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Saving Probable Cause

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I. INTRODUCTION

It is time to save an old friend. It is an age when acts of terrorism have produced irrational doubts about whether the laudatory principles our public documents espouse will serve, to some degree, as the prescription for our own undoing. These doubts are insidious, and have brought us closer to abandoning one of our democracy's most vital principles—probable cause. Our fears about terrorism counsel that we indulge the urge to act expediently and, in such expedience, to compromise the probable cause doctrine in exchange for what we think would be greater collective security. Such an exchange devalues probable cause, as, in our fear, we overlook the fact that this is a zero sum game where we purchase security with the currency of personal freedom.

Probable cause is most assuredly becoming a victim of benign neglect. There is pressure to read it, and other provisions of the Fourth Amendment, as if they were penned in disappearing ink or contained a footnote that allowed for their suspension at the discretion of those elected to thwart the next terrorist attack. To the extent the probable cause doctrine may limit the government's ability to deter future attacks, courts may consider not only neglecting it, but discarding it as nothing more than an historical eccentricity amenable to as many exceptions as the Fourth Amendment's warrant requirement. But no

1. Assistant Professor of Law, Duquesne University School of Law. I thank most sincerely my able and patient research assistants, Yuliya Charnyshova and Sarah Cottrill, for their invaluable assistance in making this Article presentable. Also, I am blessed to have benefited from the thoughts of Professors Bruce Ledewitz and Ken Gormley of Duquesne University School of Law, scholars in the finest traditions of scholarship. I extend additional thanks to my friend David Trimmer for his comments on my rendering of philosophy herein. I reserve my most profound thanks for my son, Christian Antkowiak, a teacher of political science and student of the law, whose debates with me about John Rawls inspired this piece and proved to me that, no matter what else I may be, I am not the best thinker in my family.

matter how serious our fears, we cannot seem to bring ourselves to consign probable cause to history's scrap heap. As political beings, our instinct holds us back because we sense that probable cause reflects something that goes to the core of our notion of what justice means in a free society. To abandon probable cause is to bring to an end a concept that has lasted many centuries and persevered through tumultuous times. A concept this old and resilient must speak to values quite profound.

While we may refuse to abandon probable cause openly, our society also risks allowing the doctrine to slip away by inattention and neglect. This Article represents a call to recognize that an old friend is in trouble; it is an exhortation to save probable cause not for its own sake, but for our own. It is an open letter to judges—the administrators of probable cause—giving advice on the understanding, care, and handling of a doctrine that comes to them from antiquity but resonates with importance in a modern, nervous age. It provides a new, practical approach to the probable cause doctrine that will give that doctrine a tangible form while paying homage to the substance of the critical constitutional theory upon which it is based. In the final analysis, this Article argues that the effort to save probable cause is a search to find the core of our sense of justice and the best processes we can use to bring about its closest approximation. The process, it turns out, involves listening carefully to the most powerful force in the political universe—the reasoned voice of the governed.

We will proceed simply. First, we will note the criticism directed at probable cause after September 11th and observe that such criticism existed before the attacks. Next, this Article will explore both the general importance of probable cause within American constitutional jurisprudence and the current trend toward treating it with benign neglect. Saving probable cause requires us to understand it more deeply than we have done through history. That understanding does not come easily, as neither precedent, history, nor etymological processes provide more than superficial insight. Finally, this Article will examine probable cause from the perspective of political science (particularly, the teachings of John Rawls), and derive a practical formula to save this valued old friend.

II. BLAMING PROBABLE CAUSE

Thoughtful scholars writing in the wake of the September 11th attacks questioned whether our understanding of the Fourth Amendment contributed to our vulnerability, and argued that we must alter this understanding to enable the government to interdict future terrorist acts.² Blaming probable cause or, for

2. Professor Etzioni has written a comprehensive analysis of post-September 11 societal attitudes toward governmental powers of search and seizure. *See generally* AMITAI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT? FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM (2004). In his book, Professor Etzioni argues

that matter, any other constitutional provision, amounts, of course, to blaming the Framers who cast the provisions in constitutional stone. We hope the Framers granted power to the government commensurate with the threat we face. In times of crisis, we wonder if they actually intended to force law enforcement officials to adhere to the Marquis of Queensbury rules while letting their opponents use knives and attack after the bell.

While the September 11th attacks catalyzed these discussions, dissatisfaction with Fourth Amendment interpretations that limit government power substantially did not begin on the afternoon after the Twin Towers fell.³

that “trade-offs” between security and implementation of the Bill of Rights are a necessity. *Id.* at 1-3. He posits that we can and should “refashion” our conception of these rights in the face of the need to prevent future attacks. *Id.* at 5. We must refashion, he argues, to prevent the Republic from following Germany’s Weimar Republic into the pages of obscurity: he contends the Weimar Republic failed to preserve its institutions and fell to the totalitarian Nazi regime because of its “inaction in the face of threats, not [its] excessive action.” *Id.* at 5-14. While investigative tools like large scale interviewing of groups of individuals “are not measures the United States would have taken in normal times,” they represent “a price we must pay for our enhanced security.” *Id.* at 33-34.

Other scholars have argued similarly for expanding police powers in the wake of the attacks. See William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002) (arguing “Fourth and Fifth Amendment law is likely to move toward greater authority for the police”). Professor Lerner identified a concern Justice Department officials raised regarding a probable cause interpretation the U.S. Attorney’s Office in Minneapolis adopted before September 11 that arguably limited a planned search of September 11 co-conspirator Zacarias Moussaoui. See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 952-53 (2003) (noting U.S. Attorney’s Office “required showings akin to a ‘clear and convincing’ evidentiary standard” before approving warrant applications).

The events of September 11 affected the academic community, too. In October 2001, Professor George Thomas published a thoughtful and fascinating Fourth Amendment analysis in which he argued the Framers designed the Amendment to limit the powers of the federal government. He argued specifically that:

[t]he principal concern in the Bill of Rights was not to protect innocent defendants. The Framers instead intended to create formidable obstacles to federal investigation and prosecution of crime. An expansive protection against prosecution means, of course, that guilty as well as innocent people go free, but the Framers expressed no concern about this effect of the Bill of Rights. The anti-Federalists simply distrusted prosecutors who would advance the federal government’s interests and federal judges who might be corrupt or biased against those who did not pay proper obeisance to the federal government.

George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 160 (2001). He asserts “the Framers were not concerned with the government’s interests in solving crime,” and that while today we “fear criminals, the Framers feared the central government.” *Id.* at 173.

In the aftermath of September 11, the differences between the Founders’ fears and modern Americans’ fears became clear. Professor Thomas acknowledged this difference, noting that “the world is different in 2001.” *Id.* at 174. He advised that another paper should resolve the implications of his thesis that future Fourth Amendment analyses should return to a vigorous warrant requirement for federal criminal procedure. *Id.*

3. Contrast the following quotations from scholarly articles published before and after the attacks. In a 2003 article, Professor Lerner began his conclusion with the following commentary:

In the aftermath of September 11, several commentators mused that the Constitution would handicap our nation’s efforts to combat terrorism. One observer wondered whether the Bill of Rights was so hopelessly out of touch with the reality and gravity of the threat to our nation that unless we

Rejoinders to criticism that the Bill of Rights constitutes the “whereas clauses” of a suicide pact are as old as the criticism itself. In 1866, for example, the Supreme Court in *Ex parte Milligan*⁴ set forth an elegant defense of the Constitution in times of crisis. Milligan had been convicted summarily and denied the protections of a grand jury indictment and trial by jury. The Court spared Milligan’s life when it granted a writ of habeas corpus vacating his conviction for treason.⁵ In response to the government’s argument that the desperate events of the Civil War justified a relaxation of basic constitutional principles, the Court retorted that

[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the *theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.*⁶

But, of course, during the Civil War, a weapon of mass destruction meant canister fire, and the participants—sporting uniforms sufficient to enable ready identification—engaged each other on a defined battlefield. May we still say today that the Constitution’s noble eighteenth century language grants our collective entity all the power it needs to survive? Indeed, what compelled the *Milligan* Court to assert this point so confidently? Can the Fourth Amendment

“abandon[] key constitutional protections . . . deaths from terrorism [will number in the millions].” This Article takes as its starting point the following principle: Any [sic] interpretation that renders the Constitution a suicide pact is almost surely an erroneous interpretation.

Lerner, *supra* note 2, at 1028 (internal citations omitted).

In an article he wrote seventeen years before the Twin Towers fell, Professor Grano concluded that

[t]his article has addressed the evidentiary burden that the government must carry before such an intrusion should be permitted. I have argued that the government’s burden should not be defined at so high a level that it impedes legitimate law enforcement interests. We need not interpret the fourth amendment’s [sic] probable cause requirement to leave us so secure against encroachments by government that we are left insecure against predatory behavior by our fellow citizens, behavior that also may destroy our liberty, our pursuit of happiness, and sometimes our very lives. (Footnote omitted.) I have attempted to demonstrate that neither history nor common sense compels such a restrictive view of the probable cause requirement.

Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 520 (1984).

4. 71 U.S. 2 (1866).

5. *Id.* at 130-31.

6. *Id.* at 120-21 (emphasis added).

still stand after the Twin Towers have fallen? Why is probable cause—simply one component of the Fourth Amendment—so important anyway?

III. THE IMPORTANCE OF PROBABLE CAUSE

a. Probable Cause as a Protection of a Specific Right

To save probable cause, we must first understand it. To understand probable cause means to place it firmly within the context of the right to which it relates. Justice Brandeis identified the right most poetically in his dissent in *Olmstead v. United States*,⁷ writing that

[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans and their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.⁸

According to no less an authority than Professor LaFave, the probable cause doctrine is a core protection of this “right most valued.”⁹

Indeed, the Fourth Amendment's probable cause component contributes far more to the Amendment's meaning than does the warrant requirement. Scholars argue often that the Amendment's history shows the warrant requirement was not something ever truly required and, given that exceptions to the requirement are now so numerous, it is a requirement in name only.¹⁰ In an

7. 277 U.S. 438 (1928).

8. *Id.* at 478-79 (Brandeis, J., dissenting).

9. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1 (4th ed. 2004).

10. Professor Lerner has called the warrant requirement one of two “presumptions” about the Fourth Amendment that turn out to be “fictitious.” In discussing the warrant requirement, he describes it as a “requirement” with at least twenty-four exceptions that courts and law enforcement honor only when they breach it. *See* Lerner, *supra* note 2, at 954-55. As a side note, Professor Lerner posits a second “fictitious presumption”: a constitutional search requires probable cause. *Id.* at 955-56. This argument here strikes me as somewhat less convincing. Law enforcement may conduct non-probable cause searches administratively at airports, DUI check points, or during a *Terry*-type street encounter. *Id.* at 956. Professor Lerner writes correctly that large numbers of citizens endure these searches and the searches do not require probable cause. *Id.* Nonetheless, the type of search that, by its intensity and intrusiveness, challenges Justice Brandeis' right to be let alone most significantly is that in which probable cause remains a requirement.

