworn evidence. According to Coke and the cases he cited, officers could arrest only after such an indictment.[142]

COLONIAL AMERICA: THE CHESAPEAKE AND NEW ENGLAND, 1660-1750, at 47-48 (2016) (observing that many JPs in seventeenth-century Virginia studied law in England, importing its common law rules, whereas in other colonies JPs were often nonlawyers).

135. *Horrell*, *supra* note 134, at 420 (describing Mason's involvement with the Fairfax County Court).

136. Henry Graff & Allan Nevins, *George Washington*, ENCYCLOPÆDIA BRITTANICA, https://perma.cc/6WAH-RDKP (archived Feb. 20, 2022).

137. CATALOGUE OF THE JOHN ADAMS LIBRARY IN THE PUBLIC LIBRARY OF THE CITY OF BOSTON 30, 39 (Lindsay Swift ed., 1917).

138. HENING, *supra* note 133 (showing that Madison appears on the subscription list).

139. 4 COKE, *supra* note 102, at 176-77. Before the Marian Statutes, "a Justice of Peace . . . [could not] make a warrant to another . . . for this warrant to take a Felon should be in nature of a Capias [a writ to arrest] for felony, which cannot be granted before indictment . . . ." *Id.* at 177.

140. *Id.* at 177 ("[B]ut for Justices of Peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stoln [sic] goods, is against Magna Carta . . . .").

141. *Id.* at 176.

142. *Id.* at 177; Hyll v. Gyll, YB 14 Hen. 8, Hil. 3 (1523) (Eng.), *reprinted in* 119 SELDEN SOCIETY 142 (2002).

In 1554 and 1555, Parliament passed the Marian Statutes, authorizing JPs to examine suspects and, if necessary, commit them for trial or release them on bail.[143] This power, Coke conceded, necessarily implied that JPs could issue warrants to arrest a person in public, but they still could not issue warrants that would authorize breaking into a home to search or arrest.[144] Coke justified the common law rules limiting warrants for a few reasons. Most relevant for purposes of this Article, he sought to protect the liberty of the subject from intrusion.[145] The home was sacred, each person's "castle and fortress."[146]

By the time of Hale, Hawkins, and Blackstone, the rule had evolved to allow both search and arrest warrants, including in the home[147]—though Hale continued to reject the notion that a search warrant for stolen goods could authorize breaking into a dwelling.[148] These later treatise writers relied to some extent on case law and statutes, but they mostly argued that the power to issue warrants simply arose from JPs having amassed it over the years. Hale thought search warrants necessary to find those who had committed a crime.[149] Blackstone and Hawkins were less charitable; both labelled the development a "connivance" of JPs, who established the right by practice rather than statute.[150]

Hawkins pointed to incursion upon liberty as reason to note that a JP "cannot well be too tender in his Proceedings of this Kind"[151]—an assessment often quoted in American JP manuals.[152] As a result, Hawkins noted the importance of ensuring "probable Cause," or even "strong Grounds of Suspicion," when issuing a warrant.[153] The requirement that the magistrate examine the party under oath seems (at least in part) to have grown out of this continuing concern with individual liberty, especially in the home.

Protecting liberty against unfounded searches and arrests works best if the real accuser with personal knowledge swears the oath and subjects himself to

143. 1554-1555, 1 & 2 Phil. & M. c. 13; 1555, 2 & 3 Phil. & M. c. 10.

144. 4 COKE, *supra* note 102, at 176-78.

145. *Id.* at 177-78 ("For though commonly the Houses or Cottages of poore and base people be by such Warrants searched, &c. yet if it be lawfull, the houses of any subject, be he never so great, may be searched, &c. by such Warrant upon bare surmises.").

146. Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 b.

147. 2 HAWKINS, *supra* note 104, at 86.

148. 2 HALE, *supra* note 133, at 116-17; *see also* 2 HAWKINS, *supra* note 104, at 86 (noting that breaking doors is disfavored even for an arrest warrant).

149. 2 HALE, *supra* note 133, at 113.

150. 4 BLACKSTONE, *supra* note 105, at *287; 2 HAWKINS, *supra* note 104, at 84.

151. 2 HAWKINS, *supra* note 104, at 84.

152. *E.g.*, BURN, *supra* note 110, at 419.

153. 2 HAWKINS, *supra* note 104, at 84-85.

examination by the magistrate. Examining an officer merely repeating another's account does little to ensure that the allegations are true, especially when the person who originally made them does not swear to any facts under oath. This general observation enjoys concrete support from the particular procedures the treatise writers insisted on, considered below.

2. The warrant process and the search for truth

The strongest evidence that the real accuser must seek the warrant and swear the oath comes from the repeated requirement that this person not merely make a statement under oath, but that he be *examined* under oath. Hale, for example, insisted that the JP "examine upon oath the party requiring a warrant."[154] Hale later repeated this requirement, stating that the "party that demands [the warrant] ought to be examined upon his oath touching the whole matter."[155] Indeed, this examination should be "put into writing."[156]

Blackstone's views on warrants followed and often directly quoted those of Hale. He wrote, as did Hale, that it was "fitting" for the magistrate to examine the party seeking the warrant "upon oath."[157] Blackstone went further than Hale, however, in writing that the complainant must "*prove*" probable cause that the suspect committed the felony.[158] The word "prove" connotes legal evidence and thus would rule out inadmissible thirdhand accounts. Geoffrey Gilbert, in his evidence treatise greatly admired by Blackstone, apparently used "proofs" to mean admissible evidence.[159]

Other treatise writers near the Founding provided even more detailed requirements for JPs examining accusers seeking warrants. Joseph Chitty required the magistrate to "interrogate[]" the accuser and write down his replies so that the accuser could read his statement and swear to those "facts."[160] One American treatise writer, writing in 1824, said the accuser's suspicion "ought to be carefully examined."[161] Another American treatise that year expressly stated that the person seeking the warrant must be competent to

154. 2 HALE, *supra* note 133, at 110.

155. *Id.* at 111.

156. *Id.*

157. 4 BLACKSTONE, *supra* note 105, at *287.

158. *Id.*

159. *See* GEOFFREY GILBERT, THE LAW OF EVIDENCE 148-49 (London, Henry Lintot 1756).

160. 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *31 (Philadelphia, Edward Earle 1819).

161. 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 244 n.* (Boston, Cummings, Hilliard & Co. 1824).

testify at trial to support his allegations.[162] This treatise says JPs should "interrogate the accuser, and other witnesses."[163]

American JP manuals also required that the JP examine the party seeking the warrant. Richard Burn's *Abridgement* used Hale's words almost exactly: "It is necessary, that the party who demands the warrant be first examined on oath, touching the whole matter whereupon the warrant is demanded."[164] In addition to citing Hale, the 1792 New Hampshire edition of Burn's manual cited the state constitution for this principle.[165] JP manuals in other colonies (and, later, states) contained the same examination requirement.[166] Another JP manual, *The Conductor Generalis*, noted that "these warrants are judicial acts, and must be granted upon examination of the fact."[167]

Thomas Davies similarly reads the above materials to require personal knowledge.[168] For example, he too relies on Hale's requirement that a JP examine the party seeking the warrant, and on Hale's requirement that the person who seeks the warrant have the suspicion himself.[169] Some of the cases from the late nineteenth and early twentieth centuries requiring personal knowledge for the oath also interpreted the older treatises as supporting a personal-knowledge requirement.[170]

On the other hand, a small group of scholars has argued that these treatises do not represent how JPs actually conducted their daily affairs. Wesley Oliver and Fabio Arcila claim that the party seeking the warrant needed only to

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162. DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 8 (Boston, Cummings, Hilliard & Co. 1824). Davis muddies the picture by suggesting that a disqualified witness could tell another of his allegations and let that person "bring an offender to justice." *Id.* at 8-9. It is unclear how another could testify at trial in his stead, however, since the rules of evidence would clearly ban such hearsay testimony.

163. *Id.* at 18.

164. BURN, *supra* note 110, at 417.

165. *Id.*

166. *See, e.g.*, HENING, *supra* note 133, at 402, 450 (explaining that the party must "shew his reasons" and generally be "examined on oath"); HENRY POTTER, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE 20 (Raleigh, North Carolina, Joseph Gales 1816) (noting that the JP must "examine upon oath the party requiring a warrant"); HITCHCOCK, *supra* note 110, at 460 ("[T]he party who demands the warrant ought to be first examined on oath, touching the whole matter . . . .").

167. THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 323 (James Parker ed., New York, Hugh Gaine 1788) [hereinafter THE CONDUCTOR GENERALIS].

168. Davies, *supra* note 20, at 650-52, 652 nn.290-91 & 293.

169. *Id.* at 650-52, 652 n.290.

170. *E.g.*, People v. Elias, 147 N.E. 472, 475 (Ill. 1925) (citing 4 COKE, *supra* note 102, at 177), *overruled in part by* People v. Williams, 190 N.E.2d 303 (Ill. 1963); Giles v. United States, 284 F. 208, 212 (1st Cir. 1922).

allege, upon oath, that he had probable cause to believe the suspect committed the crime, or that the place contained the stolen goods.[171] The party did not need to provide any specific facts, and JPs did not independently ascertain probable cause.[172]

This argument seems to be at odds with the predominate thrust of the Founding-era sources.[173] Moreover, Arcila concedes that his observation about practice "in the trenches" might not have affected the views of the Framers or the ratifiers of the Fourth Amendment.[174] These individuals may well have relied upon the major treatises in believing that JPs examined parties to independently weigh the facts.[175]

Either way, the view of Oliver and Arcila supports this Article's view. Their premise—that a JP could issue a warrant because an individual with personal knowledge swore an oath that there was probable cause—still requires an individual with personal knowledge to swear the oath.

3. The arrest or search "belongs to" the accuser

Once the warrant issued, the real accuser was not done. His continued role further reinforces the real-accuser requirement. Coke, Hale, Hawkins, and the American JP manuals agree: The search or arrest, even with a warrant, remained in some sense that of the accusing party.[176] The constable or sheriff who executed the warrant served only as an assistant, there to keep the peace, even though the warrant was directed to that constable.[177]

As Hawkins put it, the person "who hath the Suspicion [should] make the Arrest in his proper Person, and [should] get a Warrant from a Justice of Peace

171. Oliver, *supra* note 127, at 383-84.

172. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause*, 10 U. PA. J. CONST. L. 1, 6, 24-27 (2007).

173. *See infra* Part II.B.6. Arcila argues that JP manuals often said a justice should examine the party, under oath, and put the examination in writing, but that it was "not always necessary" to do so. Arcila, *supra* note 172, at 24-25 (emphasis omitted). *But see* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 77 n.122 (2010) (rebutting Arcila's central claim in detail). It is unclear which of these three requirements was unnecessary and when. The next paragraph in these manuals tended to show the specific and limited circumstances where the oath was not required: If the JP bound the party over to give evidence, he did not need to put his initial examination in writing. *See, e.g.*, HENING, *supra* note 133, at 450.

174. Arcila, *supra* note 172, at 6.

175. *Id.*

176. *See, e.g.*, 2 HAWKINS, *supra* note 104, at 85.

177. *Id.*

to the Constable to keep the Peace."[178] Similarly, for search warrants for stolen goods, Hale wrote that the private party "should be present and assistant, because he knows his goods."[179] The American JP manuals affirmed this principle, regularly stating that the party can and often should attend the search for the same reason.[180]

This principle makes sense only if the party who seeks the warrant is the real accuser with personal knowledge—in other words, the victim. Only he "knows his goods."

4. Suspicion of felony

The treatises sometimes spoke of using warrants to arrest "persons suspected of felony,"[181] or to search a house where a person had reason "to suspect" he would find stolen goods.[182] They also used "suspicion" in other contexts. One might argue that this use of the term "suspicion" indicates that a person can obtain a warrant based on less than personal knowledge and, in particular, based upon a thirdhand account. Though far from clear, the context in which the treatises used "suspicion" seems to relate to the degree of certainty and not the method of proof. The oath still requires firsthand facts.

Hale separated arrests for a felony "*certainly* committed" from arrests for "*suspicion* of felony."[183] But this suspicion did not relate to whether a felony had been committed—the fact of a felony must be established beyond mere suspicion. Instead, it was suspicion as to whether a specific person had committed an already-established felony. Thus Hale provided an example: "[S]uppose a robbery upon A."[184] That is, the victim explains that someone robbed him, not that he *suspects* someone robbed him. Hale continued on to explain that the suspicion related to who committed this felony.

This felony-in-fact requirement long predated Hale. Michael Dalton in the 1600s required "some Felony committed indeed."[185] Thus any use of "suspicion" does not undermine the personal-knowledge requirement, at the very least for the statement of a felony committed. But even as to suspicion concerning the perpetrator, Hale seems to envision the JP hearing the victim's particular,

178. *Id.*

179. 2 HALE, *supra* note 133, at 150.

180. BURN, *supra* note 110, at 358; HENING, *supra* note 133, at 403.

181. 2 HALE, *supra* note 133, at 105.

182. *Id.* at 150.

183. *Id.* at 90.

184. *Id.* at 91.

185. MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 408 (London, Co. of Stationers 1655).

firsthand facts that led to the suspicion.[186] Dalton, Hawkins, and others required the arresting person to have "a suspicion of [the accused] himself."[187]

As a further elaboration on the details of suspicion, Hawkins and Coke both spoke of presumptions that fell short of direct observation but were nonetheless sufficient, and they both gave the same example.[188] A witness enters a house to find a dead person bleeding there. Another person has just fled the house. The witness has grounds for suspicion. But note that his suspicion is still based upon firsthand facts: The witness saw someone flee from a bleeding body. Gilbert also took up this example.[189] This and other illustrations of presumptions rely upon personal observation of facts that are then used to draw a probable conclusion.

At other times, the treatises appear to use "suspicion" merely as a label for a pre-indictment allegation. A grand jury had not indicted, so any allegation, even though it rested upon firsthand facts, counted as a "suspicion."[190]

5. Forms

The American JP manuals included forms for (1) complaints to obtain a warrant; and (2) the warrant itself. These forms uniformly inserted the real accuser with firsthand knowledge as the person seeking the warrant, which itself was directed to the constable. The forms contained a blank for the party seeking the warrant, followed by a comma showing the person's station, such as "gentleman,"[191] "yeoman,"[192] "farmer,"[193] "carpenter,"[194] and so on—but never "constable," "sheriff," or "officer." The forms proceeded to recite facts that the individual observed personally.

186. 2 HALE, *supra* note 133, at 90-91, 109-10.

187. DALTON, *supra* note 185, at 408; 2 HAWKINS, *supra* note 104, at 77 ("[W]hoever would justify the Arrest of an innocent Person, by Reason of any such Suspicion, must . . . shew that he suspected the Party himself . . . .").

188. 2 HAWKINS, *supra* note 104, at 438; 1 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND 6(b) (London, Societie of Stationers 1628).

189. GILBERT, *supra* note 159, at 160.

190. *See* 2 HAWKINS, *supra* note 104, at 84 (nothing that a warrant may issue on "strong Grounds of Suspicion for a Felony or other Misdemeanor, before any Indictment hath been found"); 2 HALE, *supra* note 133, at 109 (noting the power of JPs over "as well persons suspected as indicted of felonies"); 4 COKE, *supra* note 102, at 176-77 (same).

191. HENING, *supra* note 133, at 20-21.

192. PARACLETE POTTER, THE ATTORNEY'S COMPANION 436 (Poughkeepsie, New York, P. Potter 1818).

193. *Id.* at 431.

194. *Id.*

For example, Burn's *Abridgement* for New Hampshire contains a form entitled "Complaint and Warrant for an Assault and Battery."[195] The complaint contains a spot where a particular person, there "C.D. of —— in said county of S——" swears that another person, "E.F.," committed a "violent assault on the body of your complainant."[196] It then contains further firsthand details: E.D. beat, bruised, and wounded the complainant with many heavy blows to the face and body.[197] This is a form, of course, but it envisions a JP who has examined the real accuser carefully to determine the details of the assault.[198]

In his Virginia JP manual, William Hening similarly used a form for an arrest warrant in which "A I" swore that two other individuals, "A O" and "B O," beat his "person."[199] Significantly, in its form to issue an arrest warrant for barratry, Hening's manual allowed a particular person to make the allegation; but in the alternative, the JP could simply swear that the barratry was "on the justice's own view."[200] This option provided a simple alternative: Either the JP personally observed the crime or the person seeking the warrant did.

Other forms also reflect the understanding that the person seeking the warrant and swearing the oath must have personal knowledge. The warrant for a reputed father of a "bastard child" required examination of the mother, under oath, taken down in writing.[201] An arrest warrant for burglary had the merchant swear the complaint, alleging the relevant facts: night, dwelling, broken open, and what was stolen—"one gold watch."[202]

The JP manuals were filled with forms, nearly all of which included a blank for the real accuser to make his or her particular factual allegations based

195. BURN, *supra* note 110, at 435-36.

196. *Id.*

197. *Id.* at 436.

198. *Cf.* RICHARD BURN, ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER 321-22 (Boston, Joseph Greenleaf 1773) (printing a JP examination of a robbery victim who described the assailants in detail, noting that one "was a tall lusty man, wearing a black wig, and a blue grey coat, mounted on a bay gelding about fifteen hands high, with a black mane and tail, and star in his forehead"). This was a form for an "[e]xamination of the person robbed, before the action brought," *id.* at 321, but it seems so detailed as to have been drawn from an actual examination.

199. HENING, *supra* note 133, at 21.

200. *Id.* at 82.

201. *Id.* at 86-87.

202. *Id.* at 99.

on personal observations.[203] Even the form for a counterfeiting complaint included firsthand knowledge:

> AB of, &c. hath this day made oath before me that . . . he being in the next room to a private shop or ware-house of the said C D . . . through a hole or crany in the partition wall or door, saw the said C D . . . making and moulding some white pieces of metal . . . which he took to be the coining of money.[204]

These warrant forms also reflected the division of labor between complainant and constable. The accuser sought the warrant, which was then directed to the constable, sheriff, or other officer to execute.[205] These latter officers did not initially seek the warrant by repeating the accuser's account.

6. Real warrants and applications

Based on records of actual examinations before JPs, the historical practice followed the above requirements. Some examinations came before arrest (in order to obtain the warrant) and others after.[206] JPs did not appear to distinguish between the two—"examination" seems to be a term of art referring to a statement under oath, regardless of the timing.[207] The examples below uniformly involve a witness reciting firsthand facts.

