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Portland, Prohibition and Probable Cause: Maine's Role in Shaping Modern Criminal Procedure

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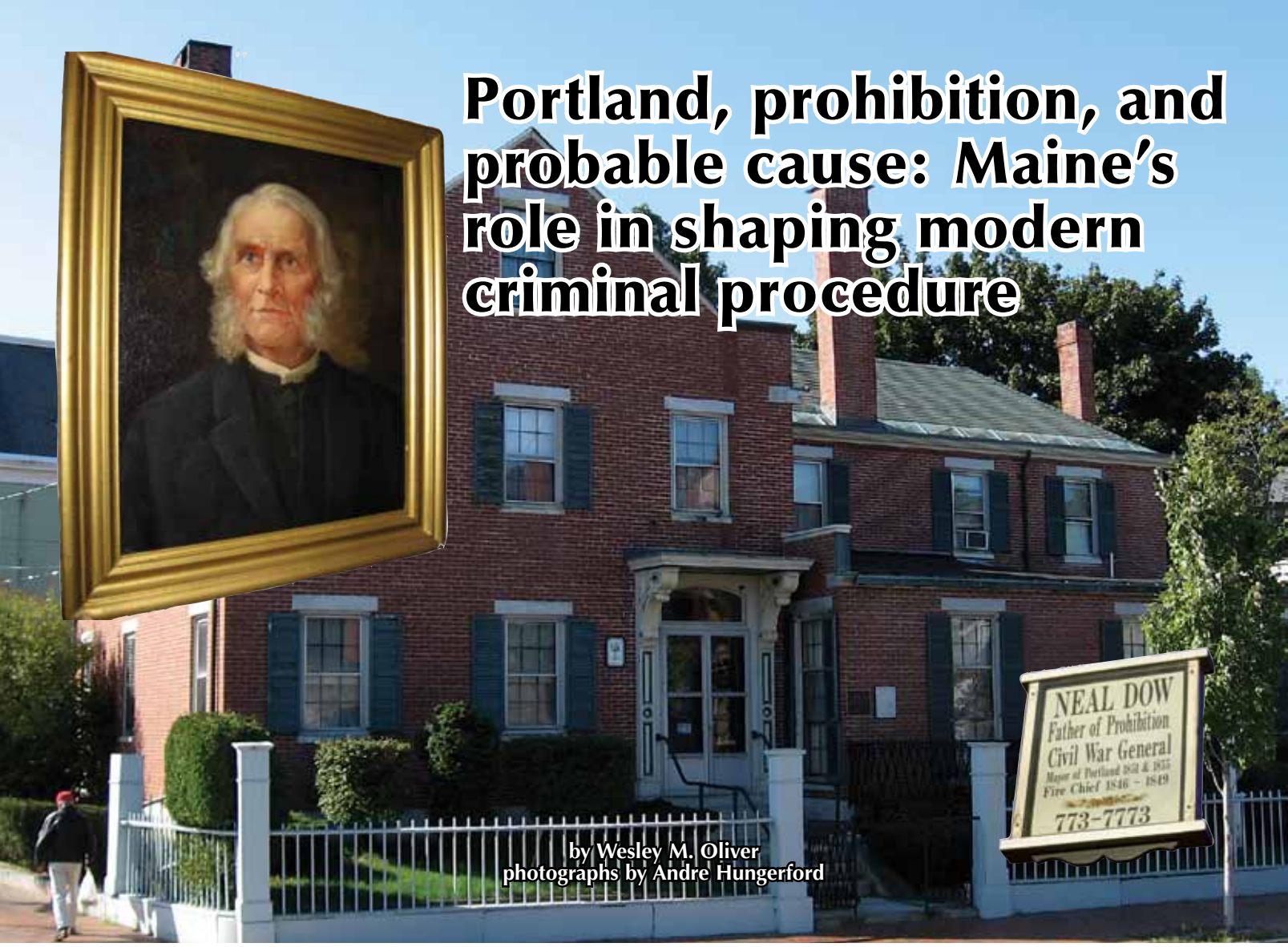