Professors Sklansky and Amar assert that not only have Courts excepted the warrant requirement into virtual obscurity today, but the requirement does not have the sort of historical mandate we once might have believed. Both argue that the modern Court does not view the warrant requirement in the same manner as 18th and 19th century authorities. *See* Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 767 (1994); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1763-64 (2000). Professor Amar writes bluntly that

age where the government seeks to water down the Amendment's protections in the name of national security, it can no longer target the already-diluted warrant requirement. Instead, the probable cause doctrine will become the target, and the weapon of choice will be to pretend the doctrine no longer exists. The casualty of this attack will be our right to be let alone.

On January 19, 2006, the U.S. Attorney General published a forty-one-page, single-spaced defense of the President's asserted power to tap telephones that persons "reasonably believed to be linked to al Qaeda" used.¹¹ This remarkable document's thesis asserts that without any explicit congressional authority, such as the Foreign Intelligence Security Act (FISA),¹² and solely under the auspices of Article II of the Constitution, the President may order electronic surveillance of international calls without a warrant, without probable cause, and under the sole scrutiny of the Department of Justice and the National Security Agency, which will "ensure that civil liberties are being protected."¹³

The Attorney General's document mentions the term "probable cause" just six times. It appears once when its authors quote the Fourth Amendment.¹⁴ It appears again when they quote FISA.¹⁵ The four remaining references to probable cause—all on one page—surface in citations to cases dealing with student drug testing and an exigent circumstance where police, having probable cause to search, made a man wait outside his trailer while they obtained a warrant.¹⁶

Were this document to be the only legal treatise on the Fourth Amendment to survive a cosmic cataclysm, future generations would believe that the Amendment's use of the terms "warrant" and "probable cause" were surplusage. The "touchstone" for evaluating the government's justified intrusions of privacy, the text asserts, is simply "reasonableness" "assessed under a general balancing approach," in which the government's interest in defending the Nation from al Qaeda, quite obviously, always tips the balance in

[t]he Amendment's Warrant Clause does not require, presuppose, or even encourage warrants—it limits them. Unless warrants meet certain strict standards, they are per se unreasonable. The Framers did not exalt warrants, for a warrant was issued ex parte by a government official on the imperial payroll and had the purpose and effect of precluding any common law trespass suit the aggrieved target party might try to bring before a local jury after the search or seizure occurred.

Amar, *supra*, at 771-72. Warrants, he concludes, "were friends of the searcher, not the searched." *Id.* at 774.

11. U.S. DEPARTMENT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 1 (January 19, 2006) [hereinafter "DOJ REPORT"].

12. 50 U.S.C. §§ 1801-1811 (2000).

13. See DOJ REPORT, *supra* note 11, at 5.

14. See DOJ REPORT, *supra* note 11, at 36.

15. See DOJ REPORT, *supra* note 11, at 18.

16. See DOJ REPORT, *supra* note 11, at 37 (citing *Bd. of Ed. v. Earles*, 536 U.S. 822 (2002); *Illinois v. McArthur*, 531 U.S. 326 (2001); and *Veronia Sch. Dist. v. Acton*, 515 U.S. 646 (1995)).

favor of allowing intrusive conduct.¹⁷

Lest anyone feel this approach represents only the executive branch's advocacy, recent Supreme Court opinions on various areas of Fourth Amendment jurisprudence portend that the overt sublimation of probable cause to a broader, wholly transitory judgment of reasonableness is not far away. For example, in *Brigham City v. Stuart*,¹⁸ the police affected an exigent circumstances entry into a home after viewing an ongoing assault within.¹⁹ Pursuant to the classic formulation of a proper exigent circumstances search, *police armed with probable cause* may enter a home without a warrant either when delay in getting a warrant will endanger the occupants or when the police fear the perpetrator or evidence will disappear before they obtain a warrant.²⁰

The only reference to probable cause in this opinion is, however, in the recounting of the Utah Supreme Court's ruling on the matter.²¹ In upholding the officers' warrantless entry and ensuing search, Chief Justice Roberts never refers to "probable cause." Rather, he casts the issue as one regarding "the ultimate touchstone of the Fourth Amendment," namely, "reasonableness."²² To be sure, the Chief Justice does not remove probable cause as an element of an exigent circumstances search. However, a once-traditional part of the exigent circumstances equation becomes quite conspicuous by its absence in the opinion.

The Court's move to marginalize probable cause in an ephemeral search for reasonableness presented itself far more evidently in *Samson v. California*.²³ In *Samson*, the Court sanctioned the warrantless, suspicionless search of a parolee under California law by any law enforcement officer, at any time, and, essentially, for any reason.²⁴ The *Samson* dissent alleged that the majority had never before deemed reasonable a search that lacked either individualized suspicion or some limited, programmatic special needs justification that could be carefully circumscribed by procedural protections.²⁵ Justice Thomas rejoined this argument by asserting

[t]hat simply is not the case. *The touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.* Thus, while this Court's jurisprudence has often recognized that "to accommodate public and private

17. See DOJ REPORT, *supra* note 11, at 37.

18. 126 S. Ct. 1943 (2006).

19. *Id.* at 1946.

20. See, e.g., *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (applying and affirming exigent circumstances test when warrant not required); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (same); *Ker v. California*, 374 U.S. 23, 40 (1963) (same).

21. *Stuart*, 126 S. Ct. at 1946.

22. *Id.* at 1947.

23. 126 S. Ct. 2193 (2006).

24. *Id.* at 2196.

25. See *id.* at 2202-03 (Stevens, J., dissenting) (noting "suspicionless search is the very evil the Fourth Amendment was intended to stamp out").

interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure,” . . . we have also recognized that the “Fourth Amendment imposes no irreducible requirement of such suspicion[.]” *Therefore, although this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be “reasonable” under the Fourth Amendment.*²⁶

A search is “reasonable,” the *Samson* majority ruled, whenever it survives a simple process of weighing “the degree to which it intrudes upon an individual’s privacy” against “the degree to which it is needed for the promotion of legitimate governmental interests.”²⁷ In this rendering, the probable cause doctrine is not just something to be ignored readily but is a branch of the Fourth Amendment tree ripe for pruning. Because the Constitution never mandates probable cause *per se*, the *Samson* majority seems to argue that the Court may excise the doctrine from the Fourth Amendment reasonableness equation whenever the modern needs of law enforcement require.²⁸

Evidently, the Court finds nothing in the Constitution that enforces probable cause as an abstract principle. Thus, when the executive provides a sound policy reason to ignore the doctrine, the courts have no authority to do anything other than acquiesce to the executive’s command. Once the Court discards the structure that probable cause imposes on the Fourth Amendment, thereby reducing Fourth Amendment jurisprudence solely to a case-by-case policy judgment about whether the government’s needs outweigh citizens’ privacy interest, the disembodied icon of reasonableness renders probable cause superfluous.

Samson gives no external objective standard for lower courts to apply when balancing the degree to which a search intrudes on an individual’s privacy against the degree to which the search is required to promote legitimate government interests.²⁹ This lack of an external standard, or even a methodology to locate standards, imposes a more troubling consequence than befuddling trial courts. Citizens, wondering what actual rights the Fourth Amendment grants them, may begin to wonder whether the Amendment grants

26. *Id.* at 2201 n.4 (emphasis added).

27. *Samson*, 126 S. Ct. at 2197 (quoting *United States v. Knight*, 534 U.S. 112, 118-19 (2001)). In *Knight*, the Supreme Court upheld a warrantless search because legitimate governmental interests combating recidivism and integrating probationers into community outweighed the probationer’s privacy expectation. *Knight*, 534 U.S. at 119-21.

28. *Samson*, 126 S. Ct. at 2201 n.4 (holding policy constitutional because parolees have virtually no expectation of privacy and “[i]n light of California’s earnest concerns respecting recidivism, public safety, and reintegration of parolees into productive society, and because the object of the Fourth Amendment is reasonableness”).

29. *Id.* at 2197 (explaining “reasonableness” balancing test).

them any de jure rights at all, or whether the protections they enjoy are simply rights de jour.

The definition of “reasonableness” in *Samson* is not the only one the Supreme Court has espoused in recent years. Indeed, the definition the Court discussed in *Georgia v. Randolph*³⁰ instructs that a court’s internal view of reasonableness may not triumph over the term’s historically-rooted meaning. The *Randolph* case considered whether the consent of one occupant of a house sufficed to authorize a search when another occupant was present and expressly refused to consent.³¹ Whether it was reasonable for the police to enter the house in this circumstance required, the Court held, contemplation of a factor the *Samson* Court did not consider: “[t]he constant element in assessing *Fourth Amendment* reasonableness in the consent cases, then, is the great significance given to *widely shared social expectations*, which are naturally enough influenced by the law of property, but not controlled by its rules.”³² Time and again in the *Randolph* majority opinion, the Court turned its analysis on the “customary expectation of courtesy,” the “common understanding” or “societal understanding of superior and inferior” capacities to consent, and “social custom” about the legitimacy of entries in such circumstances.³³ It found none of these factors sufficient to judge the officers’ entry reasonable under the circumstances. Coupled with a paramount concern for the sanctity of the home and the recognition that a “generalized interest in expedient law enforcement cannot, without more, justify a warrantless search,” the Court invalidated the present occupant’s consent.³⁴

Surely, *Randolph* does not require a trial court to consult a book of etiquette before it rules on a suppression motion. The Court seems to suggest, however, that a court may not determine reasonableness by its own subjective standard in each case. The “common understanding” is real, and derives from something far more profound, something akin to a deep, societal consensus the court must discover.³⁵

But, regardless of the definition of reasonableness we use, reasonableness does not swallow the doctrine of probable cause. There is an independently enforceable principle that binds courts to enforce probable cause in the face of law enforcement’s transitory needs to disregard it, regardless of how reasonable those needs seem at the moment. That principle contemplates probable cause as a structural protection of liberty and the courts as its protector. Losing sight

30. 126 S. Ct. 1515 (2006).

31. *Id.* at 1518-19.

32. *Id.* at 1521 (emphasis added).

33. *Id.* at 1522-23, 1526.

34. *Georgia*, 126 S. Ct. at 1524 n.5, 1528.

35. In certain respects, the discussion upcoming in this Article about the practical use of John Rawls’ conception of the original position is a way to find and enforce that profound political and constitutional reality. See *infra* Section V (discussing Rawls’ philosophy and its relevance to probable cause).

of that principle would portend the final days of probable cause. And if protection of the right to be let alone is vested in the same branch of government—the executive—that would effect the right’s invasion, its days, too, are numbered. But, an understanding of the probable cause requirement’s history and context refutes these suppositions. The Constitution mandates that the judiciary enforce probable cause as a doctrine that cannot be readily excised without creating dangerous, structural problems to a system designed to protect not just a single right, but freedom on a macro level.

b. Probable Cause As a Structural Protection of Liberty Generally

To understand truly the nature and importance of probable cause, I submit that we must know it by recognizing what it does when we deem that it exists. A finding of probable cause represents a societal authorization for police to invade an individual’s privacy and, thus, violate the individual’s right to be let alone. This finding is important both as an endpoint and a process to reach that endpoint. If we hold privacy in high regard, we will demand that a heightened sense of certainty accompanies a finding of probable cause because we know that probable cause, once acquired, alters the relationship between citizens and their government in a most profound way. That “finding,” moreover, cannot be made by the same branch that accomplishes the privacy invasion if we are to afford “privacy” any value at all. When the executive branch seeks to alter the relationship of citizen to government, it must do so based on proof the Judiciary—a co-equal branch—has deemed objectively reasonable.