Julius Goebel Jr. and T. Raymond Naughton have collected affidavits and examinations from eighteenth-century New York, including one by a woman alleging that the suspect "forsed your petitioner . . . against her will."[208] This affidavit sought to have the JP look into the matter, presumably to issue an arrest warrant. Another deponent swore he was standing at a door when he saw the defendants' cart strike and injure the victim.[209] Still another person

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203. *See, e.g.*, *id.* at 302 (larceny: "[D]ivers goods of him the said A J . . . have feloniously been stolen" from his house); *id.* at 405 (search warrant: Goods stolen "out of the possession of the said A J"); RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE 66 (Williamsburg, Virginia, Alexander Purdie & John Dixon 1774) (burglary: "WHEREAS ——, of &c. Planter" complains that his dwelling was broken into); JAMES PARKER, CONDUCTOR GENERALIS: OR THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 32 (New York, John Patterson 1788) (assault: "A.I. of —— in the said county, taylor" swears he had been beaten by "A.O. of —— aforesaid, butcher" on a particular day).

204. POTTER, *supra* note 192, at 440.

205. THE CONDUCTOR GENERALIS, *supra* note 167, at 324-25.

206. *E.g.*, DANIEL HORSMANDEN, THE NEW-YORK CONSPIRACY, OR HISTORY OF THE NEGRO PLOT 18-22 (New York, Southwick & Pelsue 2d ed. 1810).

207. 1 CHITTY, *supra* note 160, at *75-76.

208. GOEBEL & NAUGHTON, *supra* note 134, at 339 n.42 (alteration in original) (quoting the affidavit).

209. *Id.*

seeking an arrest warrant alleged that he had been robbed by various individuals at a particular home.[210]

Additionally, in New York, a 1744 journal recorded numerous pretrial examinations by JPs investigating a complicated series of theft and arson cases.[211] Those JPs (or other officials) engaged in repeated examinations of defendants, suspects, and witnesses, all under oath. These examinations centered around detailed, firsthand accounts. The JPs sometimes took the examinations before arrest, sometimes after, without discrimination—all were "examinations" or "depositions."[212] For example, in a theft case, one witness testified that he found the stolen goods under the floorboards of his kitchen, but that the only way to access that basement was from the adjoining property of another person, John Romme.[213] The JPs issued a warrant to arrest John Romme based upon this firsthand account.[214]

The deposition book of Richard Wyatt, a prominent English JP, similarly includes hundreds of examinations that were based on firsthand knowledge.[215] Wyatt often examined numerous witnesses to the same crime, suggesting that one witness could not simply retell the information of another. Wyatt also does not appear to have distinguished between examinations taken to obtain a warrant and those taken after arrest.

As early as 1519, a mayor in England (apparently acting as a JP) took detailed examinations under oath of several different witnesses to a killing. These were likely examinations at the preliminary hearing rather than to obtain a warrant, but they nevertheless show that pretrial examinations under oath were based on detailed personal knowledge.[216]

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210. *Id.* at 321.

211. HORSMANDEN, *supra* note 206, at 18-22. Daniel Horsmanden led an investigation so broad in scope that there are questions as to its accuracy, particularly given that much of his account was based on the inconsistent recollection of a single, paid informant. His journal must be viewed carefully. Nevertheless, his recitation of the procedural content of examinations and their timing is likely to be accurate for our purposes. Horsmanden would have had little motive to fabricate timing and procedure, especially since other JPs joined him at these sessions.

212. *Id.* at 5-8, 18-22. This source appears to use the terms "examination" and "deposition" interchangeably.

213. *Id.* at 22.

214. *Id.*

215. Elizabeth Silverthorne, *Introduction* to DEPOSITION BOOK OF RICHARD WYATT, JP, 1767-1776, at vii, x (Elizabeth Silverthorne ed., 1978).

216. JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 98-103 (1974).

C. Evidence Law

By the Founding era, evidence law had long required that witnesses testify based on personal observations and not the observations of others. This Subpart shows how the oath requirement ruled out thirdhand accounts for those seeking to obtain warrants. These individuals were witnesses under oath, just like any other witness before a grand jury or at trial. At the Founding, it was well established that no testimonial "evidence [was] to be admitted but what is upon oath."[217] A corollary was also true: To be under oath required personal knowledge.

This Subpart first reviews the chronology of a criminal case with an eye toward the function of witnesses at each stage. Second, it shows how at each stage—including when obtaining a warrant—a witness needed to abide by the personal-knowledge rule, in part because his testimony at one stage might be used at a later one. Third, having established that the same rule against repeating a thirdhand account applied to witnesses in each context, this Subpart examines that rule more closely and shows that it must have applied at the warrant stage just as it did at trial.

1. The chronology of a criminal case

An individual, especially the victim-accuser, would testify under oath at several related stages of the criminal process. First, she would seek a warrant from a JP. In doing so, she either filed a complaint under oath, with a follow-up examination under oath by the JP, or sat for the examination under oath right away.[218] Hale and many American JP manuals required the JP to write down this examination (along with any complaint).[219]

In discussing this first phase, the procedure to obtain a warrant, some early writers such as Hawkins and Chitty said that the warrant had to rest on "Evidence."[220] Hawkins expressly noted that a warrant should issue upon "Evidence."[221] Chitty also seems to have required admissible "evidence" to obtain a warrant; this requirement would have ruled out thirdhand

217. *See* HENING, *supra* note 133, at 181.

218. *See supra* Part II.B.2.

219. *See supra* Part II.B.2.

220. 2 HAWKINS, *supra* note 104, at 84; 1 CHITTY, *supra* note 160, at *33.

221. 2 HAWKINS, *supra* note 104, at 84. True, Hawkins references "Evidence" when talking about the strength of the evidence, but as a careful treatise writer, it seems unlikely he would use that term unless he meant it technically. He does, after all, have an entire section entitled "Evidence" where he rules out "hearsay." *Id.* at 428-39.

accounts.[222] As discussed in more detail below, several state constitutional provisions echoed and reenforced this view by requiring that judges issue warrants only upon "evidence."[223]

After a party obtained a warrant, the next stage in the criminal process was for the constable—and perhaps the accuser—to arrest the accused and bring him before the JP.[224] At this point the JP performed the "preliminary" hearing or examination.[225] Laws such as the English Marian Statutes, as well as practice in many American colonies, required that the JP examine the accuser and other "witnesses" under oath, write down these examinations, and certify them.[226] The Marian Statutes, which largely governed in America, then required the JP to bind over the accuser and other witnesses for trial.[227]

Notice that we already have a continuity. The person seeking the warrant must testify under oath and have her examination written down, just as she must after the arrest. Both were called "examinations," as was testimony at trial.[228] In fact, Chitty said that the JP, during the preliminary examination after arrest, could simply use the earlier examination taken to obtain the warrant and affix a "fresh Jurat."[229] The old examination became the new one, as long as the witness swore again that its facts were true. Chitty noted that, even if the preliminary examination occurred before a different JP, the new JP could use the older examination.[230] We can already see the requirements from later stages imposed on the earlier stages.

After the preliminary examination, at least for serious felonies, the case moved to a higher court.[231] The witnesses who had been bound over now

222. 1 CHITTY, *supra* note 160, at *33. Chitty asks "what evidence" is required for a warrant and rules out a Quaker's affirmation. *Id.* at *33-34. Such an affirmation would not have been admissible at trial because Quakers would not swear an oath. *See* BURN, *supra* note 110, at 154.

223. *See infra* Part III.A.

224. *E.g.*, HENING, *supra* note 133, at 146-47, 403.

225. 2 HALE, *supra* note 133, at 120 & n.5.

226. *Id.*; GOEBEL & NAUGHTON, *supra* note 134, at 339-41, 348-49 (explaining New York procedure). *But see* HENING, *supra* note 133, at 147-48 (noting that a Virginia statute had transferred this power to four JPs sitting together). In most other jurisdictions, the JP examined the accused, but not under oath; any confession was admissible only if voluntarily given. *E.g.*, BURN, *supra* note 110, at 156-57.

227. 2 HALE, *supra* note 133, at 120-22, 120 n.2; *e.g.*, GOEBEL & NAUGHTON, *supra* note 134, at 341.

228. *See* LANGBEIN, *supra* note 216, at 125 (noting this similarity in the use of "examination").

229. 1 CHITTY, *supra* note 160, at *80 (noting that if the examination taken to obtain the warrant sufficed, and the accused had no questions, the "examinations are not again gone over, but a fresh Jurat is made to them; and this even before a fresh magistrate").

230. *Id.*

231. 2 HALE, *supra* note 133, at 121.

testified before the grand jury. Here, too, they were referred to as "witnesses" who must testify based upon personal knowledge.[232] But note that these witnesses were sometimes permitted to submit their sworn depositions from the preliminary examination in lieu of live testimony.[233] Why? Because those earlier written statements were under oath and based upon personal knowledge.[234] In-person appearances were not necessary at the grand-jury stage,[235] but Hawkins still noted that hearsay was banned in the sense that the deposition had to rest upon personal knowledge.[236]

Finally, trial: Here the witness had to testify in person, under oath.[237] The witness could testify only to facts based on personal knowledge.[238] Here too, however, the prosecutor could use the person's deposition taken before the JP if the witness had died or was too sick to travel.[239] Courts could introduce these depositions into evidence because they were sworn and based upon personal knowledge;[240] by the late eighteenth century, and sometimes before, they could only be introduced if the defendant had been present at the preliminary hearing with an opportunity for cross-examination.[241]

The criminal process thus made witnessing a continuum. The statement to the JP to obtain a warrant was an examination under oath and made the person a witness. This same examination could stand in for the examination at the later preliminary hearing—even before a new JP. The preliminary-hearing examination could serve as evidence at the grand-jury and trial stages, but only if the rules applicable to witnesses at those stages (that is, the requirement of an oath based on personal knowledge) had also applied earlier. As an illustration of this concept, Chitty wrote that the examination at the preliminary hearing must be under oath with personal knowledge because it may end up being entered into evidence at trial.[242]

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232. 2 HAWKINS, *supra* note 104, at 257-58.

233. *Id.* at 257; GOEBEL & NAUGHTON, *supra* note 134, at 348-49 (noting that written depositions were sometimes permitted as grand jury testimony in New York).

234. 2 HAWKINS, *supra* note 104, at 257-58.

235. *Id.* at 257.

236. *Id.* at 258.

237. *See* HENING, *supra* note 133, at 181, 183; R v. Brasier (1779) 168 Eng. Rep. 202, 202; 1 Leach 199, 200.

238. *See* 2 HAWKINS, *supra* note 104, at 431; 2 HALE, *supra* note 133, at 285; GOEBEL & NAUGHTON, *supra* note 134, at 630-39 (cataloging instances of witnesses bound over to appear in person at trial and noting that in general, at least for felonies, preliminary examinations could not be introduced at trial in lieu of live testimony).

239. 2 HALE, *supra* note 133, at 284; *see* 2 HAWKINS, *supra* note 104, at 429.

240. *See* 2 HALE, *supra* note 133, at 284-85; 2 HAWKINS, *supra* note 104, at 257-58.

241. Crawford v. Washington, 541 U.S. 36, 45-47 (2004) (collecting cases).

242. 1 CHITTY, *supra* note 160, at *77-79.

Indeed, this continuum may have produced the rules of evidence. Let us consider that historical evolution, first with respect to oaths. As John Langbein has pointed out, many early statutes authorizing JPs to conduct examinations never mentioned that they should take the testimony under oath.[243] This included the Marian Statutes.[244] And yet, judges soon required oaths for preliminary hearings.[245] Again, why?

The oath requirement for examinations before JPs likely arose in part because of the continuity between those examinations and testimony at the grand-jury and trial stages. Both William Lambard and Dalton wrote that JPs should take examinations under oath because those examinations might have to be read as evidence at trial should the witness die or otherwise fail to show up.[246] Langbein, drawing on Lambard and Dalton, went so far as to argue that other rules of evidence, such as competency of witnesses, *started* with JPs and their examinations and migrated from there to the trial context.[247] Going further, Langbein writes that JPs were tasked with gathering admissible evidence for trial,[248] and therefore took examinations with admissibility at the trial stage in mind.[249]

The same logic applies to the warrant process. No statute originally required a JP to take the accuser's statement under oath for ordinary criminal cases such as theft or robbery.[250] The Marian Statutes did not expressly provide for warrants at all.[251] But Hale, Hawkins, and others insisted upon an oath. These writers may have drawn the oath requirement for warrants from the preliminary-examination requirement just described. Hale and Hawkins did not say so explicitly, but their zeal to answer Coke's statement that JPs could not issue pre-indictment warrants[252] probably led them to conform the warrant process to the preliminary-examination process authorized by statute.

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243. *See* LANGBEIN, *supra* note 216, at 64-77 (surveying thirty-one pre-Marian examination statutes).

244. 1554-1555, 1 & 2 Phil. & M. c. 13, §§ 1-2; 1555, 2 & 3 Phil. & M. c. 10, § 1.

245. *See* DALTON, *supra* note 185, at 292.

246. 1 WILLIAM LAMBARD, EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE 210 (London, Ra: Newbery & H. Bynneman 1581) ("[I]f these informers bee examined upo[n] Oath, then although it should happe[n] them to die before the Prisoner have his Triall, yet their information may be give[n] in evidence . . . ."); *see also* DALTON, *supra* note 185, at 292.

247. LANGBEIN, *supra* note 216, at 119-25.

248. *Id.* at 124-25.

249. *Id.* at 123.

250. *See id.* at 73-76 (noting that almost none of the statutes authorizing JPs to take examinations, including the Marian Statutes, required an oath).

251. *See* 1554-1555, 1 & 2 Phil. & M. c. 13; 1555, 2 & 3 Phil. & M. c. 10.

252. *See supra* Part II.B.1.

Indeed, Coke, Hale, and Hawkins all rooted the power (or supposed power) of JPs to issue warrants in their power to take examinations after arrest and bind over defendants and witnesses for trial.[253]

As a matter of common sense, there is little reason a JP would distinguish an examination under oath to obtain a warrant and one taken at the preliminary examination. Both were examinations, under oath and in writing, that could end up being used in front of a grand jury or at trial (albeit the warrant examination by way of a fresh jurat). By the Founding era, JPs did not appear to distinguish between these two examinations in terms of whether they required an oath based upon personal knowledge.[254]

Another writer used this same logic to find that a warrant must be based upon an oath because the later trial testimony must be. In his 1680 book *English Liberties*, Henry Care considered a 1670 statute criminalizing unlawful religious assemblies called conventicles.[255] The statute required two sworn witnesses to convict at trial.[256] The statute also authorized JPs to issue search warrants, but did not require sworn witnesses for them to do so.[257] Care nevertheless argued that JPs should issue warrants based upon sworn witnesses because the later trial required them.[258] Care's logic echoes the arguments of Dalton and Lambard concerning JP examinations more generally.

Care's argument also separately supports the proposition that the oath requires personal knowledge. The reasoning is as follows. Care urged the requirement of not one but two sworn witnesses to obtain a warrant.[259] His

253. *See* 2 HALE, *supra* note 133, at 109-10; 2 HAWKINS, *supra* note 104, at 84; 4 COKE, *supra* note 102, at 177.

254. *See* s*upra* Part II.B.6. After the Founding, courts, statutes, and the Sixth Amendment limited the use of JP examinations or depositions at trial. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 43-49 (2004). But by then the oath requirement was well established, and JPs would likely have continued to treat a pre-warrant examination under oath as they would an examination for trial: Namely, both would require personal knowledge.

255. HENRY CARE, ENGLISH LIBERTIES: OR, THE FREE-BORN SUBJECT'S INHERITANCE 188-200 (London, G. Larkin 1680); *see* Conventicles Act 1670, 22 Car. 2 c. 1.

256. *See* Conventicles Act 1670, 22 Car. 2 c. 1. Care read the statute to require two witnesses, but the statute also allowed conviction by confession. *See* CARE, *supra* note 255, at 197-99.

257. Conventicles Act 1670, 22 Car. 2 c. 1.

258. CARE, *supra* note 255 at 197-99. Care's logic required a few steps. He wrote that he would require two sworn witnesses so that constables would not later be liable for burglary. Although the statute did not require sworn witnesses for a warrant, only for trial, a constable's immunity to burglary charges would rest upon a later conviction based on the sworn witnesses. Consequently, Care essentially worked backward from the trial requirement to determine that a constable's immunity from burglary required two sworn witnesses for the warrant.

259. *Id.*

argument can be read as presupposing each sworn witness will testify only as to personal knowledge; otherwise, the JP could rely upon one witness to testify as to his own knowledge and repeat the hearsay information of another. This two-witness rule parallels the observation by Coke and Hawkins concerning treason that neither witness can be permitted to simply repeat the hearsay of another.[260] Otherwise, one could satisfy the two-witness requirement with only one real witness and a second who restates the words of the first. Care deserves some acknowledgement here: Cuddihy traces the requirement of a specific warrant in part to his arguments.[261]

Finally, JPs were likely to recognize a continuum between the examination for the warrant, the examination at the preliminary hearing, and trial for minor felonies and misdemeanors.[262] After all, JPs tried these minor cases—sometimes immediately or sometimes at their next session—both in England and America.[263] The JPs would of course hear the testimony of the very same witnesses.[264] Sometimes the JPs would simply use the earlier examinations of the witnesses.[265]

Early nineteenth-century cases similarly drew no distinction between the examination of a party under oath to obtain a warrant and one taken after arrest, at the preliminary hearing, to determine commitment or bail.[266] In 1806, for example, the Supreme Court applied the same Fourth Amendment standard to both.[267]

2. Personal knowledge

The foregoing establishes that Founding-era practitioners likely viewed a witness obtaining a warrant in much the same way as a witness testifying before a grand jury or at trial. It relies in part on inferences, but those inferences enjoy greater support when we keep in mind that Founding-era

260. *See* 2 HAWKINS, *supra* note 104, at 258.

261. CUDDIHY, *supra* note 61, at 268.

262. *See, e.g.*, Act Directing the Method of Proceeding Against and Trying Free Persons Charged with Certain Crimes, ch. 57, 1786 Va. Acts 37 (outlining the process from arrest through preliminary hearing and trial).

263. *See id.*; 4 BLACKSTONE, *supra* note 105, at *268-69, *278-79.

264. *See* 1786 Va. Acts 37.