Probable cause thus acts like the gravitational pull a celestial body exerts: we cannot see it, but we can observe how it affects objects around it. Though no more tangible than separation of powers or federalism, it operates in much the same way to frustrate the tendency of government toward tyranny by reducing the occasions in which government may wield arbitrary power.³⁶ It operates to define the sphere in which the executive may operate. In this sense, probable cause may not ultimately address any one right specifically, but instead protect all of liberty generally.

A number of scholars have identified this critical aspect of the Fourth Amendment. History is not unreliable or inconsistent in this respect. The Founders drafted the Amendment to curtail the capricious search powers exercised under general warrants and writs of assistance, devices so offensive to a populace determined not to live under an arbitrary government that when the government employed such devices, it was properly accused of tyranny.³⁷

36. I have, at great length, sought to demonstrate that separation of powers and federalism are the two structural pillars of personal liberty. *See generally* Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 DUQ. L. REV. 599 (2005).

37. *See* *Boyd v. United States*, 116 U.S. 616, 624-25, 630 (1886); KEN GORMLEY, *THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES* 300-01 (2004); Amar, *supra* note 10, at 771-72; Tracey

In *Boyd v. United States*,³⁸ the Supreme Court discussed the fear of the invasions of personal security, liberty, and property that the Fourth Amendment was designed to protect.³⁹ The Fourth Amendment addressed the evil of the government's exercise of arbitrary power through discretionary searches undertaken by federal officials. Interpreting the Amendment, the *Boyd* Court indicated, was an ongoing effort to engage in a struggle against such unchecked government power.⁴⁰ In *Henry v. United States*,⁴¹ the Court observed again that the probable cause requirement was meant to combat the pernicious general warrant and limit arbitrary action by the government in all respects.⁴² And, of course, in *Olmstead*, Justice Brandeis reminded us to recognize that the Fourth Amendment protects a right to be let alone, a right of infinite variety that reflects most particularly the government's structural charge to perform tasks the Constitution delegates to it and, otherwise, to leave us alone.⁴³

But focusing on what right or rights probable cause (and the Fourth Amendment generally) protects and whether probable cause bans a specific kind of search may miss the larger point. At a deeper level, the judicial process that accompanies probable cause determinations may serve as an overall admonition to the government that its powers are limited, defined not simply by the functions it may perform, but also in how it is permitted to perform them, with structures in place at the constitutional level ready to enforce those limits.

The importance of structural limits was recognized from the outset. For example, in *Federalist No. 84*, Hamilton confronts criticism that the Founders' failure to include a bill of rights in the Constitution rendered the document deficient.⁴⁴ He dismissed the argument that because declarations of specific rights appeared in documents like the Magna Carta, one must appear in our Constitution.⁴⁵ Our Constitution was written against a different, and new, set of assumptions. Hamilton characterized older declarations as "stipulations between kings and their subjects" that "have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants."⁴⁶ Strictly speaking, he argued, under our Constitution, "the people surrender nothing; and as they retain everything

Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 941-43, 966-77 (2002); Sklansky, *supra* note 10, at 1763-64, 1813-14.

38. 116 U.S. 616 (1886).

39. *Id.* at 630.

40. *Id.*

41. 361 U.S. 98 (1959).

42. *Id.* at 100.

43. See *Olmstead v. United States*, 277 U.S. 438, 478 (1929) (Brandeis, J., dissenting). Professor Ken Gormley of the University Of Pittsburgh School of Law has written an outstanding review of *Olmstead* and *Henry* and the underlying themes of privacy they reflect. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WISC. L. REV. 1335, 1357-74 (1992).

44. THE FEDERALIST NO. 84 (Alexander Hamilton).

45. *Id.*

46. *Id.*

they have no need of particular reservations.”⁴⁷ Given this premise, a bill of rights is “not only unnecessary . . . but would even be dangerous” because it “would contain various exceptions to powers which are not granted” and would, therefore “afford a colorable pretext to claim more than they were granted.”⁴⁸ The “plan of the convention,” the plan of government, is itself a bill of rights, Hamilton argued, because it serves “to declare and specify the political privileges of the citizens in the structure and administration of government” and defines “certain immunities and modes of proceeding, which are relative to personal and private concerns.”⁴⁹

Of course, Hamilton lost the argument about whether the Constitution required a bill of rights. His underlying point, however, has great importance: the initial plan of government incorporated a check on arbitrary power even while it sought to grant power to the central government it created. No amendment passed thereafter to provide further specific protection to the people could countermand the Constitution’s innate structural protection; indeed, to the extent the Fourth Amendment creates a clear mandate for a judicial check on executive power to search by an insistence on a finding of probable cause, it grants the Constitution’s original structural protection a set of teeth.

This need for structural protection of liberty finds further articulation in the philosophical writings of Phillip Pettit and his concept of antipower.⁵⁰ For Pettit, the traditional notion of freedom, one he argues the Framers embraced, held that true freedom exists in a system that subjects no person to the arbitrary power of another, regardless of whether arbitrary conduct actually occurs.⁵¹ Describing “freedom as antipower,” he explains that

I am free to the degree that no human being has the power to interfere with me; to the extent that no one else is my master, even if I lack the will or the wisdom required for achieving self-mastery. The account is negative in leaving my own achievements out of the picture and focusing on eliminating a danger from others.⁵²

The actual act of interference is not nearly as critical as the elimination of an arbitrary power that allows a dominating entity to act without fear of opposition or consequence. Such power denies to the one subjugated either the capacity to assert himself in response, or to petition a neutral body to assert his position and punish such arbitrary transgressions.⁵³ The best way to achieve antipower,

47. *Id.*

48. THE FEDERALIST NO. 84 (Alexander Hamilton).

49. *Id.*

50. See Philip Pettit, *Freedom as Antipower*, 106 ETHICS 576 (1996); see also Antkowiak, *supra* note 36, at 623-27 (discussing Pettit’s views on federalism and antipower extensively).

51. Pettit, *supra* note 50, at 576-78.

52. Pettit, *supra* note 50, at 578.

53. Pettit, *supra* note 50, at 579-80.

Pettit argues, is to

consider the introduction of protective, regulatory, and empowering institutions. I do not say that every institution will necessarily increase antipower, of course; some may have indirect, counter production effects, and empirical work will be required to determine which mix of institutions does best. I say only that protective, regulatory, and empowering institutions represent the sorts of options that we ought to be considering if we are interested in the promotion of antipower in a society.⁵⁴

A constitutional amendment that prohibits unreasonable and arbitrary searches and employs judicial review to hold searchers to an independent standard represents an institution in the service of antipower. A concept like probable cause, as a component of that institution, is a doctrine in service of a basic conception of freedom.

Giving vitality to the Fourth Amendment's protections is thus every bit as important as preserving federalism and separation of powers. Madison deemed these latter doctrines "a double security . . . to the rights of the people,"⁵⁵ and the Supreme Court would later call them a system to "reduce the risk of tyranny and abuse."⁵⁶ They, like the system the Fourth Amendment established, form the first line of defense against the rise of a tyrant. Tinkering with the meaning of probable cause thus does more than just allow a law enforcement officer to conduct a given search in a given case. Over time, such tinkering risks altering the blueprint of a republic we have always admired for keeping tyrants at bay.

So we find that our search for meaning as to the elusive term "probable cause" leads us straight to the center of the political earth. And yet we still do not have much of a handle on its nature as a device designed to actualize the lofty goals it seems positioned to achieve. But to say "we" here presupposes something quite philosophical but not something very practical. Someone in our society will have to do the "actualizing." While John Locke observed

54. Pettit, *supra* note 50, at 590.

55. Antkowiak, *supra* note 36, at 606 (quoting THE ORIGINS OF THE AMERICAN CONSTITUTION 183, 204-05 (Michael Kammen ed., Penguin Books 1986)).

56. Antkowiak, *supra* note 36, at 609 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)). Parenthetically, one should note how the probable cause procedure incorporates ideas about the separation of powers. Probable cause limits a government's ability to act oppressively by involving all three branches in the probable cause equation. Probable cause relates to the likelihood a suspect committed a particular crime, not to the suspect's being "bad" or suspicious. In *Maryland v. Pringle*, a unanimous Supreme Court identified the issue as whether the officer had probable cause to believe the suspect committed the specific crime of felony drug possession. 540 U.S. 366, 370 (2003). The officer arrested the suspect after finding him and two others with drugs and cash. The Court held the officer inferred reasonably that "a common enterprise among the three men" existed supporting the officer's belief that each had violated the statute. *Id.* at 373. Therefore, the legislature must define the crimes for which searches may occur. The executive branch plays a part in enforcing the legislature's laws by seeking authorization to search private places where officers may find evidence. The judicial system determines, either before or after the search, whether the executive branch acted legitimately, and it weighs the suspect's privacy expectation against the executive's need to execute the search. Under this scheme, no branch may act alone.

accurately that the state of nature lacks “an established, settled, known law, received and allowed by the common consent to be the standard of right and wrong,” he was also right in arguing that it needs “a known and indifferent judge” to administer it.⁵⁷ While we all must search for a meaning for probable cause, our judges will put that meaning into effect. Guidance for them in their search for its meaning is crucial. As we will see, however, searching for a practical meaning of probable cause that guards the right to be let alone, and makes it a tangible component of the structural protection of liberty, is not easy. Disconcertingly, the help we have given judges to date hardly makes their search any easier.

IV. THE COURTS AND PROBABLE CAUSE

Clearly, the governmental official best positioned to turn probable cause into a meaningful concept is a judge. Unlike the notion of proof beyond a reasonable doubt, where committees of citizens—juries assess the government’s request for authorization to punish a defendant, the criminal system leaves the probable cause determination squarely in the judge’s lap.⁵⁸ When reviewing a search warrant application or considering the validity of a warrantless search after it occurs, the judge must decide whether the impending or transpired invasion of privacy was sufficiently justified.⁵⁹ As we have seen, this is a matter of no small importance. But how is the judge supposed to do this? At the most basic level, a judge should begin by recognizing what probable cause is as a thing to know, and then assess the best ways to know it.

57. JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 70 (Prometheus Books 1986) (discussing nature of inception of civil society).

58. I have discussed the matter of juries and reasonable doubt in two earlier articles. See Bruce A. Antkowiak, *Judicial Nullification*, 38 CREIGHTON L. REV. 545 (2005) [hereinafter *Judicial Nullification*]; Bruce A. Antkowiak, *The Ascent of an Ancient Palladium: The Resurgent Importance of Trial by Jury and the Coming Revolution in Pennsylvania Sentencing*, 13 WIDENER L.J. 11 (2003) [hereinafter *The Ascent of an Ancient Palladium*].

59. See FED. R. CRIM. P. 41(b), which provides that

[a]t the request of a federal law enforcement officer or an attorney for the government . . . a magistrate judge with authority in the district—or if none is reasonably available, a judge of a state court of record in the district—has authority to issue a warrant to search for and seize a person or property located within the district

FED. R. CRIM. P. 41(b)(1); see also FED. R. CRIM. P. 12(d). Rule 12(d) provides that

[t]he court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party’s right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

FED. R. CRIM. P. 12(d).

a. *Probable Cause as the Thing in Itself*

Philosophers often have advised students on the search for knowledge to consider first the “thing in itself.”⁶⁰ Probable cause, in itself, embodies a standard of proof. It describes a state of human certainty.⁶¹ It represents a point on a continuum upon which both the presumption of innocence and proof beyond a reasonable doubt requirement also exist. According to a most thorough study, the placement of probable cause on this legal continuum connotes a matter of some significance in the doctrine’s history.