265. GOEBEL & NAUGHTON, *supra* note 134, at 380-81.

266. *See, e.g.*, *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 452-53 (1806); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT 378, 383-84 (Albany, New York, W.C. Little & Co. 1858); *see also* Caudle v. Seymour (1841) 113 Eng. Rep. 1372, 1374; 1 Q.B. 889, 894 (treating the examination for a warrant and the examination for a commitment the same).

267. *See Burford*, 7 U.S. (3 Cranch) at 453.

commentators evinced no reason to treat a person swearing an oath under examination to get a warrant differently from one swearing the same oath under examination in later proceedings.

This Subpart now considers the substance of the rule that barred witnesses from repeating thirdhand accounts. It does so to establish that rule, and to clarify that the rule's justification lay primarily in the oath requirement rather than in a requirement for cross-examination. It also does so because the rule itself, and its justifications, apply equally to a person obtaining a warrant under oath as to a witness at trial.

First, the oath itself. The definition of a testimonial oath remained the same from Coke's time to the Founding era. It was understood chiefly in terms of a person averring or denying that a fact was true: "An oath is an affirmation or deniall . . . for advancement of truth and right . . . ."[268] As Thomas Starkie wrote in his evidence treatise, the oath is the "first great safeguard which the law provides for the ascertainment of the truth."[269] This emphasis on the use of the oath to establish truth works best, of course, if the person swearing the oath is the one averring the underlying facts.[270]

The definition of perjury paralleled that of the oath. Perjury required not just a statement under oath, but also a statement in which a person made a "direct" or "absolute" assertion of truth—in other words, a statement not based on mere belief.[271] Hawkins said the oath must be sworn "absolutely and directly," and it is not perjury when someone "swears a Thing according as he thinks, remembers or believes."[272]

Significantly, the possibility of perjury applied to a person seeking a warrant.[273] That is, the person made a statement to a judge under oath in seeking the warrant; for that reason he was a witness in the same way he would be later at trial.

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268. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINALL CAUSES 166 (London, M. Flesher 1644); *see also* 1 THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 29 (George Morley Dowdeswell & John George Malcolm eds., London, V. & R. Stevens & G.S. Norton 4th ed. 1853).

269. 1 STARKIE, *supra* note 268, at 29.

270. Oaths occur, of course, in contexts unrelated to being a witness. Jurors swear an oath to perform their role faithfully in deciding a case, a type of oath distinguished early on from a witness's oath. *See* Bushell's Case (1670) 124 Eng. Rep. 1006, 1009; Vaughan 135, 142.

271. *See* 3 COKE, *supra* note 268, at 166 ("[T]he deposition must be direct and absolute . . . .").

272. 1 HAWKINS, *supra* note 104, at 175.

273. *Id.* at 173; *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 129 (1807); *see also* Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (holding that a defendant can challenge a warrant if the affiant committed perjury or recklessly disregarded the truth in obtaining it).

As for "witnesses," the personal-knowledge requirement enjoys a long pedigree. In 1349, the Chief Justice of the King's Bench said that witnesses "should say nothing but what they know as certain, *i.e.*, what they see and hear."[274] In a later leading English case concerning the independence of the jury, Chief Justice Vaughan wrote that the jury listens and decides facts based on what witnesses with firsthand knowledge swear to.[275] In language that came to dominate the definition of a witness, Chief Justice Vaughan wrote for the court that "a witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses."[276] As John Henry Wigmore noted, the requirement of personal knowledge is what it means to be a witness (and, by extension, to swear an oath as a witness in a court proceeding).[277] In short, to be a witness requires observation by the senses.[278]

In portions of their treatises, Hawkins, Coke, and others come close to equating being under oath with being a lawful witness or accuser. In discussing treason, Hawkins wrote that, by definition, being a witness means being under oath: "[H]ow can any Accuser be said to be a lawful Witness, if he be not upon his Oath?"[279] He went on to say, relying on Coke and Hale, that the two-witness requirement for treason was not met if Witness A merely repeated what Witness B said, even if Witness B said it under oath. Witness A did not count as one of the witnesses for the two-witness rule because he did not observe the underlying facts firsthand.[280] Put another way, "the Common Law admits of no other Accusers but Witnesses."[281] Hawkins explicitly referred to both trials and grand juries.[282] Although he did not say so, his logic applied equally to those seeking a warrant: Because they were accusers under oath and therefore "witnesses," they were required to testify based upon personal knowledge.

274. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 100-01 (Boston, Little, Brown & Co. 1898) (quoting the Chief Justice).

275. *Bushell's Case*, 124 Eng. Rep. at 1009, Vaughan at 142. In his opinion, Chief Justice Vaughan nevertheless acknowledged that jurors may draw upon evidence apart from testimony in open court. *Id.* at 1012, Vaughan at 147.

276. *Id.* at 1009, Vaughan at 142.

277. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 657, at 751-52 (1904).

278. *Id.*

279. 2 HAWKINS, *supra* note 104, at 257.

280. *Id.* at 258.

281. *Id.* at 257.

282. *Id.*

3. Hearsay

The personal-knowledge rule outlined above stated what was required of witnesses: observation by the senses. The same principle could also be phrased in terms of what the personal-knowledge rule barred: thirdhand accounts or hearsay. Legal writers such as Gilbert and Hawkins used the term "hearsay" to refer to witnesses who lacked personal knowledge and merely repeated what they had heard another say.[283] These writers said that hearsay was banned because it was not evidence.[284]

Treatise writers excluded hearsay because the person who testified in court under oath had not observed the event (thus failing the personal-knowledge requirement) and the person who *had* observed it was not under oath when originally speaking (thus failing the oath requirement).[285] When used in this context, hearsay failed both the personal-knowledge and oath requirements.

The right to cross-examine played only a secondary role in justifying the exclusion of hearsay. For example, Hawkins wrote: "It seems agreed, That what a Stranger has been heard to say is in Strictness no Manner of Evidence either for or against a Prisoner."[286] Hawkins gave two main justifications for this rule. First, the person—the "Stranger" who saw the events—was not under oath when he relayed his account to the witness. Second, that "Stranger" could not be cross-examined. This rule was neither mere guidance nor one that could be ignored for convenience. Instead, it was a flat prohibition: Absent very particular exceptions, "it seems a settled Rule, that [hearsay] shall never be made use of."[287]

Gilbert's evidence treatise required that a witness testify "to what he knows, and not to that only which he hath heard."[288] Gilbert elaborated that "a mere Hearsay is no Evidence."[289] In explaining the justifications for the rule, Gilbert did not stress the lack of cross-examination, but rather the lack of

283. *Id.* at 431; GILBERT, *supra* note 159, at 152; *see also* Goodwin v. Harrison, 1 Root 80, 80 (Conn. Super. Ct. 1781).

284. *See, e.g.*, 2 HAWKINS, *supra* note 104, at 431.

285. GILBERT, *supra* note 159, at 152; *see also* 2 HAWKINS, *supra* note 104, at 431 (noting that the individual with personal knowledge was not under oath).

286. 2 HAWKINS, *supra* note 104, at 431 (footnotes omitted).

287. *Id.* John Langbein has argued that the rule was not as absolute a bar in the early 1700s as Hawkins noted, and that courts often admitted hearsay in criminal cases during this period. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1186-90 (1996). But Langbein also agrees that by the "last decades of the eighteenth century," this hearsay rule was well established and consistently practiced. *Id.* at 1172.

288. GILBERT, *supra* note 159, at 152.

289. *Id.*

personal knowledge by the individual who testified and the lack of an oath by the hearsay declarant.[290] Gilbert thus formed the hearsay rule by joining the oath and personal-knowledge requirements together; an individual needed to satisfy both to testify. Starkie similarly joined oath, witness, and personal knowledge.[291] As Richard Friedman and Bridget McCormack have observed, "until near the end of the eighteenth century, lack of the oath appears to have been a greater concern with respect to out-of-court statements than was absence of the opportunity to cross-examine."[292]

American JP manuals agreed with the early treatise writers. These sources often spoke of "hearsay" as "no evidence."[293] For example, *The Conductor Generalis* noted that what a stranger said could not be repeated because the stranger was not under oath and the opposing party had no opportunity for cross-examination.[294] It was "in strictness no manner of evidence" and "it shall never be made use of."[295]

Hening's JP manual, reflecting the Virginia law that Madison and Mason would have been familiar with, agreed: "It is a general rule that hearsay is no evidence."[296] Hening's main justification rested on the lack of an oath, "for no evidence is to be admitted but what is upon oath."[297] Significantly, Hening wrote that an out-of-court statement was not more valuable just because the person testifying was under oath: "[F]or if the first speech was without oath, another oath that there was such speech . . . [is] of no value in a court of justice . . . ."[298] The original person's unsworn account remained a "bare speaking."[299]

Hening pointed to this lack of an oath as the primary reason to exclude thirdhand accounts, followed by the absence of cross-examination as a secondary reason: "[A]nd besides, the adverse party had no opportunity of a cross examination . . . ."[300] As was common at the time, Hening rested his

290. *Id.* at 152-53.

291. 1 STARKIE, *supra* note 268, at 43-44. Unlike Gilbert, however, Starkie also joined cross-examination. *Id.*

292. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1209 n.141 (2002) (citing T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 533 (1999)).

293. *E.g.*, BURN, *supra* note 110, at 149; *see also* THE CONDUCTOR GENERALIS, *supra* note 167, at 142.

294. THE CONDUCTOR GENERALIS, *supra* note 167, at 142.

295. *Id.*

296. HENING, *supra* note 133, at 181.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

justification on the best-evidence rule. If the witness was alive, "what he has been heard to say is not the best evidence."[301]

We can see how the Founding era saw the rule against hearsay as resting on the more literal sense of the word "hearsay" in an illustrative 1745 case, in which the New York council refused to issue a warrant because the informant was "able to Sware only to [here] Says."[302]

Some early American cases rooted the hearsay rule in the personal-knowledge requirement.[303] In 1813, the Supreme Court rejected the hearsay of a dead person, restating the rigid rule that testimony required personal knowledge.[304] The Court did not mention cross-examination; instead, it mentioned the best-evidence rule and the tendency of hearsay to be inaccurate.[305] The Court's characterization of hearsay could apply with equal force to officers seeking warrants based on information from confidential informants today: "Its intrinsic weakness, its incompatency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."[306]

4. Cross-examination

One might object to applying the rule against hearsay to the warrant process, arguing that the rule against hearsay only protects the right of cross-examination. The person who seeks a warrant does so ex parte, outside the

301. *Id.*

302. CUDDIHY, *supra* note 61, at 426 (quoting Letter from Connecticut Governor Jonathan Law to Massachusetts Governor William Shirley (June 19, 1745), *in* 1 THE LAW PAPERS: CORRESPONDENCE AND DOCUMENTS DURING JONATHAN LAW'S GOVERNORSHIP OF THE COLONY OF CONNECTICUT 1741-1750, at 312, 312 (1907)).

303. *See, e.g.*, Penner v. Cooper, 18 Va. (4 Munf.) 458, 460 (1815) (argument of the appellee) (noting that the justification for excluding hearsay rests on the need for the best evidence and the oath requirement in order to believe the declarant); Claiborne v. Parrish, 2 Va. (2 Wash.) 146, 147-48 (1795); Cherry v. Boyd, 16 Ky. (1 Litt. Sel. Cas.) 7, 8 (1800). These cases rooted the oath requirement in the best-evidence rule, which itself rested on the personal-knowledge requirement. Gilbert, for example, established that the best-evidence rule required evidence as close to personal observation by the senses as possible. GILBERT, *supra* note 159, at 3-5.

304. Queen v. Hepburn, 11 U.S. (7 Cranch) 290, 295-96 (1813) (enslaved party). In this case, the plaintiffs sought their freedom from slavery on the basis of hearsay evidence that proved an ancestor was free, which would make the plaintiffs free themselves. *Id.* at 295. The majority refused to admit this evidence under a hearsay exception. *Id.* at 296-97. Justice Duvall—in his only written dissent in twenty-three years on the Court—supported an exception for freedom suits, arguing that "the right to freedom is more important than the right of property." *Id.* at 299 (Duvall, J., dissenting).

305. *Id.*

306. *Id.* at 296 (spelling in original).

presence of the suspect. Since the suspect has no right and no ability to cross-examine, this objection would conclude, it does not matter whether the accuser seeks the warrant based on hearsay.

It is true that today the chief justification for the rule against hearsay lies in the right to cross-examine.[307] But as noted above, the Founding-era rule against hearsay was rooted more in personal knowledge and the oath requirement than cross-examination. With that in mind, the rule against thirdhand accounts applies perfectly well to warrant applications. After all, this rule also applied to grand-jury proceedings even though those proceedings contained no right to cross-examine witnesses.[308]

True, treatise writers did list cross-examination as a reason (albeit a secondary one) to ban thirdhand accounts. But historically, the right to cross-examine arose far more urgently in cases[309] where the prosecutor sought to introduce, at trial, a sworn deposition of a witness rather than their live testimony.[310] Such a deposition was under oath and based on personal knowledge, and so the objection did not lie in hearsay. Indeed, the deposition cases did not even use the term "hearsay."[311] Rather, the objection lay in the inability of the defendant to cross-examine the absent witness.[312] If the defendant had been present when the deposition was taken (as was often the

307. The Federal Rules of Evidence ground the rationale for the rule against hearsay in part on the lack of the ability to cross-examine the declarant, and they separate the requirement of personal knowledge into a distinct rule. *Compare* FED. R. EVID. 801 advisory committee's notes (discussing the hearsay rule), *with* FED. R. EVID. 602 advisory committee's notes (describing the personal-knowledge requirement). Even in 1904, Wigmore wrote that the rule against hearsay rested entirely upon the requirement of cross-examination, whereas the oath and personal-knowledge requirements were conceptually distinct and related to the meaning of being a witness. 2 WIGMORE, *supra* note 277, §§ 1360-1364, at 1673-81; *see also* Gallanis, *supra* note 292, at 533, 537 (arguing that cross-examination began to replace the oath and personal-knowledge requirements as the primary justification for the rule against hearsay in the late eighteenth century).

308. *See supra* notes 231-36 and accompanying text.

309. *See, e.g.*, R v. Paine (1696) 87 Eng. Rep. 584, 585; 5 Mod. 163, 164-65; R v. Woodcock (1789) 168 Eng. Rep. 352, 352-53; 1 Leach 500, 500-02; Crawford v. Washington, 541 U.S. 36, 45-47 (2004) (summarizing cases); *see also* Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 118 (2005).

310. *Paine*, 87 Eng. Rep. at 584, 5 Mod. at 163-64 (considering whether a sworn deposition given before the mayor could be introduced at trial).

311. *See, e.g.*, *id.* at 584-87, 5 Mod. at 163-67; *see also* 2 HAWKINS, *supra* note 104, at 429-31 (analyzing what Hawkins calls the hearsay cases separately from the deposition cases, for which Hawkins does not use the term "hearsay").

312. *Paine*, 87 Eng. Rep. at 585, 5 Mod. at 164-65.

case), he could not have challenged its admissibility as easily, because he would have had a chance to cross-examine the declarant.[313]

When we draw back to first principles, the rationale behind the oath and personal-knowledge requirements applies equally to trial and the warrant process. Both trial and the warrant process require the truth to protect individual liberty, as the Founding-era sources emphasize.[314] Ensuring the truth of an allegation before undertaking the drastic measure of breaking into a home should have similar weight as ensuring the truth before a conviction or penalty. Recall that Coke so prioritized safety and security that he entirely denied the right of JPs to issue pre-indictment warrants to break into homes and conduct searches or arrests.[315] Hale also denied the power of search warrants to authorize breaking into a home, and Hawkins and Blackstone emphasized that search warrants represented an erosion of liberty.[316]

Additionally, at both trial and the warrant stage, the witness must make her statement under oath to a judge. Writers from Lambard to Hale and Hawkins noted that a JP, in issuing a warrant, was performing a judicial act; these writers referred to JPs generally as judges of record.[317] Hening, citing Hale, said that warrants were "judicial acts" and therefore must rest upon "examination of the fact."[318] Accordingly, witnesses in both settings are legal witnesses that should be bound by similar rules.

This Article does not argue that, as a matter of practice, a particular party seeking a warrant should never repeat hearsay, or that if she did the judge should formally strike the statement (as might occur at trial). Rather, it argues that in issuing a warrant, the judge must have before her sufficient firsthand knowledge under oath, even if the witness also supplies extraneous hearsay.[319]

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313. Trial courts still preferred live testimony. In order to introduce a deposition, the prosecutor would have to show, in addition to an earlier opportunity to cross-examine, that the witness was unavailable. *See supra* notes 239-40 and accompanying text. This practice survives today. *See* FED. R. EVID. 804(b)(1).

314. *See supra* Part II.B.1; *infra* Part II.E.

315. *See supra* notes 139-46 and accompanying text.

316. *See supra* notes 147-53 and accompanying text.

317. 2 HALE, *supra* note 133, at 150 ("[T]hese warrants are judicial acts . . . ."); 2 HAWKINS, *supra* note 104, at 4 (stating that JPs were judges of record); 1 LAMBARD, *supra* note 246, at 3 (same).

318. HENING, *supra* note 133, at 402.

319. *See, e.g.*, LANCASTER COUNTY, VIRGINIA ORDER BOOK ABSTRACTS 1703-1706, at 28-33 (Ruth Sparacio & Sam Sparacio eds., 1993). This order book contains examinations of witnesses to the murder of John Sandall by John Bush. *Id.* The JPs remanded Bush for trial, *id.* at 33, based on the detailed examination of Robert Stuart, a firsthand witness, *id.* at 28-31. Another witness was careful to declare that he knew nothing about the death firsthand, but instead knew only what Stuart had told him. *Id.* at 31. The JPs inquired into this hearsay, but apparently for reasons unrelated to the truth; rather,

footnote continued on next page

After all, as noted below,[320] the text of the Fourth Amendment does not require probable cause from a witness under oath, but rather probable cause *supported* by oath.

D. Accountability

The oath requirement can also be seen as an accountability mechanism, both as a deterrent against false allegations and as a remedy if they are made. The oath identified the accuser so that she could be sued for trespass, false imprisonment, or malicious prosecution; the oath also made the accuser liable for perjury if she lied. Many nineteenth- and twentieth-century cases emphasize this theme of accountability.[321] The prospect of later sanctions would logically make the witness far less likely to lie, and would encourage the witness to take care to ensure that her account is accurate.

But the above remedies should be seen as valuable for their own sake because the Founding generation would have viewed them as fundamental. The leading seditious-libel cases in England that established the fundamental principle against general warrants started as criminal investigations by government officials, but ended almost entirely as trespass cases against those officials in which the rights of those under investigation were largely vindicated.[322] The Founding generation built the Fourth Amendment on top of this existing system involving trespass and perjury.

Trespass and perjury should therefore be seen as providing constitutional remedies. Indeed, we refer to the federal analogues of trespass, malicious prosecution, and false imprisonment as "constitutional torts."[323] When we eliminate the real accuser and allow officers to obtain warrants based on information from unnamed informants, we deprive aggrieved individuals of civil causes of action (for example, trespass) as well as the criminal remedy and deterrent of perjury.

The Founding generation was, of course, keenly aware of the potential abuse of warrants. Its leaders focused primarily on abuses in the writs-of-

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they wanted to probe Stuart's credibility and determine whether he made the allegations promptly. *See id.* at 31.

320. *See infra* Part III.B.

321. *E.g.*, Entick v. Carrington (1765) 95 Eng. Rep. 807, 818; 2 Wils. K.B. 275, 291-92; *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 452 (1806); Veeder v. United States, 252 F. 414, 418 (7th Cir. 1918); *see also* Entick v. Carrington (1765) 19 How. St. Tr. 1029, 1067.

322. *See* CUDDIHY, *supra* note 61, at 439-58 (canvassing the numerous English trespass cases).

323. *See, e.g.*, Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978); *see also* Jennifer E. Laurin, Essay, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 672 (2011) (discussing constitutional-tort jurisprudence).

assistance cases in the colonies and the seditious-libel cases in England.[324] But even for ordinary criminal cases, some treatise writers worried about individuals abusing the warrant process to exact vengeance or extort money from the victim. In his Massachusetts criminal law treatise, Daniel Davis wrote that the privilege of seeking a warrant was often abused because the government paid for the resulting prosecution.[325] The complainant, Davis noted, might act from "motives of revenge."[326] For this reason, Davis urged magistrates to examine those seeking warrants carefully so that the magistrates could "acquaint [themselves] with the real motives."[327] These motives could have included a desire to use the legal process and false affidavits to steal another's goods with the sheriff's assistance; Hawkins expressly identified this conduct as a type of larceny.[328]

Perjury and trespass are thus foundational parts of the Fourth Amendment, and their elements support a real-accuser requirement. Consider perjury first. As noted above,[329] perjury required a "direct" assertion of truth[330] and could not be what someone "thinks, remembers or believes."[331] Under current law, the officer who repeats the hearsay account of the real accuser could not face a perjury prosecution based on the lies of the informant. This species of remedy has evaporated.

Next, consider trespass. The criminal process divided roles between the accuser who sought the warrant and the constable or sheriff who executed it.[332] Any subsequent liability for bad searches or arrests hung on this division.[333] If the arrested person turned out to be innocent or, in the context of a search warrant, the goods were not found, the officer enjoyed immunity as long as his role was limited to executing the warrant.[334] The party seeking the warrant, however, could be sued in trespass.[335] This remedy would have made little sense if the officer, who in most cases had immunity, could swear the oath himself.

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324. *See infra* Part II.E.

325. DAVIS, *supra* note 162, at 7-8.

326. *Id.* at 8.

327. *Id.*

328. 1 HAWKINS, *supra* note 104, at 90.

329. *See supra* notes 271-72 and accompanying text.

330. 3 COKE, *supra* note 268, at 166.

331. 1 HAWKINS, *supra* note 104, at 175.

332. *See supra* note 205 and accompanying text.

333. Davies, *supra* note 20, at 589; 2 HAWKINS, *supra* note 104, at 82-83; Bostock v. Saunders (1773) 95 Eng. Rep. 1141, 1145; 3 Wils. K.B. 434, 440.

334. Davies, *supra* note 20, at 588, 652.

335. *See, e.g.*, BURN, *supra* note 110, at 358-59.

E. Newfangled Process

In the decades leading to the American Revolution, the English Parliament devised new legal processes for search and arrest: warrants for seditious activity in England and writs of assistance for revenue searches in America. Both efforts led to legal battles that laid the foundation for the Fourth Amendment.[336]

These new methods of search and arrest evaded the common law strictures surveyed above. They did not require probable cause or particularity and, most importantly for this Article's purposes, they sometimes did not require an individual with personal knowledge to swear an oath. As detailed below, courts and advocates in England and its American colonies attacked these warrants and writs of assistance as deficient precisely because they fell short of the common law standards.

We can therefore look to these precedents as further evidence that the Founding generation intended the Fourth Amendment (and its state analogues) to conform to the common law requirements for warrants, including the real-accuser requirement. We can also look to these precedents for further elaboration on the requirement that the real accuser swear the oath.

These precedents additionally show us that the Framers and ratifiers intended the Fourth Amendment to prevent future, unforeseen, newfangled processes that evaded common law strictures. From approximately 1850 to 1930, American courts faced innovative methods of search and arrest that sought to sidestep the real-accuser requirement. Those courts did what the Founding generation intended: They pointed to the Fourth Amendment as prohibiting innovations that would erode the common law requirement of a real accuser.

1. Seditious-libel cases in England

In the early 1760s, several cases arose relating to anonymous pamphlets that criticized government policy, including those authored by John Wilkes and John Entick.[337] In these cases, a British secretary of state issued general warrants to search homes, seize papers, and arrest persons without limit, at the discretion of government officers.[338]

336. Donohue, *supra* note 58, at 1196-207, 1244-52; Richard A. Epstein, Entick v Carrington *and* Boyd v United States*: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 31-32 (2015) (explaining that the Fourth Amendment was an effort to "mimic" the protections in *Entick v. Carrington*).

337. Donohue, *supra* note 58, at 1196-204.

338. *Id.*

Entick, Wilkes, and others sued in trespass to recover damages and generally won large jury verdicts.[339] The courts rejected these general warrants, and these cases became famous and celebrated in the colonies as leading precedents for both independence and the Fourth Amendment.[340] John Wilkes's name became synonymous with liberty.[341] Later treatise writers regularly interpreted the Fourth Amendment with reference to these cases.[342]

Scholars and courts most often point to these cases as establishing (or reconfirming) the rule prohibiting general warrants, orders permitting officers to search any place or to arrest any person.[343] But for this Article's purposes, these cases also show that the Fourth Amendment oath requires the real accuser. The cases ultimately support the real-accuser requirement for several reasons.

First, these cases, especially *Entick v. Carrington*,[344] established common law limits for warrants and essentially erected those limits as the standard against which to measure any newfangled process.[345] If a new process failed to conform to old limits (such as Hale's disapproval of general warrants[346]) it would be void, at least if not provided for by statute.[347] In *Entick*, the plaintiff,[348] the defendants,[349] and the court all expressly agreed that it was appropriate to compare the secretary of state's general search warrant to a

339. *E.g.*, *id.* at 1204.

340. *Id.* at 1257-60.

341. *Id.*

342. *E.g.*, 3 STORY, *supra* note 108, §§ 1894-1895, at 748-50.

343. *See, e.g.*, Donohue, *supra* note 58, at 1257-60; Boyd v. United States, 116 U.S. 616, 625-30 (1886).

344. (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275; *see also* Entick v. Carrington (1765) 19 How. St. Tr. 1029. There are several reports of *Entick*. For a summary of the debate over which versions the Founding generation were most likely to have read, see T.T. Arvind & Christian R. Burset, *A New Report of* Entick v. Carrington *(1765)*, 110 KY. L.J. (forthcoming 2022) (manuscript at 13-16), https://perma.cc/CE7G-JHZP. The remainder of this Subpart references the longer case report published in *Howell's State Trials*. *See id.* (manuscript at 3).

345. *See Entick*, 19 How. St. Tr. at 1067-68. The court accepted stolen-goods warrants even as it questioned their underlying validity. *Id.* at 1067 (explaining that stolen-goods warrants "crept into the law by imperceptible practice"). Although the court, in rejecting warrants to seize papers, distinguished them from stolen-goods warrants, it nevertheless wrote that any valid warrant to seize papers would need to meet (at a minimum) the common law standards for stolen-goods warrants. *Id.* at 1066-68.

346. 2 HALE, *supra* note 133, at 150.

347. *Entick*, 19 How. St. Tr. at 1067-68.

348. *Id.* at 1038-39 (argument of the plaintiff).

349. *Id.* at 1040 (argument of the defendants).

stolen-goods warrant.[350] The case relating to John Wilkes similarly pointed to the common law, and to Hale, Coke, and Hawkins in particular, as the standard of lawfulness for warrants.[351]

Second, the oath was one of these irreducible common law limits. In discussing what a stolen-goods warrant required, the *Entick* court noted that there "must be a full charge upon oath."[352] The court reinforced this position by noting that a stolen-goods warrant "would require proofs beforehand,"[353] mirroring the use of the term "proof" in treatises such as Chitty's.[354]

Third, this oath required the real accuser. In the case of stolen goods, the *Entick* court wrote, "[t]he *owner* must swear that the goods are lodged in [a specific] place."[355] Moreover, the court said that the accuser must be present at the search: "He must attend at the execution of the warrant to shew [the goods] to the officer . . . ."[356] Only an individual with personal knowledge could accurately identify his own goods. The *Entick* court contrasted the real-accuser requirement for stolen goods with the Crown's proposed warrant process, which would allow officers to search individuals based upon "informers [who are] unknown."[357]

The court in *Entick* also pointed to accountability.[358] A warrant that failed to follow the common law requirement of an oath by the real accuser left innocent people who were searched with no remedy. Constables executing warrants were generally immune from suit;[359] likewise, JPs were immune if they found probable cause to issue the warrant.[360] It was the real accuser—the person who claimed to have witnessed the theft and suspected that the stolen goods were at the person's home—who had to answer in trespass if the goods

350. *Id.* at 1066 ("[Y]et it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.").

351. R v. Wilkes (1763) 95 Eng. Rep. 737, 741; 2 Wils. K.B. 151, 158 (addressing whether a warrant of commitment must state the charge); *see also* Money v. Leach (1765) 97 Eng. Rep. 1075, 1086, 1088; 3 Burr. 1742, 1763, 1766-67 (citing Hale and Hawkins).

352. *Entick*, 19 How. St. Tr. at 1067.

353. *Id.*

354. *See* 1 CHITTY, *supra* note 160, at *33-34 (noting that testimony under oath must generally "prove" probable cause to justify a warrant).

355. *Entick*, 19 How. St. Tr. at 1067 (emphasis added).

356. *Id.*; *see also supra* notes 178-80 and accompanying text.

357. *Entick*, 19 How. St. Tr. at 1064.

358. *Id.* at 1065.

359. *See supra* note 334 and accompanying text.

360. 2 HAWKINS, *supra* note 104, at 85.

were not found.[361] Like Hale and Hawkins, the court treated the search as the accuser's search, with the constable merely assisting.[362]

The *Entick* court also addressed a law-enforcement argument that has persisted through the centuries: convenience. The defendants argued that their warrant was permissible for reasons of convenience, utility, and "state necessity."[363] The court rejected these arguments. Regarding convenience and state necessity, it wrote that the "common law does not understand that kind of reasoning."[364] The court similarly rejected the defendants' argument that warrants should be granted based on "utility, [because] such a search is a means of detecting offenders by discovering evidence."[365] Even in heinous cases such as "murder, rape, robbery, and house-breaking," utility could not overcome liberty to justify such searches.[366]

2. Writs of assistance in the colonies

The other key precedent leading to the Fourth Amendment was the Crown's use of writs of assistance—akin to general warrants authorizing customs officials to search wherever they chose—in order to enforce British revenue laws.[367] These writs did not require an oath at all. Courts in Massachusetts, for example, granted writs to customs officers on standing authority rather than doing so on a case-by-case basis.[368] The customs officer, in turn, enjoyed almost complete discretion regarding where to search.[369]

The writs lasted only as long as the current sovereign's lifetime plus six months. When King George II died in 1760, all writs of assistance died six

361. *Entick*, 19 How. St. Tr. at 1067.

362. *See id.*; *supra* notes 178-79.

363. *Entick*, 19 How. St. Tr. at 1073.

364. *Id.*

365. *Id.*

366. *Id.* Here, the court rejected warrants to seize papers even if they *did* conform to the strictures of stolen-goods warrants. *Id.* at 1065-66, 1074. *Entick* ultimately rejected these general warrants entirely. *Id.*

367. *See generally* CUDDIHY, *supra* note 61, at 489-536 (discussing opposition to writs of assistance in the American colonies). For additional background, see Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 244, 247-48 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1856) ("Then and there the child Independence was born."); Clancy, *supra* note 58, at 992; Donohue, *supra* note 58, at 1244-52; and M.H. SMITH, THE WRITS OF ASSISTANCE CASE 6-7 (1978).

368. *See* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772 app. 1, at 401-06 (Samuel M. Quincy ed., Boston, Little, Brown & Co. 1865) (collecting colonial writs).

369. *See id.* app. 1, at 404-05.

months later by operation of law.[370] After customs authorities in Massachusetts sought a new writ from the Massachusetts high court, merchants enlisted James Otis to argue against them in 1761.[371]

Even though Otis ultimately lost his argument, this famous case became a cause célèbre in the march toward independence. The same can be said for battles against writs of assistance, including later writs authorized by the Townsend Acts, throughout the colonies.[372] Otis's focus on the general nature of the writs proved central to the Fourth Amendment's particularity requirement—a ban on general warrants.[373]

For purposes of this Article, two strands of Otis's argument further illuminate the real-accuser requirement. First, Otis expressly referred to stolen-goods warrants and common law arrest warrants as the fundamental standards against which writs of assistance should be measured.[374] This means that we should look closely at the common law protections such warrants afforded when interpreting the Fourth Amendment.

Second, Otis's argument supported the real-accuser requirement. Otis admitted that stolen-goods warrants could be legal when both sufficiently narrow and "*upon oath made* . . . by the person, who asks, *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH."[375] The emphasis here at least suggests an officer who swears upon personal knowledge. Otis further argued that narrow, "*special* writs" could only be granted to "certain persons on oath"[376]—possibly another reference to the real-accuser limitation.

Beyond these two strands, Otis's argument touched on a theme that persists today: Warrants are not simply a limit but also an authorization. Those opposed to the writs of assistance and other general warrants in Massachusetts opposed them because they authorized officers to search whenever and wherever they wanted, and authorized intrusions in support of those searches.[377] Cuddihy has identified the violence associated with home

370. Donohue, *supra* note 58, at 1248.

371. *Id.* at 1248-49.

372. *Id.* at 1194, 1244, 1260; SMITH, *supra* note 367, at 412; BAILYN, *supra* note 122, at 4, 111, 117, 176-78.

373. Donohue, *supra* note 58, at 1250, 1284.

374. QUINCY, *supra* note 368, app. 1, at 530-32.

375. SMITH, *supra* note 367, at 552-53 (quoting Otis).

376. *Id.* at 553 (quoting Otis).

377. *See id.*

searches as central to Massachusetts's decades-long turn against general warrants.[378]

Otis lost, and the Massachusetts court granted the writ.[379] But the Massachusetts legislature attempted to fight back with a bill that required special warrants, upon oath, that followed common law requirements.[380] As for the oath, the bill would have required it to be in writing.[381] The governor, however, refused to sign the bill.[382]

Why did Otis lose? In part because of the premium placed on law enforcement's need for convenience. The lawyer for the officials seeking the writ admitted that his main argument was "the necessity of the case."[383] While the court rejected law-enforcement convenience in *Entick*, Thomas Hutchinson, the judge who presided over the writs case, apparently accepted it. In writing about the writs case in his later history of Massachusetts, Hutchinson noted that, if the oath of an informer were required, no one would ever seek a warrant for fear of the "rage of the people."[384]

Hutchinson's insight supports the argument that the oath, had it been necessary, would have required the real accuser. If, in Hutchinson's view, the oath requirement did not refer to the real accuser, but instead allowed an officer to apply for a warrant, his point would have had less weight. After all, the officer who applied would be the same customs officer who already exposed himself to the "rage of the people" in executing the warrant (and indeed, by his very post).[385] Throughout this period, mobs attacked customs men and their homes.[386] Only if the oath required an ordinary civilian witness would that informer be afraid to come forward.

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378. CUDDIHY, *supra* note 61, at 371 (noting that the violent searches by "press gangs" singled out Massachusetts).

379. SMITH, *supra* note 367, at 412.

380. *Id.* at 425-26; QUINCY, *supra* note 368, app. 1, at 495-99.

381. QUINCY, *supra* note 368, app. 1, at 495. An extra page apparently attached to the bill might have required the officer to name the informant, but the effect or intention behind this extra page is unclear. SMITH, *supra* note 367, app. N at 567-68.

382. QUINCY, *supra* note 368, app. 1, at 497-99.

383. George Gregerson Wolkins, *Daniel Malcom and Writs of Assistance*, 58 PROC. MASS. HIST. SOC'Y 5, 9 n.15. (1925) (emphasis omitted) (quoting an April 29, 1773 *Massachusetts Spy* article).

384. QUINCY, *supra* note 368, app. 1, at 414 n.2 (quoting 3 THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, FROM 1749 TO 1774, at 94 (John Hutchinson ed., London, John Murray 1828)).

385. Customs officers faced the ire of the people throughout the colonies. *See, e.g.*, PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN 1765-1776, at 7-10, 57, 125 (2d prtg. 1991); BAILYN, *supra* note 107, at 73-74, 120-21.

386. BAILYN, *supra* note 107, at 73-74, 110, 120-21.

This theme of law-enforcement convenience returned a few years later with the Townshend Acts, which unambiguously authorized general writs in the colonies.[387] The Attorney General of England, in discussing the history of such writs, noted that they evolved from specific warrants under oath to general warrants because the former had caused "Inconvenience."[388]

3. Subsequent writ history

From the 1760s until the American Revolution, the courts in many colonies rejected the writs of assistance because they were general and did not require an oath.[389] Sometimes the courts would instead grant specific writs.[390] In Massachusetts and the few other colonies where the writs remained lawful, officers almost never sought or executed such writs because the people would interfere and prevent any seizure (or, after a seizure, would rescue the ship or other property seized).[391]

One leading writ case illustrates the view, both legal and cultural, that an individual with personal knowledge was required to make the accusation. This was the Malcom Affair, a well-publicized incident of resistance in 1766 that played a key role in the lead-up to the Revolution and the eventual adoption of the Fourth Amendment.[392]

Daniel Malcom was a merchant suspected of storing undutied liquors in his house's cellar.[393] Customs officers arrived with a writ to search.[394] Malcom argued that the writ was unlawful and that breaking into a home to search was likewise unlawful.[395] The real accuser was not present.[396] Another person on

387. *E.g.*, Revenue Act 1767, 7 Geo. 3 c. 46, § 10.