In *Beyond Reasonable Doubt and Probable Cause*,⁶² Professor Shapiro argues that the law’s concept of certainty derived in part from John Locke’s view that facts reported in human testimony can never reach beyond a basic level of probability.⁶³ For this reason, Shapiro asserts, society needed to define the proper degree of probability in various legal contexts.⁶⁴ Probable cause came under greater scrutiny when the legal system shifted away from relying almost entirely on the alleged victim’s suspicions and toward requiring a neutral magistrate to assess evidence independently before a privacy invasion could occur.⁶⁵ As the eventual arbiter of the probable cause determination, the court had to evaluate objectively the likelihood of a defendant’s conviction based upon the evidence gathered to date.⁶⁶ Professor Shapiro concludes that

[t]he American probable cause standard represents the latest stage in a long historical evolution in which the justification for arrest moves from the personalized suspicion of a directly involved party, through the generalized suspicions of a more distanced party based as much on the suspect’s life-style as on particular events, to the rough estimate of a very distanced official of the chances that a suspect will be convicted if tried.⁶⁷

Thus, while nominally a noun, probable cause is much more an adjective and verb. As an adjective, it describes a level of certainty about a person’s guilt based on accumulated facts that justifies an invasion of the person’s privacy. As a most active constitutional verb, it then sanctions the invasion. Examined merely in its noun form, however, probable cause becomes a difficult concept to grasp. It is not a tangible thing that can be measured in liters, meters, or degrees. Like any love, fear, or wonder, probable cause defies

60. See generally IMMANUEL KANT, *THE CRITIQUE OF PURE REASON* (Cambridge University Press 1998).

61. Grano, *supra* note 3, at 473-74. Professor Grano has argued that Supreme Court jurisprudence overlooks understanding “the degree of certainty that probable cause requires” in favor of assessing the trustworthiness of the evidence upon which that level of certainty rests. *Id.*

62. BARBARA J. SHAPIRO, *BEYOND “REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE* (University of California Press 1991).

63. SHAPIRO, *supra* note 62, at 61.

64. SHAPIRO, *supra* note 62, at 61.

65. SHAPIRO, *supra* note 62, at 135-45.

66. SHAPIRO, *supra* note 62, at 142-45.

67. SHAPIRO, *supra* note 62, at 145.

quantification or objectification. We may discuss feelings by analogy (as when we say that we love our neighbor as our self), but we cannot measure them because they escape all common modes of measurement and calculation.⁶⁸ But, our inability to describe our sense of love seldom affects other citizens' privacy or defines their relationship with their government. Comparatively, serious consequences follow when a judge "feels" that probable cause exists. For this reason, insight as to when judges should recognize that feeling becomes vital.

Judges who examine that "feeling" critically will use tried and true methods. As creatures of the law, they will look to precedent. As creatures that use language as the means of their craft, they will seek linguistic insight. As scholars envious of the precision of mathematics, they will dabble with arithmetic formulae. And, as students of history, they will hope the past enlightens the present. In many respects, however, each of these paths will lead to disappointment.

i. Sources of Possible Insight

A. Probable Cause as the Orphan of Precedent

There are two profound proofs that the Supreme Court has given up trying to define probable cause. First, in *Maryland v. Pringle*,⁶⁹ the Court surrendered explicitly:

On many occasions, we have reiterated that the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. [P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.⁷⁰

Second, in *Illinois v. Gates*,⁷¹ the Court advised judicial officers to apply "the totality of circumstances" test to probable cause problems.⁷² The "totality

68. Indeed, any attempt that speaks of probable cause as an "it" will fail because the "it" represents nothing more than a manner or means by which we try to make operative a deeper, shared consensus of our sense of justice. The attempt to use various disciplines not sensitive to this underlying truth is not only futile but dangerous, as we risk seriously losing focus on the fundamental meaning of the thing in such a process. In a prior work, I discussed the "standard of proof" concept in terms of proof beyond a reasonable doubt. I have tried to argue that it, too, is an imprecise term that has evolved over time in ways that are troubling, particularly when courts have tried to describe it as a tangible object. In that process, I submit, we turn the presumption of innocence on its head. Antkowiak, *Judicial Nullification*, *supra* note 58, at 558-65.

69. 540 U.S. 366 (2003).

70. *Id.* at 370-71 (internal citations and quotations omitted).

71. 462 U.S. 213 (1983).

72. *Id.* at 230-31.

of the circumstances” test is not really a test at all; it is a pointless tautology that identifies nothing a judge really needs to know.

What court does not consider the *totality* of all circumstances relevant to any determination? Only irresponsible courts would base their rulings on select circumstances. To say that a court must consider the “totality” of the circumstances tells a court nothing whatsoever about which of the hundreds of circumstances they encounter should constitute the relevant “totality” for probable cause purposes. To illustrate, should the totality of the circumstances the court considers encompass such details as the maiden name of the searching officer’s mother? Surely not, but does “the totality of the circumstances test” tell us why that fact holds no relevance? The “test” set forth in *Gates* signifies nothing more than a concession that the law’s thesaurus lacks words to guide the crucial probable cause judgment. As a white flag in a war of words, the test reads, “do the best you can. Be reasonable.” Surely, lower courts deserve better guidance than that.

B. *The Failure of Language*

The inability of the Court in *Pringle* to find a sensible definition of probable cause points to a general failure of nomenclature in this area. As Professor Shapiro has observed, attempts by the Supreme Court to define probable cause in the latter part of the 20th century failed to do more than describe generally the concept of probability.⁷³ The Court’s failure seems understandable: “[w]e may be a long way from an involved individual’s subjective suspicions, but we are little closer to defining a place somewhere between mere surmise and beyond reasonable doubt—no doubt because we have no conceptual or linguistic stages between nothing and moral certainty.”⁷⁴ Professor Bacigal observes that “semantic interpretation of the term ‘probable’” is possible only when “placing the term somewhere between a 1% and 100% likelihood.”⁷⁵ He argues that the Court’s attempt to describe probable cause through language “has neither improved upon nor worsened the linguistic uncertainty surrounding the term probable.”⁷⁶

If neither the Supreme Court nor the authors of dictionaries can define terms that convey the sense we feel when evidence reaches the magical melting point

73. See *Henry v. United States*, 361 U.S. 98, 102 (1959) (holding “probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed”).

74. SHAPIRO, *supra* note 62, at 147.

75. Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 282 (2004).

76. *Id.* at 282. Professor Bacigal, citing research by Professor Kevin Clermont of Cornell University Law School, names five terms that describe degrees of certainty and assigns mathematical equivalents to each term: “slightest possibility,” “reasonable possibility,” “substantial possibility,” “probability,” or “high probability.” *Id.* at 334. One must wonder, however, if feelings are so unique to individuals that one man’s possibility is another’s high probability, such that any attempt to analyze probable cause linguistically proves unsatisfying at best.

of probable cause, judges should abandon their effort to define probable cause linguistically at an early stage. We expect that poets, not lawyers, are best suited to express human feelings through words. Unless we choose to take more of our law from Dylan Thomas than Justice Thomas, our judges should not seek in words alone any insight about processes critical to individual freedom.

C. *The Imprecision of Mathematics*

Mathematicians are no help either, even though, as the historical discussion of probabilities illustrates, probable cause may appear to draw us into the land of numbers. Indeed, math seduces lawyers with the siren song of precision, certainty, and constancy—namely, the stuff our practice denies us. Thus, not surprisingly, first-rate academicians often will flirt with importing mathematical principles into a legal concept that beckons us with a name so beguilingly statistical. Mathematics, however, will fail us in our pursuit of a definition for probable cause, and, indeed, we should fear any attempt to co-opt mathematical concepts to solve the probable cause riddle.

Several scholars endorse using math to enlighten discussions of probable cause. Professor Bacigal, who “stops short of endorsing precise mathematical expressions of probable cause,”⁷⁷ argues extensively for the employment of principles of “mathematical expressions of probabilities” to “assist, if not exclusively control, probable cause determinations.”⁷⁸ He posits that properly used mathematical and scientifically valid profiles can assist in the probable cause determination, and that mathematical probabilities can supplement traditional methods of assessing probable cause by courts.⁷⁹ Another scholar, Professor Lerner, observes that few courts “have summoned the courage, or foolhardiness” to assign a number, such as thirty percent probability, to probable cause.⁸⁰ He proposes an analytical framework to understand reasonableness that derives from Justice Learned Hand’s famous negligence formula and plunges into the wilds of calculus. Using variables such as probability (P), the social value associated with the prevention or detection of a particular crime (V), the social cost or privacy intrusion a search yields (C), and the discounting of that intrusion by the likelihood that a search will fail to uncover evidence (a “privacy multiplier”) (M), Lerner proposes the following formula: $P \times V$ is greater than $(1 - P) \times (C \times M)$.⁸¹ If Lerner’s approach gains traction, judges may need to install calculators in their courtrooms.

Lerner presents an intriguing but impractical analysis. Without question, his

77. Bacigal, *supra* note 75, at 339.

78. Bacigal, *supra* note 75, at 295-304.

79. Bacigal, *supra* note 75, at 301-02, 309, 338-39.

80. Lerner, *supra* note 2, at 995.

81. Lerner, *supra* note 2, at 1019-22 (explaining math-based “reasonableness framework”).

analysis is a helpful tool to organize thoughts and priorities regarding the probable cause decision. It, however, hardly simplifies the judge's probable cause decision. Without a catalog that assigns probabilities, a separate axis that measures the social benefit associated with preventing or detecting a particular crime, or a scale that weighs the social costs particular intrusions impose, courts are left exactly where they are now in trying to define the parameters of probable cause. Further, the equation cedes too much influence to individual judges' "feelings." Whoever assigns values to Lerner's variables determines the equation's outcome. Inevitably, individual judges will assign values according to their personal views. This result frustrates Lerner's attempt to create an objective test for probable cause useful in courtrooms nationwide.

At its heart, probable cause is a statement of *science*, but *political science*—a domain where the language of mathematics is a foreign tongue. Indeed, mathematicians would bristle if a student solved an equation by pointing to a reasonable answer instead of the correct one. Mathematicians who attempt to define probable cause through numbers must understand that what the law measures lies at a golden mean between the perfection of their numbers and the lyrics of the poet. Probable cause is a search for a point along a continuum that cannot be calculated in decimals. Instead, it measures the delicate balance of human freedom and government power in the society we have created.

ii. The Frustrating Inadequacies of History

Judges who search for this golden mean will turn to history with two broad purposes in mind. First, as a general matter, the historical context of the term "probable cause" may provide some insight as to the doctrine's proper current application. Second, if we may discern the Framers' actual intent, we may also discover a mandate to apply the term in its original spirit. Unfortunately, according to a widely held judgment by the academic community, neither purpose may be fulfilled in its entirety.

b. The Search for the Historical Meaning of Probable Cause

The history of probable cause (really, the whole of the Fourth Amendment) has been sketched many times by outstanding historians.⁸² Most unearth the earliest manifestations of probable cause language in 13th century England in the concept of "suspicion" that supported actions by the constable in effecting arrests.⁸³ In 18th century England, suspicion sufficient to warrant intervention could come from the word of "good and responsible men" as well as certain

82. As indicated earlier, Professor Shapiro has written an in-depth history of probable cause's evolution, particularly from a procedural standpoint, tracing its origins from the suspicion of the wronged party to a more objective assessment made by a detached judicial officer. See SHAPIRO, *supra* note 62, at 135-36.

83. Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155, 158-60 (1982) (summarizing scholarly investigations and first-hand accounts relating to probable cause's 13th century origins).

circumstantial proofs that would justify the intervention of a court for further investigation.⁸⁴ For our purposes, however, any detailed recitation of this history serves no purpose. Instead, we must focus on the widespread judgment by historians that while probable cause may appear in the broad contours of history, studying these contours will not yield any understanding of its core purpose and modern application. Critics deem the results of attempts to plumb history for a meaning of probable cause miscellaneous, contradictory, and wrong in most respects, rendering such attempts largely pointless exercises in determining the concept's modern meaning.⁸⁵ They characterize findings about history's relevance as disputable,⁸⁶ and call the scholarship a "doctrinal mess"⁸⁷ and generally of limited utility.⁸⁸ To this end, Professor Rudovsky indicates "there is no settled judicial or scholarly position on the meaning, purpose and construction of the Fourth Amendment," rendering the matter of its history one of nominal importance for modern interpretation.⁸⁹

Indeed, many of these historical tracts agree that resorting to history alone can provide us no set meaning of probable cause. Their authors conclude that because attempts to define or describe probable cause produce variable, ambiguous, and shifting meanings over time, the term evades definition.⁹⁰ Justice Stevens, concurring in *Randolph*, emphasized this point:

The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive. This case illustrates why even the most dedicated adherent to an approach to constitutional interpretation that places primary reliance on the search for original understanding would recognize the relevance of changes in our society.⁹¹

One of the problems in dealing with the history of the Fourth Amendment is

84. See *id.* at 160-61. The criteria to used to justify "suspicion" evinced class bias. *Id.* at 162; see also Sklansky, *supra* note 10, at 1805-06.

85. Lerner, *supra* note 2, at 972-76; see also *infra* text accompanying notes 86-89 (explaining scholars' views that history bears little relevance to probable cause's meaning).

86. Grano, *supra* note 3, at 478.

87. Amar, *supra* note 10, at 759.

88. GORMLEY, *supra* note 37, at 301.

89. GORMLEY, *supra* note 37, at 301.

90. Bacigal, *supra* note 75, at 288; Grano, *supra* note 3, at 478-95 (summarizing historical viewpoints and events informing our understanding of probable cause); SHAPIRO, *supra* note 62, at 147. It is wise to recall another glitch that arises when we turn to history for insight into the meaning of probable cause. In citing English history for the purpose of understanding probable cause, we must recognize that America had the temerity to rebel against England and, in so doing, reject the history behind summary search powers that caused so many of our citizens so much distress at the hands of English officials. See Grano, *supra* note 3, at 478 (noting "English history may seem inapposite, for the colonists rebelled against English search and seizure practices"); Maclin, *supra* note 37, at 959-62.

91. *Georgia v. Randolph*, 126 S. Ct. 1515, 1528-29 (2006) (Stevens, J., dissenting).

that its history occurred, as history is wont to do, so long ago. As Justice Stevens intimates, considering a centuries-old jurisprudence in a modern context proves fruitful if, and only if, most of the underlying assumptions extant during the historical period operate in the modern age. Viewing history in the context of its age is thus critical and may, with respect to important matters, limit the utility of Fourth Amendment history in the 21st century.⁹² Despite these criticisms, of course, certain judges continue to use history to justify their positions. As writers have pointed out, however, judges on both sides of any case are often able to invoke history to support their views or provide political cover for unpopular decisions.⁹³

To call the history of the Fourth Amendment inconsistent and contradictory is, however, to err much as one errs who claims that statistics lie. The Amendment's history is what it is; it may be gleaned from the annals of English history, the writings of Hale and Coke, or from the ancient cases that surrounded its articulation. In the end, however, it is the use of history by current authorities in the name of "new originalism" that is problematic. Summarizing this concern, Professor Maclin writes that

the Court's use of history in Fourth Amendment cases has been unpredictable and inconsistent [T]he Court [should] stop considering the historical origins of the Fourth Amendment unless it is able to develop a more effective and consistent method by which do so Although history can provide significant insights into the Framers' thinking about the Amendment, the Court's current use of the Fourth Amendment history neither accurately reflects the Framers' "underlying vision" of the Amendment nor provides a useful methodology for deciding modern search and seizure cases. Accordingly, unless the Court develops a more appropriate method for interpreting the complexity of the Fourth Amendment's origins, it should stop relying on history when deciding Fourth Amendment cases. It is in this sense that . . . the Court should simply let sleeping dogs lie.⁹⁴

The view Professor Maclin articulates provides the transition point to the second question we ask of the history of probable cause. If its long history provides no singular message about its meaning, may we at least learn what those who wrote this term into the Fourth Amendment meant by it when they put it there?

92. See GORMLEY, *supra* note 37, at 301; Bacigal, *supra* note 75, at 288; Maclin, *supra* note 37, at 972-73.

93. See Maclin, *supra* note 37, at 898-901, 909; Sklansky, *supra* note 10, at 1808-09. Also, compare the opinions of Justices Stevens and Scalia in *Georgia v. Randolph*, 126 S. Ct. 1515 (2006). One author described any court's reference to history as "purely forensic." Lerner, *supra* note 2, at 975.

94. Maclin, *supra* note 37, at 897-98 (internal citations and quotations omitted). Professor Maclin notes the intriguing anomaly that judges who intend on giving the government more leeway to conduct searches often times must disregard history because, for example, in knock-and-announce and exigent circumstances cases, history runs contrary to the leeway the courts have granted law enforcement. *Id.* at 916-17, 937.

c. *The Search for the Framers' Intent*

Judges who make a specific search through history in hopes of finding the Framers' understanding of probable cause may well come to a conclusion reached by many scholars: the Framers did not intend for probable cause to hold a fixed meaning. One of these scholars, Professor Lerner, argues that probable cause represents neither the "North Star" of Fourth Amendment jurisprudence nor something the Framers intended to be cast "in constitutional amber."⁹⁵ Similarly, Professor Amar posits that the Founders did not devise probable cause as a fixed standard.⁹⁶ For this reason, courts should approach the probable cause determination flexibly by considering factors like the seriousness of the harm and the search's intrusiveness and purpose.⁹⁷

Professor Bacigal, summarizing scholarly work on the subject, explains that probable cause during the colonial period lacked a precise meaning and that the Founders understood little about the term's common law usage.⁹⁸ To the Founders, the term "probable cause" did not have an established legal meaning.⁹⁹ Bacigal concludes that modern courts have reduced probable cause ultimately to what it has been in history, namely an admonition to "just use your common sense and act reasonably."¹⁰⁰

Professor Sklansky provides a most insightful commentary on why probable cause is a concept detached from the bounds of history and some rigid formulation of the Framers' intent.¹⁰¹ He points out that the classic test for defining when a police action constitutes a search contemplates society's willingness to recognize the criminal defendant's privacy expectation as reasonable.¹⁰² The *society* doing this recognizing is, necessarily, a society of the defendant's contemporaries, not one that expected things in and around 1791.¹⁰³ For this issue, by definition, resort to history is proper only if the expectations remain the same.

Professor Sklansky argues further that the Framers did not bar a particular class of searches they considered overly intrusive, but instead adopted a standard of reasonableness that courts could interpret over time and in the context of the American society doing the interpreting.¹⁰⁴ He contends the Founders did not intend the Fourth Amendment as a shorthand reference to

95. Lerner, *supra* note 2, at 954, 976-78, 1029.

96. Amar, *supra* note 10, at 784.

97. Amar, *supra* note 10, at 784-85.

98. Bacigal, *supra* note 75, at 283-85.

99. Bacigal, *supra* note 75, at 285.

100. Bacigal, *supra* note 75, at 317-18.

101. *See generally* Sklansky, *supra* note 10.

102. *See* Sklansky, *supra* note 10, at 1739.

103. *See* Sklansky, *supra* note 10, at 1739-40.

104. *See* Sklansky, *supra* note 10, at 1791.

then-existing common-law rules.¹⁰⁵ (To this point, I would add that when the Framers sought to incorporate common law principles into the Constitution, they did so explicitly, as the Seventh Amendment illustrates.¹⁰⁶) Any attempt to identify with exactitude the Framers' original intent fails, Professor Sklansky argues, because the Framers did not intend to set forth this jurisprudence in the concrete of the age in which they penned the Amendment.¹⁰⁷ Rather, insofar as the history of probable cause evinces the Framers' intent, we may read it best as generally describing the Framers' effort to curtail a paradigmatic kind of arbitrary abuse by enforcement of certain key structural protections.¹⁰⁸

History thus puts on courts a burden of judgment, not a mandate to become better historians.¹⁰⁹ But is that judgment unrestrained by any core meaning of probable cause that exists regardless of the date on which the legal issue arises? If we read the Framers' intent to be that probable cause is universally flexible in content and a constitutional chameleon in form, we will, in a nervous age, read the concept out of the Fourth Amendment.

Probable cause may disappear from Fourth Amendment jurisprudence if judges, after indulging the view that history fixes nothing either in form or substance in the probable cause doctrine, allow the *seriousness* of crimes alleged to influence their probable cause determinations. Some scholars agree that because the Framers envisioned a federal government far less powerful than today's version, they did not write into the Fourth Amendment powers easily expandable to advance the goals of federal law enforcement. However, other scholars accept the role of the seriousness of the offense in the probable cause equation even though doing so would expand the search power of the state radically.¹¹⁰

The significance of weighing the seriousness of the offense as an unlimited factor in the probable cause finding cannot be understated. If probable cause is a feeling of certainty, based upon facts gathered that suggest the guilt of a defendant of a specific crime, taking into account the seriousness of that crime in an unbridled way radically lowers the quantum of facts necessary to justify the intrusion into privacy. If (forgive the mathematics) probable cause equals facts times the seriousness of the crime, a more heinous crime would require fewer facts to justify a search. According to this formula, probable cause for a

105. See Sklansky, *supra* note 10, at 1810.

106. U.S. CONST. amend. VII. The Seventh Amendment provides that [i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

107. Sklansky, *supra* note 10, at 1810.

108. Sklansky, *supra* note 10, at 1810.

109. Sklansky, *supra* note 10, at 1810.

110. Compare Maclin, *supra* note 37, at 917-19, and Thomas, *supra* note 2, at 157-61, with Lerner, *supra* note 2, at 1021, 1027-28, Amar, *supra* note 10, at 784-85, 801-02, and Bacigal, *supra* note 75, at 323-33.

crime like terrorism would arise with just about any quantum of facts the government could offer as justification.¹¹¹

Thus, courts that account for offense seriousness when calculating probable cause may, in certain cases, untether the doctrine from the Constitution. Did the Framers intend this result? If so, why did they bother to write the doctrine down? If so, why does probable cause continue to exist in our collective jurisprudential conscience as a relevant issue? A simple fact of legal life shows there is a core understanding of probable cause not subject to the whims *de jour* of a court influenced by the heinous nature of the crime being investigated. We are governed by a Constitution that is, no matter what else we may think it is, a law that, perhaps inconveniently to some at times, is written down. Words that drafters put on paper must be put into force by courts charged with the duty of interpreting and applying them. While the Framers did not provide a glossary to the Bill of Rights that defines probable cause, and while they may well have understood that it was a term that would have to be interpreted in a contemporary context by judges of the day, the Framers did not give the courts free reign to rule however they pleased. Having gone to great lengths to limit the powers of the legislative and executive branches, it is absurd to assume the Framers left judges to decide issues unrestrained by anything other than their individual good faith. Indeed, history demonstrates the Founders did not place blind faith in judges to act as the final outpost against tyranny.¹¹² Judges, too, have to follow the “rule of law.”¹¹³

By advising judges on how to find probable cause, we act not simply as court jesters to the king. Rather, we help the courts understand that the supreme law of the land—a law deriving its authority from the consent of the governed—uses a specific term to restrict the power of courts as they, in turn, define the executive’s power to invade personal privacy. The term—the restriction—has meaning that transcends the vagaries of the moment. It has a core that lasts.