388. SMITH, *supra* note 367, app. A at 521 (quoting Attorney General William de Grey). The first act authorizing writs in 1660 required an oath. Customs Act 1660, 12 Car. 2 c. 19. Its replacement in 1662 eliminated the oath requirement. Customs Act 1662, 13 & 14 Car. 2 c. 11, § 5.

389. SMITH, *supra* note 367, at 460; Davies, *supra* note 20, at 566-67; QUINCY, *supra* note 368, app. 1, at 500-511 (cataloging court responses to requests for writs of assistance in each colony); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 224-26 (1993).

390. Donohue, *supra* note 58, at 1260.

391. *See* JOHN PHILLIP REID, IN A REBELLIOUS SPIRIT: THE ARGUMENT OF FACTS, THE LIBERTY RIOT, AND THE COMING OF THE AMERICAN REVOLUTION 10 (1979); BAILYN, *supra* note 107, at 74 ("No custom house officer would now dare make a seizure . . . .").

392. *See* CUDDIHY, *supra* note 61, at 496-501, 550-51, 569 (describing the events); Wolkins, *supra* note 383, at 5.

393. Wolkins, *supra* note 383, at 13-14.

394. *Id.* at 26.

395. *Id.* at 54-55.

396. *Id.* at 46.

the scene refused to assist the officers unless they were to "bring the Informer" because "that was the way in the old Countrys."[397] Malcom's understanding of the law is significant: He was a client of Otis's, and indeed had earlier retained him to argue the writs-of-assistance case in 1761.[398]

The crowd that assembled outside Malcom's home to help him resist similarly declared to the officers that the writ was unlawful.[399] Even an ordinary search warrant the officers had obtained from a JP—based upon a thirdhand account—was not valid without the real accuser, the crowd maintained.[400] The officers "should swear to their Informer," and the crowd wanted the real accuser to be "discovered or delivered up."[401] Perhaps the crowd meant that the accuser must swear the oath. More likely it demanded that the real accuser attend the search because, as Hawkins and Hale would say, it was his search.[402]

The crowd also seemed concerned that anonymous informants were paid for their information by sharing in the goods seized. For example, a group of schoolboys arrived in the afternoon to join the crowd outside of Malcom's home and jeer about the informant[403]—who was apparently well-known anyway. The schoolboys discussed going to the informant's house and, because he was a paid informant, ironically giving "him three Cheers for the great Prize he'd got."[404]

As night drew on, the customs officers withdrew in defeat.[405] Even they seemed to concede they could not lawfully execute the warrant at night,[406] and doing so would be too dangerous in any event.[407] They were likely grateful for the setting sun.

397. *Id.* (quoting the declaration of Benjamin Goodwin).

398. *Id.* at 7-8, 13. Otis represented sixty-three Boston merchants, including Malcom. *Id.* at 7-8.

399. *Id.* at 38.

400. *Id.*

401. *Id.* (quoting the declaration of Stephen Greenleaf).

402. *See supra* notes 178-80 and accompanying text.

403. Wolkins, *supra* note 383, at 46-47.

404. *Id.* at 47 (quoting the declaration of Benjamin Goodwin); *see also, e.g.*, Sugar Act 1764, 4 Geo. 3 c. 15, § 42 (providing money to informants).

405. Wolkins, *supra* note 383, at 39.

406. *Id.* at 38-39.

407. *Id.* at 39 (noting that attempting to enter Malcom's house at night might be attended by the "most Terrible Consequences" (quoting the declaration of Stephen Greenleaf)).

III. The Fourth Amendment

This Part provides textual support for the real-accuser requirement from two sources: (1) the state constitutional provisions that led to the Fourth Amendment; and (2) the text of the Fourth Amendment itself.

A. State Constitutional Provisions

Two major state sources inform our understanding of the Fourth Amendment: (1) state constitutional provisions and bills of rights; and (2) demands at state ratifying conventions for a federal bill of rights. In both contexts, states required or demanded an "oath" or "evidence" for a warrant, and often banned general warrants.[408] "Evidence," of course, would require an individual with personal knowledge to swear the oath.[409] I argue below that states appeared to use "oath" and "evidence" interchangeably,[410] even within specific proposals. Their treatment of the two terms as synonyms suggests that the oath (1) required the real accuser; and (2) was understood as legal evidence.

Among state constitutional provisions, the most notable is one of the earliest: article X of the 1776 Virginia Declaration of Rights.[411] This provision required that warrants issue only upon "evidence," without mention of any oath.[412] For search warrants, it required "evidence of a fact committed."[413] For arrests warrants, it required that they be "supported by evidence."[414] North Carolina's Constitution contained nearly identical language.[415]

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408. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 232-35 (Neil H. Cogan ed.,1997) [hereinafter Cogan].

409. *E.g.*, R v. Brasier (1779) 168 Eng. Rep. 202, 202; 1 Leach 199, 200 ("[N]o testimony whatever can be legally received except upon oath . . . ."); HENING, *supra* note 133, at 181 ("[N]o evidence is to be admitted but what is upon oath . . . .").

410. Richard Nagareda makes a similar argument concerning the Fifth Amendment. *See* Richard A. Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575, 1604-05 (1999). He shows that early state provisions banned compelling a person to "give evidence" against himself instead of being a "witness" against himself (as the Fifth Amendment declares). *Id.* at 1605-08. Despite the word change, Nagareda demonstrates that the Founding generation likely meant the same thing in both formulations and intended, by using the term "witness," to ban compelling a person to furnish "evidence" against himself. *Id.*

411. VA. DECLARATION OF RIGHTS of 1776, art. X, *reprinted in* Cogan, *supra* note 408, at 235.

412. *Id.*

413. *Id.* The particular language closely tracks the common law formula from Hale onward requiring proof of a felony in fact to obtain a warrant. 2 HALE, *supra* note 133, at 92, 110.

414. VA. DECLARATION OF RIGHTS of 1776, art X.

415. N.C. DECLARATION OF RIGHTS of 1776, § XI, *reprinted in* Cogan, *supra* note 408, at 234-35.

Neither Virginia nor North Carolina explicitly required an oath. But because the oath to obtain a warrant had become so entrenched in the common law and had been so central to challenging the writs of assistance, it is most likely that their use of the term "evidence" embraced the oath. That is, they meant "evidence" in its legal sense. This legal use of "evidence" suggests, in turn, that Virginia and North Carolina intended the oath to be sworn by the real accuser, since hearsay would not have been "evidence" in most cases.[416] As noted above, Hening, a leading writer on Virginia law, described hearsay as "no evidence" because it was not upon oath.[417]

A second category of states simply required, without further elaboration, an "oath."[418] A third category, including Massachusetts, required either (1) "cause or foundation" supported by oath; or (2) "sufficient foundation."[419] The latter, at least to our ears, seems to presuppose personal knowledge.[420]

These states often borrowed from each other;[421] the differences in language between "oath," "evidence," and "sufficient foundation" were never accompanied by a reason for deviation.[422] Rather, we can infer from liberal interchanging of the terms that state framers considered them essentially synonymous, with each, therefore, requiring personal knowledge.

This interchangeability of "oath," "evidence," and "sufficient foundation" reappeared when the states objected that the original Constitution of 1787 lacked a bill of rights.[423] These states ratified the Constitution but demanded that a bill of rights be added, supplying various proposals.[424] Pennsylvania, for

416. Justice Douglas, in his dissent in *Draper v. United States*, understood the term "evidence" in the Virginia Constitution to require firsthand knowledge and argued that the Fourth Amendment oath therefore did as well. 358 U.S. 307, 318-19, 321-22 (1959) (Douglas, J., dissenting).

417. HENING, *supra* note 133, at 181; *see also supra* notes 288-92 and accompanying text (discussing Gilbert's similar views).

418. DEL. DECLARATION OF RIGHTS of 1776, § 17, *reprinted in* Cogan, *supra* note 408, at 234; MD. DECLARATION OF RIGHTS of 1776, art. 23, *reprinted in* Cogan, *supra* note 408, at 234.

419. MASS. CONST. of 1780, pt. I, art. XIV ("cause or foundation"), *reprinted in* Cogan, *supra* note 408, at 234; N.H. CONST. of 1783, pt. I, art. XIX ("cause or foundation"), *reprinted in* Cogan, *supra* note 408, at 234; PA. CONST. of 1776, ch. I, art. X ("sufficient foundation"), *reprinted in* Cogan, *supra* note 408, at 235; VT. CONST. of 1777, ch. I, art. 11 ("sufficient Foundation"), *reprinted in* Cogan, *supra* note 408, at 235.

420. *E.g.*, FED. R. EVID. 602.

421. Clancy, *supra* note 58, at 1027 n.324, 1028 n.327 (tracing the development of state search-and-seizure provisions with a focus on the unreasonableness clause).

422. *See* CUDDIHY, *supra* note 61, at 680-86 (discussing different state provisions, but not suggesting that changes in specific terms brought about a change in meaning).

423. *Id.*; *see* sources cited *infra* note 424.

424. *Proposal of Maryland Minority*, Apr. 26, 1788, *reprinted in* Cogan, *supra* note 408, at 232; *Proposal of Massachusetts Minority*, Feb. 6, 1788, *reprinted in* Cogan, *supra* note 408, at 232-33; *Proposal of New York*, July 26, 1788, *reprinted in* Cogan, *supra* note 408, at 233;
footnote continued on next page

example, proposed that "warrants unsupported by evidence" should not be granted.[425] It did not mention oaths.[426] Other states, including Virginia, now used "oath" along with the phrase "legal and sufficient cause," likely another way of saying "evidence" (since Virginia's constitution still required "evidence" to obtain a warrant).[427] Moreover, Patrick Henry argued in the Virginia ratification debate that the original Constitution, absent a bill of rights, would allow searches without "evidence."[428]

Virginia played a particularly important role in the ratification of the Fourth Amendment.[429] Its Declaration of Rights provision was one of the earliest, and the recommendation of its federal ratifying convention inspired the recommendations of other states.[430] And James Madison, a Virginian, introduced the original language of the Fourth Amendment.[431] Madison's formula changed the language in the Virginia Declaration of Rights from "evidence" to "oath."[432] It is easy to imagine that he and others understood "oath" to simply incorporate the requirement that the foundation be "evidence," which required personal knowledge.[433]

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*Proposal of North Carolin*a, Aug. 1, 1788, *reprinted in* Cogan, *supra* note 408, at 233; *Proposal of Pennsylvania Minority*, Dec. 12, 1787, *reprinted in* Cogan, *supra* note 408, at 233; *Proposal of Virginia*, June 27, 1788, *reprinted in* Cogan, *supra* note 408, at 233.

425. *Proposal of Pennsylvania Minority*, Dec. 12, 1787. Only a minority of Pennsylvania delegates supported including a federal bill of rights in the Constitution, and those delegates published a proposal in a separate pamphlet. CUDDIHY, *supra* note 61, at 682.

426. *Proposal of Pennsylvania Minority*, Dec. 12, 1787.

427. *Proposal of Virginia*, June 27, 1788 ("legal and sufficient cause"); *Proposal of New York*, July 26, 1788 ("sufficient cause"); *Proposal of North Carolin*a, Aug. 1, 1788 ("legal and sufficient cause").

428. Patrick Henry, Address to the Virginia Ratifying Convention (June 24, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 588 (Jonathan Elliot ed., Washington, 2d ed. 1836). The First Continental Congress also noted its objection to the fact that customs commissioners could search houses without the authority "of any Civil Magistrate, founded on legal information." First Cont'l Cong., *Memorial to the Inhabitants of the British Colonies* (Oct. 21, 1774), *in* 1 AMERICAN ARCHIVES: FOURTH SERIES 921, 925 (Washington, M. St. Clair Clarke & Peter Force 1837).

429. CUDDIHY, *supra* note 61, at 683-86.

430. *Id.*

431. *Id.* at 691-92.

432. *Compare* VA. DECLARATION OF RIGHTS of 1776, art. X, *reprinted in* Cogan, *supra* note 408, at 235, *with* U.S. CONST. amend. IV.

433. Madison also supplied a standard of "probable cause," U.S. CONST. amend. IV, rather than using "sufficient foundation" or "evidence of a fact committed," *see supra* notes 411-20 and accompanying text. This change likely did not lower the standard of proof, however. *See* Davies, *supra* note 20, at 703 (discussing the origins and history of the phrase "probable cause").

Changes to the Fourth Amendment text in Congress shed no additional light on the oath requirement. From Madison's first proposal in the House on June 8, 1789, to the final, agreed-upon resolution between House and Senate on September 25, 1789, the language remained the same, requiring that warrants be supported by oath or affirmation.[434]

B. Text of the Fourth Amendment

The text of the Fourth Amendment further supports the argument that the oath requires personal knowledge. As the previous Subpart shows, the Founding generation likely equated the terms "oath," "witness," and "evidence" with personal knowledge. But the Article's textual argument must first confront the textual argument to the contrary. A hyperliteral reading of "oath" could lead us to allow thirdhand information: The officer repeating the information does swear the oath, and has does have personal knowledge of what he was told. The historical argument above rebuts this reading,[435] and this Subpart shows that the Fourth Amendment text also refutes such empty literalism.

First, under the rule against surplusage,[436] if we allow thirdhand information, we essentially read the oath requirement out of the Fourth Amendment because it performs no function that the probable-cause standard does not already perform.

The probable-cause standard already requires a magistrate judge to inquire into whether the officer's informant is reliable and has firsthand knowledge.[437] Consider a hypothetical: The judge might ask the officer to elaborate with additional facts to demonstrate the reliability and personal knowledge of the informant. The informant, of course, is neither present nor under oath, and so this inquiry of the officer will have to do. What does the *officer's* oath add to the foregoing inquiry if it allows hearsay? The judge will still inquire as to the informer's reliability and personal knowledge. The officer will provide the

434. Cogan, *supra* note 408, at 223-232; CUDDIHY, *supra* note 61, at 691-98.

435. *See supra* Part II.B.

436. *See* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1058 (2019) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." (quoting Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988)); City & County of San Francisco v. Farrell, 648 P.2d 935, 938 (Cal. 1982) ("In construing the words of a statute or constitutional provision . . . surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning.").

437. Illinois v. Gates, 462 U.S. 213, 230 (1983) (noting that "an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant" in determining probable cause (quoting People v. Gates, 423 N.E.2d 887, 891 (Ill. 1981)).

same facts. The fact that the officer is under oath can do nothing to enhance the reliability or foundation of the informer's allegations.

All the oath does with respect to an officer is ensure that *she* is not lying when she says she has an informant. But this purpose seems completely at odds with the purpose of the oath under the common law for ordinary criminal cases. Officers in such cases did not even *seek* the warrant. Moreover, requiring only the officer's oath covers only a small subset of problematic cases—those involving lying officers—as opposed to the well-documented danger of lying or misleading informants.[438]

The second textualist argument relies on the term "supported." The Fourth Amendment requires that probable cause be "supported" by oath.[439] That term demands a closer relationship than simply allowing probable cause to be established by a witness who happens to be under oath. The term "supported" connotes evidence or foundation in the form of firsthand information. A witness may be under oath and utter hearsay as well as firsthand information, of course, and the magistrate judge need not formally exclude the hearsay. But the magistrate must ensure the facts that *support* probable cause are under oath and firsthand.

The Supreme Court ultimately permitted hearsay for warrants because probable cause requires a lower showing than proof at trial and can therefore rely upon hearsay.[440] That makes sense if we focus only on "probable cause." A probable-cause standard by itself could certainly permit thirdhand information, as long as it is reliable. But the Warrant Clause also contains a separate oath requirement. This requirement specifies not a *level* of proof but a particular *method* of establishing it, and therefore bans thirdhand information which otherwise might be perfectly useful in establishing probable cause.

This argument closely parallels the Court's observations in *Crawford v. Washington*, which banned out-of-court "testimony" under the Confrontation Clause.[441] The *Crawford* Court noted that admitting reliable out-of-court testimony at trial might be a good way to find the truth: Trials are, after all, about finding the truth based on reliable evidence.[442] But Justice Scalia, writing for the Court, noted that the Sixth Amendment supplied a particular method of determining reliability—confrontation—that banned certain out-of-court

438. *E.g.*, NATAPOFF, *supra* note 16, at 70-72; BALKO, *supra* note 16, at 3, 21.

439. U.S. CONST. amend. IV.

440. Jones v. United States, 362 U.S. 257, 269-70 (1960), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).

441. Crawford v. Washington, 541 U.S. 36, 50-51, 68 (2004).

442. *Id.* at 61-63.

testimony.[443] This method of channeling the search for truth might not be the right one, or the only one, he wrote, but it is the one the Founders chose.[444]

C. Early Opinions Banning Thirdhand Information

Few cases addressed the oath requirement in any depth until the mid-nineteenth century, probably because newfangled attempts to evade the real-accuser requirement rarely arose.[445] The above discussion also suggests that the Founding era thought of those under oath as witnesses, requiring personal knowledge just like witnesses at trial.[446] Allowing hearsay would therefore have been an unusual exception that rarely arose because it was rarely argued. It also rarely arose because suspects were not present when a party sought a warrant and therefore could not bring an objection. But if a suspect later challenged his arrest or commitment on habeas, he could challenge hearsay.

In *Ex parte Bollman*, for example, the Court considered whether a commitment warrant could issue upon hearsay.[447] Defense counsel argued that the warrant was unlawful under the Fourth Amendment because it was not based on firsthand knowledge, which violated the oath requirement.[448] Defense counsel conceded that the warrant application could include *some* hearsay, but argued that there must be firsthand knowledge, under oath, supporting the key components: that there was a crime committed and reason to suspect the person noted in the warrant.[449] Even the government in this case seemed to concede that hearsay was inadmissible for the warrant; instead, it argued that it was not admitting the statement at issue for the truth of the matter asserted, as required to run afoul of the hearsay rule.[450]

The Court was split, and it ultimately sidestepped the issue. Chief Justice Marshall's opinion summarized the two positions. Two Justices, he wrote,

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443. *Id.*

444. *Id.* at 61-62, 67.

445. States and the federal government did not rely on officers and prosecutors to repeat thirdhand information to obtain warrants in a widespread way until the advent of charging by information, as well as Prohibition. *See infra* Part IV.

446. *See supra* Part II.C.

447. 8 U.S. (4 Cranch) 75, 130-31 (1807). The defendant treated the commitment warrant as governed by the Fourth Amendment, *id.* at 110 (argument of Swartwout's attorney), and the Court applied ordinary Fourth Amendment and common law standards in deciding whether to commit, *id.* at 130, 136 (majority opinion).

448. *Id.* at 110 (argument of Swartwout's attorney) ("No belief of a fact tending to show probable cause, no hearsay, no opinion of any person *however high in office*, respecting the guilt of the person accused, can be received in evidence on this examination.").

449. *Id.*

450. *Id.* at 119 (argument of the government).

would have held that the oath requirement banned the statement.[451] These two believed that evidence to arrest or commit under the Warrant Clause must be admissible at trial.[452] Their view noted that commitment can be "long and painful" and that it ought therefore to be "proved by testimony in itself legal."[453]

The other two Justices believed that the affidavit, which summarized a separate letter, could be admitted as evidence at this early stage, particularly because the original letter was so geographically distant.[454] This position seems to rest on the best-evidence rule. But the would-be holding of these two Justices was undermined by the holding of the entire Court that the evidence was not enough to justify commitment.[455]

While we cannot draw many conclusions from *Ex parte Bollman*, it does support the argument in this Article. First, defense counsel unflinchingly argued that probable cause to commit must rest on firsthand facts, even if some other hearsay appears in the testimony. Second, the government did not challenge the assertion that probable cause must rest upon personal knowledge. Finally, the two Justices who would have allowed the affidavit at issue did not act inconsistently with the personal-knowledge requirement. After all, the affiant merely reported what a letter in his possession said, and the letter itself would have been admissible evidence. The affiant therefore *did* have personal knowledge of the facts contained in the affidavit.

Writing in a related case, Chief Justice Marshall identified himself as one of the two Justices who would have admitted the affidavit.[456] He elaborated that the affidavit was admissible because "the material facts alleged may very well be within the knowledge of the witness, although he has failed to state explicitly all the means by which this knowledge is obtained."[457]

The closely related Aaron Burr case[458] affords a far more explicit example that an arrest warrant must be based upon personal knowledge, at least under the common law. In 1806, government lawyers asked the federal circuit court in Kentucky to issue process to arrest Aaron Burr. The attorney for the United

451. *Id.* at 130 (majority opinion).

452. *Id.*

453. *Id.*

454. *Id.* at 130-31.

455. *Id.* at 135.

456. United States v. Burr, 25 F. Cas. 2, 12-13 (C.C.D. Va. 1807) (No. 14,692a).

457. *Id.* at 13. Chief Justice Marshall, overseeing the preliminary commitment hearing of Aaron Burr, concluded that the relevant witness likely had personal knowledge that Burr wrote the letter, in part because he could only decipher the letter if he already knew the cipher key. *Id.*

458. United States v. Burr, 25 F. Cas. 1 (C.C.D. Ky. 1806) (No. 14,692).

States, in his affidavit, testified under oath that he had been told, and he believed, that Burr was committing a high misdemeanor by preparing a military expedition against Spain.[459] The government attorney added other factual details that he had been told, concluding that the charges could be "fully substantiated by evidence" if witnesses were compelled to attend and "testify thereto."[460]

The court rejected the government's motion because its supporting affidavit was based on thirdhand information.[461] It held that the government must instead present the type of evidence that would authorize an arrest: that is, "legal evidence."[462] In this case, there was "not legal evidence before the court to authorize an arrest of the person accused."[463] This followed because the government attorney, who was under oath, repeated the statements of someone who was not. "The evidence is the oath of a person who has been informed by one not upon oath . . . ."[464] This last point tracks closely the language that treatise writers used during the Founding era to explain the exclusion of hearsay: The one under oath lacks personal knowledge, and the individual with personal knowledge is not under oath.[465]

During this same era, Attorney General William Wirt wrote an opinion for President Monroe,[466] who sought to arrest a fugitive war criminal.[467] Wirt noted that the President could not simply order the arrest of someone (outside of a military context), because the power to arrest lay with the courts.[468] And the courts, he continued, could only premise an arrest warrant upon "evidence."[469] Wirt, like the state constitutions above, drew an equivalence between "oath" and "evidence," supporting the conclusion that he envisioned the real accuser swearing the oath.

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459. *Id.* at 1.

460. *Id.*

461. *Id.* at 2. The court also rejected the motion as procedurally improper. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *E.g.*, HENING, *supra* note 133, at 181.

466. The Power to Cause an Arrest, 1 Op. Att'y Gen. 229 (1818).

467. *Id.* at 229-30. President Monroe sought to arrest Captain Obed Wright for murder following his expedition's massacre of Chehaw, an Indian village in Georgia. E. Merton Coulter, *The Chehaw Affair*, 49 GA. HIST. Q. 369, 372-73, 387 (1965); *see also* Jon Gosa, *Chehaw Massacre Nearly Lost to History*, ALBANY HERALD (Apr. 21, 2018), https://perma.cc/VB7R-JPDC.

468. The Power to Cause an Arrest, 1 Op. Att'y Gen. at 229-30.

469. *Id.*

Wirt maintained his position—that the warrant must be premised upon "evidence"—even while conceding that the warrant procedure was ex parte.[470] In doing so, he referenced the twin justifications for excluding thirdhand information: personal knowledge (via the oath) to enhance the truth and the right to cross-examine. Even if the procedure was ex parte, meaning there could be no cross-examination, the former justification remained. Wirt repeated the term "evidence" to emphasize this point: "[T]he warrant of arrest is always preceded by evidence—*ex parte* to be sure, but still evidence—to wit: information on oath."[471]

IV. Innovation and Response: 1850 to 1960

During the first half of the nineteenth century, courts did not carefully consider the question of whether the oath requires the real accuser. Evidently, ordinary criminal cases proceeded in their routine fashion—with victims swearing out complaints to obtain warrants.

Two key developments in the nineteenth and early twentieth centuries challenged the Fourth Amendment oath requirement and its state analogues. First, many states (especially large western states) began to abandon the grand-jury process in favor of criminal informations,[472] documents in which prosecutors alleged crimes in lieu of indictments.[473] Authorities often sought to use these informations, in which prosecutors relied on others' accounts, to obtain warrants.[474] The prosecutors themselves swore the oath.[475]

Second was the prohibition of alcohol at the state and federal levels.[476] Here too, in order to obtain alcohol search warrants, investigating agents would swear to the location of alcohol based on information they received from third parties.[477] The contexts differed, but courts approached them with

470. *Id.*

471. *Id.*; *see also* Proof Necessary to an Arrest, 2 Op. Att'y Gen. 266, 268 (1829) (stating that depositions taken by a judge in Antigua could not support an arrest warrant in part because those depositions would be hearsay).

472. *See* Hurtado v. California, 110 U.S. 516, 538 (1884); Albrecht v. United States, 273 U.S. 1, 7 & n.3 (1927) (surveying the history and advent of prosecution by information); Nino C. Monea, *The Fall of Grand Juries*, 12 NE. U. L. REV. 411, 414, 432 (2020) (same). *See generally* R. Justin Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379 (1924) (same).

473. *E.g.*, State v. Gleason, 4 P. 363, 363 (Kan. 1884).

474. *See, e.g.*, *id.*

475. *Id.*

476. Oliver, *supra* note 127, at 400-07.

477. *See, e.g.*, Giles v. United States, 284 F. 208, 212-13 (1st Cir. 1922).

the same legal question: Did the Fourth Amendment oath requirement, or that state's analogue, require personal knowledge?[478]

The earliest of the cases described below fall into a third important historical context: They came on the heels of the ratification of the Fourteenth Amendment in 1868. These cases therefore provide insights into how we can interpret the Fourth Amendment as it applies to the states.

A. The Majority Rule: Personal Knowledge

Most courts facing the hearsay question for warrants from 1850 to 1960 required personal knowledge.[479] They did so for several reasons. First, an oath, by its very nature, requires a witness to swear to facts based upon personal knowledge. Second, courts relied upon the ordinary rules of evidence that banned hearsay with no applicable exception. That is, they simply required evidence that would be admissible at trial. Third, courts emphasized accountability. The possible remedies of perjury and trespass only work if the real accuser swears the oath.

In *State v. Gleason*, for example, the Kansas Supreme Court held that the state's constitutional search-and-seizure provision banned warrants supported only by hearsay.[480] Like its federal counterpart, the Kansas provision stated that warrants could issue only upon "oath or affirmation" establishing probable cause.[481] But a Kansas law allowed county attorneys to obtain arrest warrants by swearing, based entirely upon hearsay, that certain individuals unlawfully possessed liquor. An attorney could obtain a warrant simply by filing a "complaint or information" using facts from another.[482]

The *Gleason* court held the law unconstitutional. The Kansas "oath or affirmation" provision required an oath from the real accuser with personal knowledge of the facts. The court explicitly wrote: "If no warrant shall issue but upon probable cause, supported by oath or affirmation, the support must

478. *E.g.*, *id.* at 214 (liquor); Miller v. United States, 57 P. 836, 837-38 (Okla. 1899) (theft).

479. S. Bernstein, Annotation, *Propriety of Considering Hearsay or Other Incompetent Evidence in Establishing Probable Cause for Issuance of Search Warrant*, 10 A.L.R. 3d 359, § 2[b] (1966) (noting that, before *Jones*, "it had been the rule in federal courts that hearsay could not be considered in establishing probable cause for the issuance of a search warrant"); LESTER BERNHARDT ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 10-11 (1947) ("[T]he weight of authority . . . [requires] an averment of personal knowledge and belief."). State courts were more mixed, but appear before *Jones* to have gravitated toward requiring personal knowledge. *See* Note, *Hearsay Evidence as a Basis for Prosecution, Arrest and Search*, 32 IND. L.J. 332, 346-49 (1957).

480. 4 P. at 365.

481. *Id.* at 365-66.

482. *Id.* at 363.

be something more than hearsay or belief."[483] Such a complaint "proves nothing" and "does not state facts."[484] According to the court, the requirement of firsthand knowledge rested upon the larger principles undergirding the Fourth Amendment.[485] The freedom from general warrants fostered by the state and federal warrants clauses would be "swept away" if warrants could be based upon hearsay.[486]

Instead, the court said, the county attorney must investigate and supply the magistrate with affidavits of those with firsthand knowledge.[487] The court noted that, in the ordinary case, the county attorney should be able to perform this duty.[488]

Many other state cases similarly and expressly held that the oath required the real accuser and personal knowledge.[489] The Michigan Supreme Court, for example, wrote that the most "elementary principles of criminal law" instruct that the warrant must be based upon the "knowledge of the person making the complaint."[490] These courts often met the government counterargument that the real-accuser requirement made compliance difficult by noting that "other witnesses [can] be examined who do know [the facts]."[491]

Federal cases also required personal knowledge as the basis for a warrant under the oath requirement. Especially during Prohibition, law enforcement began to seek and obtain warrants based upon thirdhand information.[492] At

483. *Id.* at 365.

484. *Id.* at 366.

485. *See id.*

486. *Id.*

487. *Id.*

488. *Id.* at 366-67.

489. *See, e.g.*, People v. Elias, 147 N.E. 472, 475-76 (Ill. 1925); State v. Peterson, 194 P. 342, 350 (Wyo. 1920); State *ex rel.* Register v. McGahey, 97 N.W. 865, 868-69 (N.D. 1903) (collecting cases); Wallace v. State, 157 N.E. 657, 660-62 (Ind. 1927); Brown v. Kelley, 20 Mich. 27, 33-34 (1870); People v. Heffron, 19 N.W. 170, 171 (Mich. 1884); De Lancy v. City of Miami, 43 So. 2d 856, 857 (Fla. 1950); Elardo v. State, 145 So. 615, 616 (Miss. 1933); State v. Arregui, 254 P. 788, 794 (Idaho 1927); State v. Miller, 266 S.W. 1024, 1024 (Mo. Ct. App. 1924); Salter v. State, 102 P. 719, 724-26 (Okla. Crim. App. 1909); People v. Smith, 1 Cal. 9, 11 (1850); *see also* Bernstein, *supra* note 479 (collecting cases); Miller v. United States, 57 P. 836, 838 (Okla. 1899) (noting, in a federal territorial-court decision, that "the supreme courts of the various states" had "repeatedly and invariably held" that personal knowledge was required); *cf.* People v. De Vasto, 190 N.Y.S. 816, 818 (App. Div. 1921) (suggesting that the informant must be available to the court); State *ex rel.* Thibodeau v. Dist. Ct., 224 P. 866, 869 (Mont. 1924) (assessing the knowledge "possessed" by the affiant).

490. *Heffron*, 19 N.W. at 171 (emphasis omitted).

491. *See, e.g.*, *id.*

492. *See, e.g.*, Giles v. United States, 284 F. 208, 210, 212-13 (1st Cir. 1922).

the turn of the twentieth century, many federal courts held these practices unconstitutional under the Fourth Amendment. This was far and away the majority rule among the federal circuit courts,[493] and it was eventually endorsed by the Supreme Court,[494] as detailed below.

For example, in *Miller v. United States*, an assistant United States attorney filed an information charging the defendant with stealing a cow, leading to an arrest warrant.[495] The Supreme Court of the Territory of Oklahoma (an Article IV federal court) held that the arrest and proceeding based on the information violated the Fourth Amendment, writing that "some one who knows of the matter charged"—in other words, someone with firsthand knowledge—must swear the oath.[496]

The *Miller* court referred to the individual with personal knowledge as the "real accuser," using language from a leading opinion by Justice Bradley written while riding circuit in 1877.[497] In that case, a federal district judge had complained to Justice Bradley that the district had a persistent problem: Too many people were being arrested for violating the revenue laws based upon unnamed informants.[498] In response, Justice Bradley held in a "general order" governing the circuit that arrest warrants must rest upon an oath from the "real accuser" based on the accuser's firsthand knowledge.[499] Justice Bradley drew this rule from the Fourth Amendment oath requirement:

> In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by

493. *See, e.g.*, *id.* at 214-16; United States v. Tureaud, 20 F. 621, 623 (C.C.E.D. La. 1884); Davis v. United States, 35 F.2d 957, 957 (5th Cir. 1929); Sparks v. United States, 90 F.2d 61, 63-64 (6th Cir. 1937) (requiring personal knowledge but finding that it was met by oral testimony); Veeder v. United States, 252 F. 414, 418-20 (7th Cir. 1918); Wagner v. United States, 8 F.2d 581, 583-85 (8th Cir. 1925); Simmons v. United States, 18 F.2d 85, 88 (8th Cir. 1927); Kohler v. United States, 9 F.2d 23, 25 (9th Cir. 1925); Schencks v. United States, 2 F.2d 185, 186-87 (D.C. Cir. 1924). Federal district courts came to the same conclusion and generally required personal knowledge. *See, e.g.*, United States v. Kennedy, 5 F.R.D. 310, 312-13 (D. Colo. 1946); United States v. Kaplan, 286 F. 963, 969 (S.D. Ga. 1923); United States v. Michalski, 265 F. 839, 840 (W.D. Pa. 1919); United States v. Baumert, 179 F. 735, 738-40 (N.D.N.Y. 1910); United States v. Polite, 35 F. 58, 59 (D.S.C. 1888).

494. Grau v. United States, 287 U.S. 124, 127-28 (1932), *abrogated by* Brinegar v. United States, 338 U.S. 160 (1949).

495. 57 P. 836, 837 (Okla. 1899).

496. *Id.* at 839.

497. *Id.* at 838 (quoting *In re* Rule of Ct., 20 F. Cas. 1336, 1337 (Bradley, Circuit Justice, C.C.N.D. Ga. 1877) (No. 12,126)).

498. *In re Rule of Ct.*, 20 F. Cas. at 1336-37.

499. *Id.* at 1337.

> personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded.[500]

Federal courts continued to require firsthand knowledge into the 1900s. The First Circuit in *Giles v. United States*, a National Prohibition Act case, equated the oath for a warrant with the oath for witnesses at trial: According to the court, the Fourth Amendment required an affiant to possess "personal knowledge of facts competent to be adduced in evidence before a jury."[501] Lest there be any doubt, the First Circuit spelled out personal knowledge as requiring the person to state "what he saw, or heard, or smelled, or tasted."[502] The court also articulated a concern about government tyranny: "The prohibition agent was applicant, affiant, in effect the judge of the existence of probable cause, and the officer serving the writ. This is a very dangerous amalgamation of powers."[503]

The Seventh Circuit echoed *Giles* in explaining its rationale for requiring the real accuser: accountability. If the real accuser did not swear the oath, the deterrent and remedy of perjury would not work:

> But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.[504]

In arguing the above cases, the government maintained that courts should adapt the Fourth Amendment to the needs of law enforcement and permit prosecutors to obtain warrants using hearsay.[505] As late as 1946, one federal court addressed and rejected this argument as a "very insidious statement, because criminal law enforcement should follow a constitutional provision, and not vice versa."[506]

The Supreme Court referenced a personal-knowledge requirement only sporadically[507] until 1932, when the Court explicitly stated in *Grau v. United*

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500. *Id.*

501. 284 F. 208, 215 (1st Cir. 1922).

502. *Id.* at 214.

503. *Id.*

504. Veeder v. United States, 252 F. 414, 418 (7th Cir. 1918); *see also* Schencks v. United States, 2 F.2d 185, 186 (D.C. Cir. 1924) (ruling that allowing hearsay for sworn statements would leave "no one responsible").

505. *E.g.*, United States v. Kennedy, 5 F.R.D. 310, 313 (D. Colo. 1946).