111. Professor Bacigal presents a variant of the argument that a court should consider a crime’s seriousness. He argues that when a crime presents a danger of “imminent repetition,” a court should require a lesser form of probable cause. Bacigal, *supra* note 75, at 327. He would make a distinction between investigating crimes that have already occurred, and ongoing criminal activity that threatens future societal harm. *Id.* at 323-33. But few crimes ever seem to be wholly self-contained without portending any future such criminal activity. One murder may well lead the police to conclude that a dangerous and desperate individual is on the loose who must be captured before he or she kills again. Moreover, the crime that probably occasions more searches than any other single crime is the interdiction of drugs and drug-related contraband. By nature, these are all crimes which are ongoing and which threaten future societal harm. To adopt the standard that lowers the quantum of proof necessary to find probable cause here is to effectively lower it across the board in a way that would render the probable cause finding a brutal protection of this sort of privacy intrusion that the Fourth Amendment seems to have been constructed to prevent.

112. See Antkowiak, *The Ascent of an Ancient Palladium*, *supra* note 58, at 31-33.

113. The “rule of law” idea is, of course, a central concept of the Enlightenment theory upon which so much of the constitutional theory is based. See generally Frank Marini, *John Locke and the Revision of Classical Democratic Theory*, 22 W. POL. Q. 5, 8-11 (1969).

The historical longevity probable cause enjoys provides further insight into the core of the doctrine. History teaches us that probable cause is a very old friend indeed, one that has been around the law for hundreds of years. That longevity is the product of something quite primal. In an oft quoted article on probable cause, Jack Weber writes that

shifting standards as to the precise amount of cause needed does not conceal the fact that the insistence on probable cause is a glory of American legal history, and of the English and common law, as well as of standards in the English speaking world. And this demand for adequate grounds for governmental intrusions like arrest is echoed in many other countries and found in international instruments, reflecting a deeply felt yearning on the part of mankind in general.¹¹⁴

Indeed, probable cause has survived despite many times of great exigency. Its survival as a meaningful concept tells us that substance underlies its form. Somehow, there must be a core understanding of the process of probable cause, one that endures in eras when the magnitude of potential offenses may readily wipe out the requirement altogether if the calculus for finding it would permit it. That understanding, I submit, reflects even deeper values of justice that probable cause serves, accounting for the doctrine's longevity.

Such understanding is to be found in a philosophical analysis of probable cause, one taking into account the reasoned process of societal consensus to which judges can refer when they make the determination as to whether the government has justified the invasion of the privacy of the citizen before them.

Why we are just the latest in a long line of citizens that includes our Framers (and will include future generations) to yearn for probable cause, and how that yearning may be satisfied in a nervous or any other age, are critical matters rooted in meaning deeper than history may readily reveal. Neither mathematics nor science nor history nor even law *per se* can show us to the core meaning of probable cause. Instead, we must look in the basic philosophy of the Republic. That philosophy is best seen through the eyes of the science of politics and, particularly, the work of John Rawls.¹¹⁵

114. Weber, *supra* note 83, at 166 (footnote omitted).

115. Having invoked Rawls' name, an important caveat and disclaimer is appropriate. I do not profess to be versed in each of the delicate intricacies of philosophy Rawls evolved and refined during his lifetime. See generally JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly, ed., 2001) [hereinafter "JUSTICE AS FAIRNESS: A RESTATEMENT"]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *A THEORY OF JUSTICE*]; John Rawls, *Justice as Fairness*, 67 *PHIL. REV.* 164 (1958) [hereinafter "*Justice as Fairness*"]. Nor do I seek to adopt or import all of the concepts he weaves together in the complex tapestry of his form of political liberalism. Rather, as a student of Rawls, I borrow from him certain discrete conceptions that I posit relate entirely to a discussion about probable cause. Also, I am aware of the reasoned criticism of Rawls by authors such as Etzioni. ETZIONI, *supra* note 2, at 7-8, 11, 91-94.

V. SEARCHING FOR PROBABLE CAUSE IN NEW VENUES: PHILOSOPHY AND POLITICAL SCIENCE

The political philosophy of John Rawls may help us address two important matters about probable cause. First, through an adaptation of his original position analysis, we may find a method to think about probable cause determinations. Then, more generally, in his broader concepts of public reason, we may see why a probable cause analysis based on a method of understanding the process of rational societal consensus explains the critical place probable cause must continue to hold in the polity we defend so ardently.

a. Finding Probable Cause Through a Reasoned Consensus: Rawls' Original Position

We may understand probable cause to be an ancient, instinctual yearning on the part of individuals to create a livable space between themselves and their government, an intuition¹¹⁶ that there is indeed a fundamental right to be let alone that a process administered by courts can protect. If so, there must be some way to understand how that intuition manifests itself through time—in times of great exigency, and in times when states of relative calm abide. To find that core understanding of the probable cause process, we could seek out “the ablest and the purest men.”¹¹⁷ But, history teaches that many of the greatest political wisdoms of our time come not from a single voice, but from the chorus of reasoned democratic consensus.¹¹⁸ How do we access that chorus? If we can access it, how do we frame the question we wish to ask it?

To frame this question, consider that a court's probable cause determination—and the authorized invasion of privacy that flows from it—always affect three distinct parties. First, of course, the determination affects the person whose privacy is invaded. While writers sometimes view that individual in less than flattering terms,¹¹⁹ we must remember that the people searched have not yet been convicted and are (at least as the fairytale we have been told in law school goes), presumed innocent at that time. Of course, they (we) may sometimes actually be more than presumptively innocent. The cocaine or the bloody knife may well not be in our home when the police battering ram shatters our door and invades erroneously the place where privacy rights are most sacred. Second, the probable cause determination affects the victim of the crime under investigation. We may be them as well

116. Weber notes that some historians call probable cause “the horse sense of the ages.” See Weber, *supra* note 83, at 161.

117. *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., dissenting).

118. At this point, the reader should recall this Article's discussion of “common understanding” and how that concept figured in the Supreme Court's explanation of reasonableness in *Randolph*. See *Georgia v. Randolph*, 126 S. Ct. 1515, 1521-23 (2006); *supra* text accompanying notes 33-34.

119. See Amar, *supra* note 10, at 796-97. See generally Lerner, *supra* note 2.

from time to time. Third, the court's determination affects society in general, or at least those proximate enough to the particular case to know about the court's decision about whether the search met the probable cause standard. Society seeks the benefits of a constitutional system that frustrates the formation of a tyrannical government but enjoys the benefits of a government that effectively forestalls the terror of anarchy. Society would like to believe its governmental philosophy has a moral basis, namely, an orientation towards allowing the individual to live in an environment that maximizes his ability to utilize his reason in the service of higher pursuits of his own choosing.¹²⁰

To one degree or another, all three entities yearn for justice, and each of us may, from time to time, be one of those entities. To weigh and account for these interests embodies the essential philosophical question of probable cause. Various scholars posit a proper weighing of these interests using various formulations that reflect underlying, *a priori* judgments about the "proper" nature of things.¹²¹ What is critical, though, is that whatever approach we choose focuses on the issue the Fourth Amendment addresses in its most essential terms: the proper relationship between the individual and the government.

All of the scholarly approaches noted in the margin, though well-reasoned and thoughtful, make judgments about that relationship that purport to be

120. See RONALD J. PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHTS IN THE ORIGINS OF AMERICA* (2000); Antkowiak, *Judicial Nullification*, *supra* note 58, at 567-76.

121. Presumably, Professor Lerner would have a judge affix the values to his reasonableness framework, making some calculation of the social benefit of the search as well as the degree of privacy invasion multiplied by his privacy multiplier. See Lerner, *supra* note 2, at 1019-22. Lerner does not explain, though, how a judge should fix those standards other than by employing raw intuition on a case-by-case basis. Professor Grano tells us that the American Law Institute, in its 1975 Model of Pre-Arrest Procedure, disdained the term "probable cause" and preferred the term "reasonable cause" based on its *a priori* judgment that society needs efficient crime prevention more than it needs personal privacy. See Grano, *supra* note 3, at 495. Professor Grano argues that the probable cause finding, one that balances "individual interests against community interests" is one that, if understood to mean a factual finding of more probable than not, "excessively exalts the individual." *Id.* at 497. He calls for the implementation of a "community model," one in which an individual may share the benefits of community only if he makes "reasonable sacrifices" on behalf of the community to aid crime fighting. *Id.* He argues that in such a case, it would be permissible to arrest ten people, nine of whom are presumably innocent, and expect nine to sacrifice their liberty and privacy to solve the crime the tenth person committed. *Id.* "[M]ost probable cause issues should involve only the question of whether the police had a well grounded suspicion concerning the target of their action." Grano, *supra* note 3, at 501 (elevating, presumably, the interests of the community Grano considers paramount). In his 1994 article, *Fourth Amendment First Principles*, Professor Amar argues that placing the remedy for probable cause (and other Fourth Amendment) violations in the criminal system represents a societal choice that achieves what he posits are ineffective results. See generally Amar, *supra* note 10. Primarily, Amar argues that the exclusionary rule rewards the guilty by allowing them to suppress evidence of their crime and that, by doing so, the rule elevates the criminal defendant to "a kind of private attorney general." Amar, *supra* note 10, at 793-97.

As an enforcer of the Fourth Amendment, Amar labels criminal defendants terrible and "awkward champion[s]," having no extended view of the Amendment's meaning and caring only about suppression rather than overall societal views. *Id.* at 796. Compensation for a violation of the Fourth Amendment should not "flow to the guilty." *Id.* Rather, society should prefer tort actions wherein courts may grant monetary and injunctive relief. *Id.* at 815-19.

empirically obvious. They proceed from an assumption about first principles and, indeed, while a judge struggling with a probable cause issue would welcome the ability to ground a decision in such principles, he first must find comfort in the methodology used to identify them. For such a methodology, I propose that the judge consult not the ablest and purest of men, but instead seek to understand the process by which the governed functions in its most able and pure state to reach a rational consensus about the core values of justice probable cause exists to serve. The judge, I submit, may find a proper methodology to that end in the writings of the brilliant political theorist, John Rawls, beginning with his concept of the original position.