506. *Id.*

507. *See* United States v. Morgan, 222 U.S. 274, 282 (1911) (stating in dicta that the Fourth Amendment oath requires "some one having knowledge of facts showing . . . probable cause"); Rice v. Ames, 180 U.S. 371, 374-75 (1901) (noting that in ordinary criminal cases a person with firsthand knowledge must swear the oath); *cf.* Boyd v. United States, 116

footnote continued on next page

States that a "search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury."[508] The Court did not elaborate beyond citing *Giles* and other cases requiring personal knowledge. When the Supreme Court later reversed course to allow hearsay, it claimed that its statement in *Grau* was dicta.[509] But a close reading of *Grau* suggests otherwise.[510]

B. The Federal Search Warrant Statute

During this same era, Congress set forth its own view that the Fourth Amendment required the real accuser. The National Prohibition Act authorized searches of houses used for the unlawful sale of liquor.[511] The Act's search provision merely cross-referenced the search warrant provision of an earlier statute, the Espionage Act of 1917.[512] This provision contained detailed and strict limits. Among other things, it required a judge to "examine on oath" the person seeking the warrant and their witnesses, take witness depositions in writing or require witness affidavits, and have the witnesses sign the written product.[513]

The federal case law of this era pointed to this search warrant provision as essentially codifying the requirements of the Fourth Amendment, including the real-accuser requirement.[514] The First Circuit's *Giles* opinion referenced much of the Fourth Amendment's history, from Coke through *Entick v. Carrington* and Otis to the Espionage Act's search provision.[515] On that provision, the court wrote that it was "declaratory of the most carefully guarded previous judicial determinations of the meaning and scope of the Fourth Amendment."[516]

U.S. 616, 626-28 (1886) (describing the common law requirement that the real accuser attend the execution of a stolen-goods warrant).

508. 287 U.S. 124, 128 (1932) (citing Giles v. United States, 284 F. 208 (1st Cir. 1922)), *abrogated by* Brinegar v. United States, 338 U.S. 160 (1949).

509. *See* Draper v. United States, 358 U.S. 307, 311-12, 312 n.4 (1959) (citing *Brinegar*, 338 U.S. at 172-74, 174 nn.12-13 (1949)).

510. The Court in *Brinegar* said that the affidavit at issue in *Grau* was rejected because it lacked probable cause. 338 U.S. at 174 n.13. That may be true, but the Court in *Grau* also rejected a second affidavit on the grounds that it lacked personal knowledge. 287 U.S. at 127.

511. Ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919) (repealed 1935).

512. *Id.* (citing Espionage Act of 1917, ch. 30, tit. XI, 40 Stat. 217, 228-30 (codified as amended in scattered sections of 18 U.S.C.)).

513. Espionage Act of 1917 tit. XI, § 4, 40 Stat. at 228.

514. *See, e.g.*, Giles v. United States, 284 F. 208, 212 (1st Cir. 1922).

515. *Id.* at 212, 215.

516. *Id.* at 212.

The 1917 Espionage Act provision also led, through various amendments, to today's search warrant provision codified in Rule 41 of the Federal Rules of Criminal Procedure.[517] In 1972, Congress watered down the original provision to expressly allow hearsay in light of *Jones v. United States*.[518]

C. Contrary Case Law and the Indiana Flip-Flop

Few, if any, federal circuit courts expressly permitted thirdhand information.[519] Some state courts did allow warrants to issue based upon thirdhand information,[520] though they appear to be in the minority.[521] And even some of those courts imposed limits, such as a requirement that the informant be a named, reliable official source[522] or that an unofficial informant at least be named.[523]

These state court cases foreshadowed the ultimate holding in *Jones* that allowed hearsay once and for all. Some of the cases relied on law enforcement convenience,[524] a theme that has been repeated from Coke, Hale, and the Founding era to the present.[525] The Wisconsin Supreme Court, for example, said that a real-accuser requirement would make law enforcement

517. Rule 41 restated and codified what was, at the time of adoption, 18 U.S.C. §§ 611-626. *See* FED. R. CRIM. P. 41 advisory committee's note to 1944 adoption. These sections themselves codified the search provisions of the Espionage Act. *See* 18 U.S.C. §§ 611-625 (1940) (citing the Espionage Act as source).

518. FED. R. CRIM. P. 41 advisory committee's note to 1972 amendment ("The amendment . . . is intended to make clear that a search warrant may properly be based upon a finding of probable cause based upon hearsay. That a search may properly be issued on the basis of hearsay is current law.").

519. *See* Bernstein, *supra* note 479, § 2[b].

520. *See* State v. Kees, 114 S.E. 617, 618-20 (W. Va. 1922); Lowrey v. Gridley, 30 Conn. 450, 459-60 (1862); Elliott v. State, 256 S.W. 431, 431 (Tenn. 1923); State v. Davie, 22 N.W. 411, 413 (Wis. 1885); *see also* Luera v. State, 63 S.W.2d 699, 700 (Tex. Crim. App. 1933) (suggesting that hearsay was sufficient).

521. State v. Arregui, 254 P. 788, 794 (Idaho 1927) (noting that the "great weight of authority" requires search warrants to be supported by facts provided to the magistrate rather than by affidavits "based upon the conclusions of the affiant"); *see also* State *ex rel.* Register v. McGahey, 97 N.W. 865, 868-69 (N.D. 1903) (collecting cases).

522. Bland v. State, 80 A.2d 43, 45 (Md. 1951).

523. Arnold v. Commonwealth, 267 S.W. 190, 190 (Ky. 1924); Goode v. Commonwealth, 252 S.W. 105, 107 (Ky. 1923); Jackson v. State, 284 S.W. 356, 358 (Tenn. 1926) (stating that it is "proper" for the affiant to disclose the informant's name and the details of the informant's personal knowledge).

524. *Davie*, 22 N.W. at 412; *see also Lowrey*, 30 Conn. at 458-59.

525. *See supra* notes 149, 363-66, 383-84, 387-88 and accompanying text.

"impracticable if not impossible."[526] People who do have knowledge, the court worried, might be "unable or unwilling" to supply it.[527]

The other main argument, also arising later in *Jones*, conflated the probable-cause requirement and the oath requirement, essentially erasing the latter as an independent concern. In *State v. Kees*, for example, the West Virginia Supreme Court did not read the common law to require personal knowledge.[528] It accordingly held that probable cause involves merely a probable suspicion, not a certainty, and that thirdhand information could therefore be used.[529]

Many state courts struggled over the question of whether the oath requirement bans hearsay, sometimes reversing their own rulings. Indiana was particularly fickle; its supreme court flip-flopped four times to announce five different rules over a century:

- In 1869, the Indiana Supreme Court permitted thirdhand information, though it considered only the applicable statute and did not explicitly address any constitutional questions.[530]
- In 1927, it banned hearsay on constitutional grounds in a lengthy opinion that cited several of the cases above.[531]
- In 1929, it reversed itself and allowed hearsay despite constitutional objections.[532]
- In 1949, it explicitly overruled its 1929 decision, reinstated its 1927 decision, and banned hearsay on constitutional grounds.[533]
- Finally, in 1975 the court reversed course yet again and permitted hearsay (based in part on a change in the relevant statute).[534]

526. *Davie*, 22 N.W. at 412.

527. *Id.* at 413; *see also id.* at 412-13 ("The rule contended for . . . would be a very humane and safe rule for the criminal, but cruel and unsafe for society.").

528. 114 S.E. 617, 618-19 (W. Va. 1922).

529. *Id.*

530. Vannatta v. State, 31 Ind. 210, 210-11 (1869).

531. Wallace v. State, 157 N.E. 657, 659-62 (Ind. 1927).

532. Gwinn v. State, 166 N.E. 769, 770 (Ind. 1929).

533. Rohlfing v. State, 88 N.E.2d 148, 150 (Ind. 1949).

534. Madden v. State, 328 N.E.2d 727, 728-29 (1975) (finding hearsay constitutional because the relevant statute insisted upon reliable hearsay only and banned double hearsay), *superseded by statute*, IND. CODE § 35-1-6-2 (1977), *as recognized in* Baker v. State, 449 N.E.2d 1085 (Ind. 1983).

V. The Modern Rule of Convenience

The Supreme Court arrived at its *Jones* decision in a strikingly path-dependent way, starting (oddly) with warrantless arrests in 1949 and using those to justify hearsay for search and arrest warrants by 1960. By that time, the Court had clearly framed the question as one of hearsay rather than one of personal knowledge.

A. *Brinegar*, *Draper*, and *Jones*

The Court set the stage in two warrantless-arrest cases in 1949 and 1959: *Brinegar v. United States*[535] and *Draper v. United States*.[536] *Brinegar* addressed whether evidence supporting probable cause to arrest must be of a type admissible at trial. It answered no for the following reasons. First, probable cause is a lower standard than the beyond-a-reasonable-doubt standard required at trial.[537] As the Court explained, probable cause "deal[s] with probabilities" and "practical considerations."[538] Second, as compared to proof at trial, probable cause differs in both the "*quanta*" of proof required and the "modes" to establish it.[539] Third, defendants have a right to cross-examine witnesses at trial, but not, the Court implied, at the arrest stage.[540]

In *Draper*, an officer made a warrantless arrest using information from a paid informant rather than his own personal knowledge.[541] The defendant argued that the arrest was invalid because it was based on hearsay.[542] The Court rejected this argument and held that an officer may find probable cause to arrest based, at least in part, on hearsay.[543] In doing so, the Court relied on the same policy rationales it had laid out in *Brinegar*.[544]

One year after *Draper*, the Court extended the above principles to warrants. *Jones v. United States* involved a warrant affidavit by an officer that simply set forth the observations of an informant.[545] The defendant argued

535. 338 U.S. 160 (1949).

536. 358 U.S. 307 (1959).

537. *Brinegar*, 338 U.S. at 172-73.

538. *Id.* at 175.

539. *Id.* at 173.

540. *Id.*

541. 358 U.S. at 309-10.

542. *Id.* at 311.

543. *Id.* at 311-13.

544. *See id.* (citing *Brinegar*, 338 U.S. at 172-73, 175).

545. 362 U.S. 257, 267-69 (1960), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).

that a warrant could not issue based on this hearsay.[546] The Court rejected the defendant's argument and permitted hearsay even for warrants.[547] It drew the same distinction it had drawn in *Draper* and *Brinegar*: Trials exclude hearsay because they confront questions of guilt and require proof beyond a reasonable doubt.[548] Issuing a warrant lowers the standard to probable cause and does not risk convicting anyone. Because the quanta and modes of proof differed, in other words, a court could rely upon hearsay in issuing a warrant.[549]

The Court in *Jones* also sought consistency. If a warrantless arrest could rely on hearsay, surely a warrant could as well.[550] Warrants, after all, have the added protection of a judge determining probable cause (and presumably weighing the strength of the hearsay relied upon).[551]

Finally, the *Jones* Court wanted to encourage officers to seek warrants rather than make warrantless arrests.[552] If the Court made it harder to seek warrants by banning hearsay, the argument went, it would end up encouraging officers to act without them.[553]

B. Challenging *Jones*

Jones was wrongly decided in part because its methodology and focus were so narrow. It rested entirely on policy considerations, ignoring the many other methods of constitutional interpretation it should have employed.

First, *Jones* ignored the text of the Fourth Amendment. By relying entirely on *Draper* and *Brinegar*—cases involving warrantless arrests—the Court sidestepped the contradictory text of the Warrant Clause. And by relying on its new conception of the rules of evidence, and the distinction between the beyond-a-reasonable-doubt standard at trial and the probable-cause standard for warrants, the Court obscured an important omission: It never addressed the oath requirement.[554] It never even bothered to say that having the officer (rather than the firsthand witness) swear the oath suffices for Fourth Amendment purposes. And the Court certainly did not explain why it ignored

546. *Id.* at 269.

547. *Id.* at 271.

548. *Id.* at 270-71.

549. *Id.* at 270.

550. *Id.*

551. *Id.* at 270-71.

552. *Id.* at 270.

553. *Id.*

554. When the Court recited the facts, it did mention that the officer swore an oath to obtain the warrant. *Id.* at 269. But the Court did not discuss the oath requirement in its legal analysis of hearsay. *See id.* at 269-72.

text in favor of pure policy. Instead, the Court relied entirely on probable cause to permit hearsay,[555] rendering the oath requirement surplusage. But as detailed above, the text of the Warrant Clause points in the opposite direction.[556] Probable cause only sets the burden of proof. The oath sets the method of meeting that burden: personal knowledge.[557]

Second, *Jones* ignored original understanding, the common law treatises, and the JP manuals that all demanded personal knowledge.[558]

Third, the Court ignored the dense contrary precedent from 1850 until 1960, particularly the majority rule in the federal circuit courts that emphatically required personal knowledge.[559]

Fourth, the Court in *Brinegar* (relied upon by *Jones*) noted that defendants have a right to cross-examine witnesses at trial.[560] *The Brinegar* Court suggested that, since suspects have no right to cross-examine the party seeking a warrant, hearsay would be permissible during the warrant process even if barred at trial. Even if true, this reasoning looks at the modern justification for the rule against hearsay; *Brinegar*, and therefore *Jones*, ignored the original understanding of hearsay. As discussed above, the Founding-era hearsay rule rested far less on cross-examination and far more on the oath and personal knowledge.[561] Hearsay was primarily inadmissible, wrote treatise authors, because the person who made the underlying statement was not under oath. Cross-examination was only a secondary justification for banning hearsay.[562] The personal-knowledge rationale can therefore apply equally to the warrant and trial stages.

Fifth, the Court in *Jones* relied on precedent for arrests without a warrant to justify allowing hearsay for warrants.[563] This makes no sense on its face: Warrantless arrests are obviously not directly governed by the Warrant Clause. And the oath requirement was not thought by the Founding generation to govern warrantless arrests.[564]

But even if the Court were correct to have decided the question solely on policy grounds, the *Jones* decision fails on its own terms. The Court described

555. *Id.* at 269-70.

556. *See supra* Part III.B.

557. *See supra* Part III.B.

558. *See supra* Part II.

559. *See supra* Part IV.A.

560. *See* Brinegar v. United States, 338 U.S. 160, 173 (1949).

561. *See supra* Part II.C.3.

562. *See supra* Part II.C.4.

563. Jones v. United States, 362 U.S. 257, 270 (1960), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).

564. *See, e.g.*, 2 HALE, *supra* note 133, at 91-92.

officers who make warrantless arrests using reports from informants as doing so based upon hearsay.[565] But these arrests are not based upon hearsay from the officer's point of view. The victim who has personal knowledge tells the officer directly. Remarkably, the Court's entire premise is wrong.[566]

For example, when a victim tells an officer he was mugged or assaulted by a particular person, that statement is not hearsay or thirdhand information from the point of view of the officer. It is a firsthand account by the victim and only secondhand information in the officer's mind. True, the officer did not witness the crime, but when Founding-era documents afforded constables the right to arrest based on victims' reports, they said that the constable essentially stands in the shoes of the JP.[567] Constables, like JPs, could rely upon the victim's firsthand account.[568] And like JPs, they were to question the victim to establish both a "felony in fact done" and suspicion of the individual to be arrested.[569] The statement would therefore not be hearsay, whether given to the officer or given to the JP.

But when it is the officer who seeks the warrant, and the officer who tells the magistrate what the victim told the officer, that testimony *does* contain hearsay and would violate the oath requirement. An officer testifying about what the victim said interposes an extra layer and distinguishes the warrant situation from the warrantless-arrest situation relied on in *Jones*.[570] The information in the witness's head is firsthand; in the officer's, secondhand; in the magistrate's, thirdhand.[571] The Court thus created a hearsay situation for warrantless arrests (where hearsay does not exist) and blindly applied the resulting rule to warrants (where hearsay does exist).

When we repair the analogy, we discover that the case law leading up to *Jones* was actually consistent with a ban on hearsay. That case law allowed an officer to arrest for a felony based on an informant, but only one who had personal knowledge; if the informant relied on information gathered from

565. 362 U.S. at 270.

566. The decisions above read almost as if the Court realized this logical fallacy. For example, in *Draper v. United States*, the Court did not quite say that the information was hearsay, but rather that the defendant argued it was hearsay and that it "may have been hearsay." 358 U.S. 307, 311, 313 (1959).

567. *E.g.*, 2 HALE, *supra* note 133, at 91-92.

568. *Id.*

569. *Id.*

570. *See* 362 U.S. at 270.

571. Just before *Jones*, some scholars and courts apparently grasped the distinction that *Jones* conflated. For example, a 1957 note discussed how arresting officers could rely on victims (secondhand information); magistrates could also rely on victims (secondhand information); but magistrates could not rely on officers who in turn relied on victims (thirdhand information). Note, *supra* note 479, at 338-39, 344-46.

another, the officer could not lawfully make the arrest.[572] Indeed, courts required more: The officer must have "assure[d] himself" that the informant claimed to have personal knowledge.[573]

Finally, the *Jones* Court's policy argument fails for an additional reason. The Court held on policy grounds that if we allow hearsay for warrantless arrests, we should also allow it for warrants because warrants have the greater protection of a neutral magistrate.[574] But the Fourth Amendment demands the opposite. A warrant *authorizes* substantial intrusion and force, especially in relation to the home, that officers cannot otherwise engage in or use.[575] With this greater authorization should come greater protection, including the real-accuser requirement. Writing for himself in *Jones*, Justice Douglas summed up the policy problem nicely: "This is an age where faceless informers have been reintroduced into our society in alarming ways."[576]

Jones should be overruled and the real-accuser rule restored. The decision is wrong on its own terms, and it ignores the text and original meaning of the Fourth Amendment. Although it is beyond the scope of this Article to consider the formal factors of the Court's stare decisis jurisprudence, the discussion above and below should address most of these factors. Overruling *Jones* would significantly change current procedure; this Article addresses some of the practical objections below.[577]

C. *Jones*'s Aftermath

After *Jones*, the Court built upon its holding to further insulate lying or mistaken accusers. Today, a defendant seeking to challenge a warrant after the fact often cannot learn the identity of a confidential informant.[578] And even if a defendant can show that a named informant lied, that does not undermine the warrant's validity.[579] In issuing a warrant, a magistrate need not require the informant to meet some threshold level of reliability and personal knowledge; instead, she simply needs to consider the totality of the circumstances.[580] These developments, individually and taken together, remove the warrant process

572. *See id.* at 339 (discussing case law).

573. *Id.*

574. 362 U.S. at 270-71.

575. *See supra* Part I.C.

576. 362 U.S. at 273 (opinion of Douglas, J.).

577. *See infra* Part VI.C.

578. McCray v. Illinois, 386 U.S. 300, 313-14 (1967) (holding that neither the Due Process Clause nor the Confrontation Clause affords defendants the right to learn the identity of informants).

579. Franks v. Delaware, 438 U.S. 154, 171 (1978).

580. Illinois v. Gates, 462 U.S. 213, 238 (1983).

even further from the real accuser with personal knowledge. They also undermine truth and accountability.

VI. The Real-Accuser Rule Today: Scope and Objections

This Article has aimed to (1) show that the Founders envisioned an individual with personal knowledge swearing the Fourth Amendment oath; and (2) trace the development of that principle through the second half of the twentieth century. The argument that we should restore the Founding-era rule rests primarily on history, as well as on the similarity between the Founders' concerns and our own.[581]

Space does not permit a full elaboration of how such a rule would work today. That will have to await further research. Nevertheless, this Part sketches a possible implementation of the rule, its ambit, and potential policy objections. Before proceeding, it is worth noting that *whether* to implement the rule does not depend on policy so much as it does on the text and meaning of the Fourth Amendment.

A. Ambit of the Rule

This Article argues that state and federal courts should require a witness with personal knowledge to swear the oath before a magistrate as originally envisioned. In formulating such a rule for today, courts should do two things. First, they should remember the paradigmatic case: an officer who repeats, thirdhand, the information of an informant to obtain a warrant to search a house. The oath requirement should generally ban this use of informants, whether confidential, anonymous, or even named. Indeed, some have already called to ban reliance on single, uncorroborated confidential informants, at least as a matter of policy.[582]

Second, in developing any exceptions, courts should consider the text and purposes of the Fourth Amendment, as well as how Founding-era concerns best translate today. One could argue that there should be no exceptions: The oath simply requires that the individual with personal knowledge seek the warrant. But we can glean additional guidance from the Founding era, which allowed thirdhand information from the accused, for example, or from a dying man.[583] But an informant's reluctance or unwillingness to appear in court would not then have been—and therefore should not now be—a reason to

581. *See supra* Part I.

582. BALKO, *supra* note 16, at 41.

583. 2 HAWKINS, *supra* note 104, at 429; R v. Woodcock (1789) 168 Eng. Rep. 352, 353; 1 Leach 500, 501-02.

allow thirdhand information.[584] Formulating exceptions will be a challenge, no doubt. But we must not let the rare case distract from the predominant one that will involve informants who are alive and capable of testifying, and who must therefore swear the oath.

Founding-era convention likely required the personal appearance of the witness before a judge rather than an affidavit sworn before a notary, at least in the ordinary case.[585] This rule should persist today. The Founding-era sources required the JP to "examine" the party seeking the warrant.[586] In *Ex parte Bollman*, the Supreme Court permitted an affidavit taken by one judge to be relied upon by another; in doing so, the Court suggested that the initial person taking the affidavit must be a magistrate.[587] On the other hand, some cases that banned hearsay in the late nineteenth and early twentieth centuries permitted affidavits taken before other officials (though courts sometimes limited this flexibility to misdemeanors).[588]

The trial of Aaron Burr in 1807 supports the proposition that a magistrate or some other judge, rather than a notary, must give the oath and take the affidavit for a warrant.[589] Chief Justice Marshall, overseeing the circuit court and the trial, was asked to accept an affidavit as part of a motion to commit Burr on treason charges.[590] First, Chief Justice Marshall said that the affidavit's witness ought to appear in person unless great distance or some other inconvenience kept him away.[591] But in this case, the witness was at a great distance, so the court allowed an affidavit in lieu of live testimony.[592]

Second, Chief Justice Marshall wrote that a magistrate must give the oath—a solemn requirement that could not be relaxed.[593] This requirement applied not only to commitment but to the granting of warrants.[594] Chief Justice Marshall expressly relied upon the Fourth Amendment oath

584. *See* 2 HAWKINS, *supra* note 104, at 430 (noting that a witness's examination cannot substitute for his live testimony merely because "Prosecutors have used all their Endeavours to find the Witness, but cannot find him").

585. *See, e.g.*, Caudle v. Seymour (1841) 113 Eng. Rep. 1372, 1374; 1 Q.B. 889, 894.

586. *See supra* Part II.B.2.

587. 8 U.S. (4 Cranch) 75, 129 (1807).

588. *See* United States v. Baumert, 179 F. 735, 739-41 (N.D.N.Y. 1910) (collecting cases and arguments).

589. *See* United States v. Burr, 25 F. Cas. 27, 28 (C.C.D. Va. 1807) (No. 14,692c).

590. *Id.* at 27-28.

591. *Id.* at 28.

592. *Id.*

593. *Id.* at 28-29.

594. *Id.* at 29.

requirement in reaching this conclusion.[595] After all, he wrote, the Fourth Amendment oath must be a "legal oath."[596] It must therefore be taken by a "complete magistrate" who is "qualified."[597] Justice Marshall concluded that "administering an oath is a judicial act."[598] The court therefore refused to admit the purported affidavit into evidence.[599]

A leading early-nineteenth-century English case appears to sum up the common law view. In *Caudle v. Seymour*, a magistrate traveled to an injured victim's home.[600] The victim was recovering in bed in a garret two flights up.[601] The magistrate sent his clerk up to take the victim's testimony. The clerk was apparently authorized to swear oaths and take affidavits in other matters, and upon the resulting affidavit the magistrate issued an arrest warrant.[602]

The person arrested sued the magistrate on the grounds that he had failed to take the sworn examination himself, and the court agreed that this failure voided the warrant.[603] The warrant was void because there was no information under oath at all.[604] Justice Coleridge distinguished warrants from situations in which an affidavit might suffice, stating that "a magistrate taking depositions has a discretion to exercise; he is to examine the witness, hear his answers, and judge of the manner in which they are given."[605] Indeed, Justice Coleridge noted that magistrates had increasingly delegated the task of taking depositions to clerks, and he wrote that he was "glad to have an opportunity" to reject this development.[606] The other justices, writing seriatim, made similar points.[607]

Caudle was an English case from 1841, but the arguments of counsel cited treatise writers such as Hale and Richard Burn,[608] and the four opinions

595. *Id.*

596. *Id.*

597. *Id.*

598. *Id.* at 30.

599. *Id.*

600. (1841) 113 Eng. Rep. 1372, 1372; 1 Q.B. 889, 889.

601. *Id.*

602. *Id.* at 1372, 1 Q.B. at 889-90.

603. *Id.* at 1373-74, 1 Q.B. at 892-94.

604. *Id.* at 1373, 1 Q.B. at 892.

605. *Id.* at 1374, 1 Q.B. at 894. When the purpose of the affidavit was merely to allow a person to state facts, and the clerk who swore the oath acted only ministerially, such an affidavit was proper. *Id.*

606. *Id.*

607. *Id.* at 1373-74, 1 Q.B. at 892-93.

608. *Id.* at 1373, 1 Q.B. at 890-91.

authored in the case read as if the justices were merely construing the common law requirement as it had long existed. The four justices (for the most part) did not cite recent statutes or case law, but instead asserted that the purpose of a magistrate's examination before issuing a warrant—a requirement that had already existed for centuries—required that the magistrate examine the person directly.[609]

The federal rule for much of the past 100 years required the person seeking the warrant to swear the oath in person. The original federal search warrant statute that led to today's Rule 41 required in-person examinations.[610] As noted in Part IV.B above, courts in the early twentieth century pointed to this 1917 statute as the model for implementing the Fourth Amendment. Even today's Federal Rules of Criminal Procedure require that the person seeking an arrest warrant swear the oath in person.[611]

An in-person requirement will make a real difference by allowing judges who issue warrants a chance to scrutinize witnesses. One of the great dangers of relying on confidential informants is that such informants may lie or embellish to seek leniency,[612] and officers and informants may leave these details out of submitted affidavits.[613] If the informant must appear in person, magistrates can quickly explore whether the informant has cut a deal. The magistrate can also explore other reasons the informant might lie (such as revenge), or can discover that the informant is unsure or mistaken. An in-person requirement will also impress upon informants that what they say is serious because they are in court, before a judge, and under oath. By contrast, allowing witnesses to swear an affidavit before a notary public situated in the police precinct does far less to further the goals of the oath requirement.

Finally, any in-person requirement should permit an appearance by telephone or (preferably) videoconference to the same extent that those means are provided for officers seeking warrants.[614] In this case, the magistrate will

609. *Id.* at 1373-74, 1 Q.B. at 892-94.

610. *See* Espionage Act of 1917, ch. 30, tit. XI, § 4, 40 Stat. 217, 228; *supra* notes 513-17 and accompanying text.

611. FED. R. CRIM. P. 3 (requiring that the complaint forming the basis of a warrant be sworn before a magistrate judge).

612. NATAPOFF, *supra* note 16, at 46-54, 70-72 (describing the use of jailhouse informants as particularly pernicious); BRODSKY, *supra* note 66, at 42.

613. *See, e.g.*, Sack, *supra* note 29 (showing how a warrant leading to a botched SWAT raid rested upon an informant who had cut a deal to avoid jail). Some jurisdictions have upheld warrants even where officers omitted from the application that the informant had been paid, had been granted leniency, or had a criminal history. *See* Molina *ex rel.* Molina v. Cooper, 325 F.3d 963, 969 (7th Cir. 2003); United States v. Wold, 979 F.2d 632, 634 (8th Cir. 1992); Wise v. State, 570 S.E.2d 656, 658-59 (Ga. Ct. App. 2002).

614. *See, e.g.*, FED. R. CRIM. P. 4.1.

need to place and examine the person under oath and have a reliable means of identifying the person.[615]

B. The Exclusionary Rule

As for remedy, this Article's proposed rule does not envision the exclusionary rule applying to anything but reckless or willful violations—that is, magistrates who issue warrants based upon what they know to be thirdhand accounts. The entire point of the warrant and oath requirements is to impose protections ex ante. One key feature of this Article's proposal is that it shifts enforcement of the Fourth Amendment away from the exclusionary rule (which, of course, excludes probative evidence from trial) to the Warrant Clause, which was the chief source of protection envisioned by the Founding generation.[616] Should the Court overrule *Jones* and ban hearsay, magistrate judges and police can reasonably be relied on to follow that dictate without the need for the exclusionary rule in most cases. This follows because the rule, once established, is straightforward: Bring the actual witness to court.

C. Practical Objections

The first objection to this Article's proposed rule is that witnesses will be afraid to come forward. This objection is a serious one. The answer, however, is straightforward: The magistrate can take the individual's testimony secretly in chambers, as judges often do.[617] If necessary, the magistrate can shield the individual's identity or her testimony.

People v. Hobbs[618] provides an example of how a magistrate judge can personally examine an informant and yet protect his or her identity. In that case, the magistrate judge issuing the warrant examined the informant "personally," tape recorded the proceeding, and created a transcript.[619] To protect the informant's identity while preserving the information for later review, however, the judge filed these items under seal.[620] When the defendant later attacked the warrant at a suppression hearing, he sought the sealed information.[621] The trial judge reviewed the sealed information in camera,

615. *See id.*

616. *See supra* Parts II.B, II.E.

617. VAN DUIZEND ET AL., *supra* note 39, at 22-24 (noting that magistrate judges take testimony for warrants in "hushed conversation[s] at the bench," in camera, or even at home rather than in open court).

618. 873 P.2d 1246 (Cal. 1994).

619. *Id.* at 1248.

620. *Id.*

621. *Id.*

determined that the defendant was not entitled to the identity of the informant or the sealed testimony, and denied the defendant's requested relief regarding the warrant.[622] The California Supreme Court held that the trial judge had appropriately balanced the defendant's right to the information against the need to protect confidential informants.[623]

Other judges have similarly examined informants directly under oath and then filed the testimony under seal.[624] At a later suppression hearing, a trial court could review this sealed testimony in camera to determine whether the defendant was entitled either to receive the information or to have the warrant quashed and the evidence suppressed. As in California, New York's high court held that this process struck the appropriate balance between a defendant's right to challenge the warrant and the informer's privilege.[625]

In what contexts are we most likely to worry about the safety of informants? Domestic-violence cases are unlikely to present a risk to victims because these cases almost never involve warrants (and the suspect will already know who the main accuser is). Accusers are more likely to fear retaliation for acting as witnesses in drug cases. But these are the very cases where abuse by anonymous informants is most likely.[626]

Second, one might argue that our criminal justice system has changed so significantly that the real-accuser requirement no longer makes sense. We have moved from private accuser and prosecutor to a system of public police investigations and public prosecutions. This is true, of course, but nothing about that change vitiates the need for the real-accuser requirement in order to protect individual liberty against government intrusion. Quite the opposite: As government law-enforcement power increases, so too must the checks on that power. The real-accuser requirement helps ensure the police do not abuse their authority. The SWAT raids summarized in Part I were based on faulty, thirdhand reports from confidential informants. These dangerous and deadly raids, authorized by warrant, precisely illustrate the overbearing government intrusions that the Founders sought to prevent by way of the real-accuser requirement.

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622. *Id.*

623. *Id.* at 1259.

624. *E.g.*, People v. Castillo, 607 N.E.2d 1050, 1051 (N.Y. 1992).

625. *Id.* at 1055. Courts have recognized a common law informer's privilege for nearly 250 years. *E.g.*, Worthington v. Scribner, 109 Mass. 487, 488-89 (1872). The privilege is not absolute; sometimes it must yield to a defendant's rights at a criminal trial. Roviaro v. United States, 353 U.S. 53, 60-61 (1957) ("[If] the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused . . . the privilege must give way.").

626. *See supra* Part I.C.

Third is the *Jones* objection: We want to make securing a warrant as easy as possible to encourage officers to seek warrants as opposed to acting without them. This objection has some merit,[627] but it also fails. The objection views the chief purpose of the Warrant Clause as interposing a neutral magistrate, who enjoys a better position to decide probable cause than a zealous officer in the field.[628] But the Warrant Clause says not only who should decide, but also how they should decide: based upon an oath by a person with firsthand knowledge. Before we authorize a home invasion, we want the certainty and accountability that the oath brings.

The *Jones* objection suffers from another logical flaw. It presumes that the police will find a way to carry out the same conduct without a warrant, and that it is better to have a neutral magistrate at least play some role. But at least for search warrants, police will not figure out another way to violently break into a home at night—that conduct is plainly unlawful. Instead, the police will find other ways to search the home that are lawful without a warrant. They may, for example, seek consent of the resident. Indeed, police already obtain consent specifically to avoid the existing requirements of obtaining a warrant.[629] In doing so, they will accomplish the search, but without a government-sanctioned violent intrusion.

One might also object that police will seek to enlarge the exigency exception to the warrant requirement, arguing that the time it takes to assemble live witnesses would result in the destruction or disappearance of evidence.[630] Courts should reject such an expansion. The exigency exception for warrantless entry into a home requires "imminent" destruction of evidence, not simply likely or eventual destruction.[631] If the prospect of such destruction is imminent, then this Article's proposal will impose no additional barrier. If such destruction is not imminent, but only possible, during the extra time an officer needs to present witnesses to obtain a warrant, then the case would not fall under the exigency requirement.[632]

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627. *See* VAN DUIZEND ET AL., *supra* note 39, at 50.

628. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948).

629. VAN DUIZEND ET AL., *supra* note 39, at 68 (noting that some police officers in the study used "a variety of techniques that allow an officer to avoid obtaining a warrant . . . [including] obtaining 'consent'").

630. The exigency exception to render aid would not be affected by this Article's proposal, since such exigencies will satisfy the imminence requirement either way.

631. Lange v. California, 141 S. Ct. 2011, 2017 (2021) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)); Kentucky v. King, 563 U.S. 452, 460 (2011) (quoting *Brigham City*, 547 U.S. at 403).

632. *King*, 563 U.S. at 460; *see also Lange*, 141 S. Ct. at 2021-22 (rejecting a rule that police may always claim exigency to enter a home without a warrant when chasing a misdemeanor suspect); Welsh v. Wisconsin, 466 U.S. 740, 752-53 (1984) (emphasizing

footnote continued on next page

Perhaps just as likely, if it is too hard to get a warrant for a particular location, the police may decide to continue their investigation without searching that particular place. Again, the Breonna Taylor case presents a powerful example. Police did not find drugs or drug money in her home,[633] and that search therefore could not have helped their case against the true target of the investigation. This Article's proposal would require the police to consider more carefully whether it is even necessary to search a particular location, likely leading them to decide not to search the homes of people, like Breonna Taylor, who are only tangentially connected to an investigation.

Put another way, we *want* to make search warrants harder to get. Consider wiretaps. Federal[634] and state law[635] create numerous enhanced steps officers must take before obtaining a warrant to wiretap a phone call. For example, under Florida law, officers must show that they have exhausted other, less intrusive means and that the warrant limits the time and the scope of what officers may listen to.[636] These laws create extra limits because we consider a wiretap's invasion of privacy so great.[637] We usually do not argue that wiretap warrants are too hard to get and that additional requirements will discourage officers from obtaining them at all. Save for a few narrow exceptions, it is unlawful to obtain a wiretap without a warrant.[638] We should treat the home with the same reverence.

Conclusion

Under current Supreme Court doctrine, the Fourth Amendment "Oath or affirmation" requirement allows an officer to swear the oath and merely repeat the allegations of the real accuser. This Article argues that this hyperliteral expedient contradicts the original understanding of the oath requirement, the text and purpose of the Warrant Clause, and the majority rule in state and federal courts from the mid-nineteenth to the mid-twentieth century. It was not until 1960 that the Court adopted the current rule allowing hearsay. In

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sharp limits to exigency exceptions for the home and rejecting an exigency exception based on the need to preserve evidence of a minor offense).

633. Darcy Costello, *Jamarcus Glover, a Key Figure in Breonna Taylor Case, Arrested on Warrants*, COURIER-J. (updated Aug. 27, 2020, 4:51 PM ET), https://perma.cc/PVC4-2ALF.

634. 18 U.S.C. § 2511.

635. *E.g.*, Fla. Stat. § 934.09 (2021).

636. *Id.* §§ 3(c), 5.

637. *See, e.g.*, Berger v. New York, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.").

638. 18 U.S.C. § 2511.

doing so, it ignored all ordinary tools of constitutional interpretation and instead imposed its policy preferences.

We should therefore return to the original requirement that the real accuser, with personal knowledge, swear the oath. This requirement will help reduce the widespread abuse of search warrants to authorize violent home intrusions based on unreliable confidential informants. This Article shows that reliance on original meaning here does not restore some obsolete or inapplicable requirement. Instead, the same reason that drove the Founders to insist that the real accuser swear the oath—the need for truth and accountability to justify drastic intrusions into liberty and the security of the home—remains paramount today.