A well-ordered society, Rawls writes, is one in which everyone accepts the same political conception of justice that everyone else accepts.¹²² The society then employs, as its main political and social institutions, structures that serve those principles of justice.¹²³ Implemented in a “fair system of cooperation,” these principles of justice are not derived from an “authority distinct from the persons cooperating” or from “natural law.” Rather, they proceed from an agreement among its members, as “free and equal citizens,” who negotiate them rationally and with an eye to what they regard as their “reciprocal advantage.”¹²⁴ This societal agreement arises in the first instance in the Rawls’ process of “original position.”¹²⁵

Rawls assumes that persons acting on self-interest and employing reason come together for the purpose of negotiating rules that will govern them after a veil of ignorance lifts and their society forms.¹²⁶ They negotiate these governing rules without knowing who they will be once that veil of ignorance rises, but knowing that the principles and rules they negotiate will bind them in future circumstances regardless of what position they find themselves in when their society forms.¹²⁷ Under these circumstances, a rational person would

propose principles of a general kind which will, to a large degree, gain their sense from the various applications to be made of them, the particular circumstances of which being as yet unknown. These principles will express the conditions in accordance with which each is the least unwilling to have his interests limited in the design of practices, given the competing interests of the others, on the supposition that the interest of others will be limited likewise. The restrictions which would so arise might be thought of as those a person would keep in mind if he were designing a practice in which his enemy were to assign him his place.¹²⁸

122. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 8.

123. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 8-9.

124. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 14-15.

125. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 15.

126. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 15.

127. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 15-16.

128. Rawls, *Justice as Fairness*, *supra* note 115, at 172. See generally Samuel Gorovitz, *John Rawls: A*

When a member of society negotiates principles of justice without knowing where on the social ladder he will stand when society materializes, he calculates his judgments to ensure he could tolerate life in that society regardless of his ultimate social position. The negotiator will write the rules dispassionately, before exigencies cloud his judgment;¹²⁹ rationally, using his best faculties; with self interest in mind; and blindly, such that he can live in the world his rules will govern.¹³⁰

Rawls, of course, does not assume that anything like the events he describes in the original position has (or actually could have) taken place. Instead, he considers the theory an important “thought-experiment for the purpose of public and self-clarification.”¹³¹ It is a way to determine that “the principles of justice the parties would agree to . . . would specify the terms of cooperation that we regard—here and now—as fair and supported by the best reasons.”¹³²

Applying this “thought-experiment” to our probable cause analysis provides insightful results at a minimum and, maximally, something possibly exquisite. When positioned behind a veil of ignorance, the three parties (in effect, us projected into the different roles) negotiate a rule about how much information the government must produce before a court may permit authorities to invade an individual’s privacy. Each negotiator understands that when the veil of ignorance rises, courts will apply the rule regardless of the negotiator’s position in the probable cause/search triangle.

Theory of Justice, in CONTEMPORARY POLITICAL PHILOSOPHERS 272 (Anthony de Crespigny & Kenneth Minogue eds., 1975) (discussing Rawls’ theory of justice).

129. It is not time to fashion such a methodology for probable cause when airplanes are being flown into towers, or in the immediate aftermath of acts of mass murder. As in the days following the American Civil War, the temper of the times may not allow “calmness in deliberation.” *Ex parte Milligan*, 71 U.S. 2, 109 (1866). But times exist when matters of such importance can be discussed without passion or the “admixture of any element not required to form a legal judgment.” *Id.* Judges need to use a process that carefully, rationally, and dispassionately accounts for the interests of the three parties in every probable cause/search and seizure equation.

130. Rawls’ approach has been compared with, or at least spoken of in the same context as, a political application of the biblical Golden Rule. See David Barnhizer, *Truth or Consequences in Legal Scholarship?*, 33 HOFSTRA L. REV. 1203, 1229 (2005); George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 282 n.50 (1998); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1016 n.106 (2001).

It is also an approach that resonates of John Locke. In his *Second Treatise*, Locke writes that reason, which is the law of Nature, teaches that “no one ought to harm another in his life, health, liberty or possessions.” LOCKE, *supra* note 56, at 396. Charity towards all is, apparently, good political science. Even earlier than Locke, Richard Hooker extolled reason as a matter of divine origin but one so universal that it would bind all men as rational beings, regardless of whether they ascribed to sacred scripture. While complete knowledge required scripture and reason, reason could provide a common basis for governance and a justification for all positive law. See DANIEL F. EPPLEY, *THE REFORMATION THEOLOGIANS: RICHARD HOOKER (1554-1600)* 258 (Carter Lindberg ed., 2002); DEBORA KULLER SHUGER, *HABITS OF THOUGHT IN THE ENGLISH RENAISSANCE: RELIGION, POLITICS, AND THE DOMINANT CULTURE* 27-28 (1997); W.D.J. CARGILL THOMPSON, *THE PHILOSOPHER OF THE “POLITIC SOCIETY”* 26-27 (W. Speed Hill ed., 1972).

131. RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, *supra* note 115, at 17.

132. RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT*, *supra* note 115, at 17.

As the negotiator may turn out to be the victim of the crime under investigation, he would not want to hamstring police officials by limiting their search powers so extremely that searches would only occur when the perpetrators were kind enough to expose the evidence to plain view. As the negotiator may turn out to be the person whose privacy the search invades, however, the negotiator must at least presume that the invasion of privacy would be troubling in any event and shocking if a mistake resulted in a truly (not just presumptively) innocent person's home being searched. Finally, the negotiator may turn out to be a neighbor knowledgeable about the court's resolution of the probable cause question that affected the victim and target directly. That neighbor wants to view the search involving the other two with a sense of security at the reasonable ability of police to enforce the criminal laws but without the fear that police are empowered to wield an unbridled and arbitrary authority to intrude on privacy, particularly in places where the right to be let alone has its most profound meaning.

What rule would we agree to if there was an equal probability that we would fill one of these three roles when the veil of ignorance lifts, but had to write that rule in advance, not knowing who we would be when courts applied the rule? If we did not know which of these three roles we would occupy when the veil lifts, would we not fashion standards for probable cause that we could live with regardless of our role—whether victim, suspect, or neighbor—in the search decision? For a judge, the question of probable cause thus becomes: would a rational, self-interested person adjudicating this case find the amount of evidence presented at the time of the search sufficient to justify it regardless of whether they would turn out later to be the victim of the crime, the person searched, or the neighbor down the street? If yes, probable cause exists. The court cannot make a reasoned, balanced probable cause determination by considering only one of these three perspectives.

For judges to think of the roles in a veil of ignorance manner is to reason in the best posture to uncover the core principles of the protection of privacy in a civilized world. This mode of reasoning defeats the presence of arbitrary government power that the Fourth Amendment espouses, and the process of probable cause protects. A judge who is presented with an argument that the seriousness of the crime charged justifies a search, despite the absence of facts that would justify the intrusion of privacy in other circumstances, must ask himself whether all three parties in the probable cause triangle would have agreed, from behind the veil of ignorance, that the search should proceed even if it meant their door being kicked in. If the judge concludes that all three parties would have condoned the search, she should rule that probable cause exists.

Rawls' conception does not occur in a fantasy world where threats of terrorist attacks are unknown or disregarded. As the Founders extolled in *Milligan*, the negotiators behind the veil are familiar with the struggle of

persons against tyranny and anticipate the exigencies that will befall any republic during the course of its history.¹³³ The rules for probable cause, as conceived in the Rawls' veil of ignorance manner, have a consistency over time; they represent a law for "rulers and people . . . at all times, and under all circumstances,"¹³⁴ as they are adopted for "the best reasons."¹³⁵ Rules written by rational people pursuing self-interest and anticipating that they could be any one of three persons within the probable cause triangle are rules framed for the purpose of "guarding the foundations of civil liberty against the abuses of unlimited power."¹³⁶ They are rules designed for times of great stress and urgency, and they afford the government whatever power it needs to sustain the nation.¹³⁷ They would not require amendment that would forfeit personal liberty in the face of future crises since, as *Milligan* concluded, "a country, preserved by the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."¹³⁸ After all, the rules were not written by members of a suicide pact or by lambs so desperate for security that they were willing to be led to slaughter by the hand of a tyrant.

Will this application of Rawls' process always and invariably produce the same answer in each judge who applies it? Of course not. The human factor in judges is all too real to expect that any "thought experiment" will produce consistently predictable results. But Rawls' teachings do chart a common course, one that accounts for all the essential considerations in a rational manner consistent with both the primacy of the individual and the individual's need for an ordered society.

b. Probable Cause and Public Reason

For Rawls, contemplating society's basic principles does not end when the veil of ignorance lifts. Reason and the process of rational consensus become powerful forces when unleashed by political structures that derive their legitimacy from the consent of the governed. The historical "yearning" for probable cause may, it turns out, reflect these forces because enforcing a probable cause process to check arbitrary government powers is just so, dare we say, reasonable.

Rawls discusses several processes that occur after the veil lifts and a well-ordered society emerges. For example, rational people, he tells us, engage in an ongoing process of "public justification,"¹³⁹ which is "a political conception

133. *Milligan*, 71 U.S. at 109, 124-25.

134. *Id.* at 120-21.

135. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 17; *see also supra* text accompanying note 132.

136. *Ex parte Milligan*, 71 U.S. 2, 126 (1866).

137. *Id.* at 120-21.

138. *Id.* at 126.

139. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 27.

of justice for a society characterized, as a democracy is, by reasonable pluralism.”¹⁴⁰ Describing how public justification operates in a well-ordered society, Rawls explains that:

[w]e saw that in a well ordered society effectively regulated by a publicly recognized political conception of justice, everyone accepts the same principles of justice. These principles provide, then, a mutually acceptable point of view from which citizens’ claims on the main institutions of the basic structure can be adjudicated. An essential feature of well-ordered society is that its public conception of political justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just. This is the meaning of public justification.¹⁴¹

Public justification is unlikely to occur with respect to all principles a political society adopts. However, Rawls hopes that a consensus emerges on the basic principles (the “constitutional essentials”) that govern the general structure of government and the basic rights and liberties of citizenship (including freedom of thought, association, and conscience).¹⁴²

According to Rawls, achieving public justification requires “reflective equilibrium.”¹⁴³ To arrive at reflective equilibrium, each individual first uses reason and self-interest internally to identify principles most conducive to his own best interest. Afterward, all individuals in society take into account principles of justice their peers espouse. This process produces a wide reflective equilibrium—that is, “the same conception [of justice] is affirmed in everyone’s considered judgments.”¹⁴⁴ It is as if the negotiation behind the veil was perpetually ongoing, done not with a gun placed to anyone’s head, but with the rational recognition that times of great exigency may well be just over the horizon and principles solid enough to sustain us through those times need to be affirmed now. The effort is to achieve something quite practical. According to Rawls, “[t]he most reasonable political conception for us is the one that best fits all our considered convictions on reflection and organizes them into a coherent view. At any time, we cannot do better than that.”¹⁴⁵

For Rawls, the original position, reflective equilibrium, and public justification become further involved in the value of public reason that a well-ordered constitutional democracy witnesses. Professor Larmore describes public reason in this way:

Its concern is the very basis of our collectively binding decisions. We honor public reason when we bring our own reason into accord with the reason of

140. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 26.

141. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 27.

142. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 28.

143. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 31.

144. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 31.

145. RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, *supra* note 115, at 31.

others, espousing a common point of view for settling the terms of our political life. The conception of justice by which we live is then a conception we endorse, not for the different reasons we may each discover, and not simply for reasons we happen to share, but instead for reasons that count for us because we can affirm them together. This spirit of reciprocity is the foundation of a democratic society.¹⁴⁶

As the product of the rational forces that form society, societal consensus is of consummate importance.

But this consensus stands for more. The original position may derive from rules that stress rationality and self-interest, but the veil of ignorance changes societal decision-making from an exercise in selfishness to one of public-mindedness. According to Larmore, the veil imposes “moral limits” on the information negotiators may use when writing their society’s rules.¹⁴⁷ When the veil disappears, a sense of a shared, common good emerges that society affirms publicly.¹⁴⁸ In affirming this common good, the society becomes “well-ordered.”¹⁴⁹ While periods of irrationality and loss of focus will occur, the seeking and affirming of this common good constitutes the home to which rational people will always seek to return.

The longevity of probable cause is explained most likely by the fact that while we can flirt with other ideas about preserving the right to be let alone and keeping a government from becoming a tyrant, probable cause keeps stepping forward to remind us that it really can work to give us the balance of freedom and security a well-ordered society should covet. The force of reason, rational consensus, and our need to espouse public reason all operate to bring us back to probable cause with the same relentless force that gravity exerts to bring objects back to earth. This primal phenomenon has been recognized in other constitutional contexts.

While Justice John Harlan may not have read John Rawls’ work, his dissent in *Poe v. Ullman*¹⁵⁰ suggests Rawls and he read from a common source. In *Poe*, Harlan dissented from the Court’s refusal to consider the merits of a challenge by a married couple to a state statute that banned use of contraceptives.¹⁵¹ Harlan would have not dismissed the case on procedural grounds and would have declared the statute unconstitutional. While it is interesting for our purposes that at two points in his opinion he specifically refers to the freedom from unreasonable searches and seizures as a textual justification for protecting the activity of the couple in the sanctity of their

146. Charles Larmore, *Public Reason*, in *THE CAMBRIDGE COMPANION* 368 (Samuel Freeman ed. 2003).

147. *Id.* at 369.

148. *Id.* at 371.

149. *Id.* at 371.

150. 367 U.S. 497 (1961).

151. *Id.* at 522-23 (Harlan, J., dissenting).

home,¹⁵² he does not ground his Due Process constitutional analysis merely in implications from the Constitution's text. Rather, he considered Due Process more broadly:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could service as a substitute, in this area, for judgment and restraint.¹⁵³

When Harlan envisions Due Process as "the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of an organized society," he echoes Rawls' original position theory, a process of consensus struck behind a veil of ignorance. When he speaks of that tradition being a "living thing," Harlan must in some sense be speaking about the same principles that Rawls speaks of in the concept of reflective equilibrium or, more broadly, public reason. And when Harlan argues that a decision of the Court that "radically departs" from the living tradition cannot long survive, his words sound of the corrective force of reflective equilibrium in maintaining a well-ordered society that understands the core principles which its people have negotiated and continue to negotiate as central to their perception of a proper moral existence.

My colleague, Professor Bruce Ledewitz, wrote an insightful and provocative piece on Harlan's opinion entitled *Justice Harlan's Law and Democracy*.¹⁵⁴ Professor Ledewitz observes that when Harlan speaks of a decision that could not long survive, he is speaking of a process that is more than a casual dialog between the Court and the citizenry; rather, "it is the people, and not the court, that control."¹⁵⁵ The living tradition Harlan describes embodies, Ledewitz argues, "the constitutional vision of the people."¹⁵⁶

The process by which the erroneous judicial decision ultimately will be

152. *Id.* at 543, 548 (Harlan, J., dissenting). Indeed, Justice Harlan quotes Justice Brandeis' dissent in *Olmstead* in this regard. *Id.* at 548 (Harlan, J., dissenting).

153. *Id.* at 542 (Harlan, J., dissenting).

154. Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J.L. & POL. 373 (2004).

155. *Id.* at 392.

156. *Id.*

discarded does not come, however, as something achieved at the ballot box. Instead, “[a] judicial decision outside the main stream of American understanding of the Constitution will be worn away over time. There need be no single moment, like an election, in which one could plausibly say the people have spoken. There need be no special popular mobilization.”¹⁵⁷ The process is “cultural” and “organic” but it is, Professor Ledewitz argues, Harlan’s fundamental “claim about governance.”¹⁵⁸ “When the nation—the people—set the balance of due process or decide concerning any other constitutional realm, the people have the right to rule. We have only one word that adequately describes rule by the people. That word is democracy. Justice Harlan is describing our democracy.”¹⁵⁹

In this conception, democracy acts like gravity, an irresistible force pulling errant legal decisions down to earth where the people want them. This democratic gravity certainly does not operate equally in all political societies—in order for democratic forces to perform this magical, corrective function, democratic institutions must be in place. Federalism, separation of powers, human rights protections built into governing documents, courts designed to enforce these rights that are not controlled solely by majoritarian forces, and, indeed, the presence of a variety of antipower features,¹⁶⁰ are all prerequisites to democracy’s gravitational forces functioning effectively.¹⁶¹

Harlan is describing something in terms very comfortable to the political philosophy of Rawls. But is he using “democracy” in the ordinary sense of the word, the passing majority view achieved as we progress from issue to issue, or is he speaking of the deeper consensus of the values of justice on the fundamental level Rawls believes we ultimately espouse in public reason? Rawls distinguished these views of democracy vis-à-vis the role of the Supreme Court in *Political Liberalism*.¹⁶²

According to Rawls, when the people exercise their power to establish a new government, they set up a “higher law” that has the direct authority “of the will of We the People,” a law that “binds and guides” the ordinary power their

157. *Id.* at 398 (footnote omitted).

158. Ledewitz, *supra* note 154, at 395.

159. Ledewitz, *supra* note 154, at 395.

160. Pettit tells us that

[t]he protection of the individual is mainly ensured in our society by the institutions of a non-threatening defense system and nonvoluntaristic rule of law. The nonvoluntaristic regime of law—a common-law dispensation or a constitutionally governed one—will involve laws that cannot be changed in certain respects at the will of any majority, even a parliamentary majority: in this way it will serve to reduce the exposure of minorities to majority will.

Pettit, *supra* note 50, at 590.

161. In this regard, we must recall that our institutions see not merely to recognize the majority as the operating principle in the lawmaking process, but also to restrain majorities when they seek, in the passions of the moment, to change the principles that comprise our national consensus. FEDERALIST NO. 10 (James Madison).

162. JOHN RAWLS, *POLITICAL LIBERALISM* 231-40 (1993).

government exercises in everyday law-making.¹⁶³ He writes that a “democratic constitution is a principled expression in higher law of the political ideal of a people to govern itself in a certain way,” and the “aim of public reason is to articulate this ideal.”¹⁶⁴ The Supreme Court serves a profound role in this process. The Court must “give due and continuing effect to public reason by serving as [public reason’s] institutional exemplar.”¹⁶⁵ Indeed, “public reason is the sole reason the court exercises. It is the only branch of government that is visibly on its face the creature of that reason and of that reason alone.”¹⁶⁶ In assuming this role, however, the Supreme Court does not wield ultimate power. Rather, “the three branches” share power equally “in a duly specified relation with one another with each responsible to the people.”¹⁶⁷

But this hardly makes the Court the handmaiden of the vagaries of the ordinary democratic processes. The Court plays a vital role “as one of the institutional devices to protect the higher law,”¹⁶⁸ mostly, as it turns out, by checking those skilled in manipulating the ordinary processes of law-making in ways to threaten the vitality of that higher law. In doing this, the Court serves the higher law and highest goals the rational process of societal consensus sought to achieve. Rawls explains that

[b]y applying public reason the court is to prevent that [higher] law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it is incorrect to say that it is straight-forwardly antidemocratic. It is indeed antimajoritarian with respect to ordinary law, for a court with judicial review can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations.¹⁶⁹

Justices serve society best when they appeal “to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason These are values . . . that all citizens as reasonable and rational might reasonably be expected to endorse.”¹⁷⁰ They must not succumb to the exigencies of the moment, no matter how widespread the call may be to disregard that higher law in a time of crisis. The court must act as a conscience, reminding a troubled majority about

163. *Id.* at 231.

164. *Id.* at 232.

165. *Id.* at 235.

166. RAWLS, *supra* note 162, at 235.

167. RAWLS, *supra* note 162, at 232.

168. RAWLS, *supra* note 162, at 232.

169. RAWLS, *supra* note 162, at 233-34.

170. RAWLS, *supra* note 162, at 236.

the values it established at a time when reason and a fundamentally moral process produced a consensus on values that were meant to endure. If the Justices fail to rule according to higher law, over time, public reason will correct them.

Indeed, Professor Ledewitz argues that the democratic process Harlan describes is corrective only. In this process, judges must rely upon rationality and restraint, and hope that democratic forces confirm their judgments in the future.¹⁷¹ Rawls observes that

[t]he constitution [sic] is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is. A particular understanding of the constitution [sic] may be mandated to the Court by amendments, or by a wide and continuing political majority, as it was in the case of the New Deal.¹⁷²

Hopefully, though, judges can understand these forces exist and that, more vitally, the rational process of societal negotiation influences them. Through contemplation of the process of original position, judges may find their decisions will weather the test of time. Through this process, they may sense the core, and feel the heart, of the conception of justice probable cause serves and protects. The court can come home to reason by seeing what probable cause would mean when viewed through the rational process of the original position and the common good that process seeks to bring about.

At the root of this process, Harlan tells us, lies not merely “a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the right from unreasonable searches and seizures; and so on.”¹⁷³ Rather, the freedom which is at the core of the Constitution and which is profoundly expressed in the yearning for a probable cause standard that responsibly limits the ability of government to intrude upon our privacy, is part of “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.”¹⁷⁴

The insight judges must have is not one they will obtain by sitting as philosopher kings or by divining natural law etched in stone tablets. What should control is simply the voice of rational people who have negotiated deftly with each other with an eye to the common good, who have properly accounted for the needs of all persons the probable cause equation touches, and who are cognizant that the most serious test of that equation will arise when the

171. Ledewitz, *supra* note 154, at 410.

172. RAWLS, *supra* note 162, at 237-38.

173. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

174. *Id.* (internal citations omitted).

pressures of the moment seem most dire. Judges need not seek to be the ablest and purest of men, but simply to understand that the core of justice the process of probable cause addresses is the product of a reasoned people thinking, judging, negotiating, and ruling when they were as pure and as able as democratic peoples can be.

Richard Hooker told us over four hundred years ago that “[t]here are but two ways whereby the spirit leadeth men into all truth: the one extraordinary, the other common; the one belonging but unto some few, the other extending itself unto all that are of God; the one that which we call by a special divine excellency *Revelation*, the other *Reason*.”¹⁷⁵ Not all of us will be blessed with revelation, but all of us have an old friend in probable cause. In the end, that should be a comforting thought in a nervous age.

175. RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 16 (Arthur S. McGrade ed. 2004).