by Wesley M. Oliver
photographs by Andre Hungerford

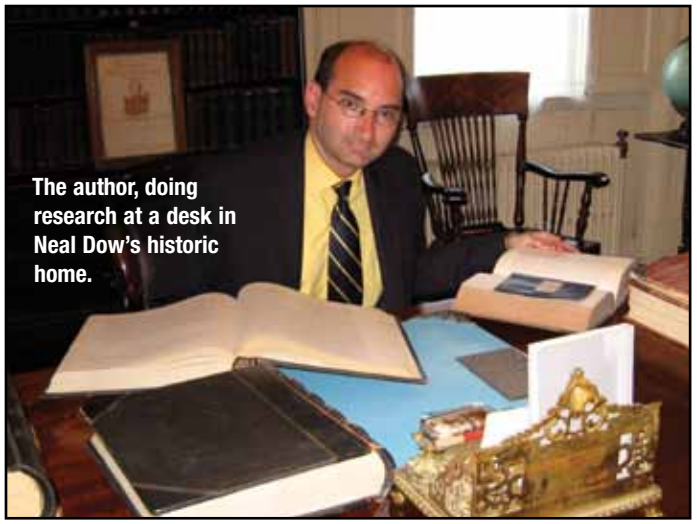
The prominent role Maine played in the history of Prohibition is familiar to many Mainers. In 1851, Neal Dow, a zealous reformer in Portland, introduced the nation, and the world, to legislation banning the possession, manufacture, and distribution of liquor that came to be known as the "Maine Law."[1] The law was soon considered in virtually every American state, was adopted by several of them, and was proposed in several foreign countries, including Canada, Great Britain, France, and Australia.[2] The Maine Law's most lasting contribution to American history was not, however, the prohibition of alcohol. Far more significantly, the Maine Law introduced a search and seizure standard that allowed police to replace victims as criminal investigators.

Before the mid-nineteenth century, victims of crimes—not law enforcement officers—had the primary responsibility for initiating criminal prosecutions. Magistrates issued search and arrest warrants only after a victim made a complaint.[3] Early police officers were similarly dependent on victims. Liability for false arrests effectively required an officer to wait for a warrant, or at least a victim's complaint to the officer, before arresting a suspect. Even if an officer gathered facts giving him probable cause to believe a suspect was guilty of a crime, he was liable for false arrest unless a crime had actually been committed, or his arrest was based on a victim's charge.[4]

The criminal justice system was overhauled in the mid-nineteenth century in ways designed to shift responsibility for prosecution from victims to the state. A number of states created

full-time, uniformed, salaried, military-style police forces to take over the task of investigating crimes.[5] The laws necessary to allow modern police forces to assume this responsibility did not, however, accompany their creation. Legal standards that effectively required a victim's complaint for police to conduct searches, or make arrests, were left intact by the state legislatures creating these new departments.[6] Police investigations were thus of limited utility, as information discovered by officers could not alone justify initiating a criminal prosecution.[7]

Prohibition set the stage for police-initiated investigations. This was a victimless crime, the effective enforcement of which depended on a large number of searches. Nineteenth-century criminal procedure provided no vehicle for such searches, as obviously no victim could swear that he had suffered an injury associated with the crime. Under the new standard developed for liquor warrants, anyone possessing relevant information could obtain a warrant by appearing before a magistrate and testifying to facts providing probable cause to believe alcohol would be discovered in the search. The liquor warrant unmoored a frequently used search-and-seizure apparatus from the requirement of a victim's complaint.



The author, doing research at a desk in Neal Dow's historic home.

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Following wide acceptance of the new liquor law, information learned from police investigations became sufficient for an arrest or a successful application for a search warrant in cases having nothing to do with liquor law violations. Newly created police forces had, since their inception, advocated a standard that would not effectively require an officer to wait for a victim's charge to act.[8] Prohibition, though controversial, advanced a law enforcement interest in a way that advocates of the new police could not. Police departments were able to effectively assert that an arrest standard that allowed them to arrest whenever they had probable cause would assist them in performing the tasks assigned to them. Police could not, however, demonstrate that the public would accept giving the government the power to determine when a prosecution should be initiated. Prohibition vetted the standard the police had requested.

Mid-nineteenth century distrust of government authority doubtlessly made courts and legislatures reluctant to increase the discretion of the new officers. The new liquor law's standard for warrantless searches demonstrated society's willingness to accept a standard that allowed the government to act even if there was no request for assistance from an injured party—a standard that allowed the government to act even if there was a chance no crime had been committed at all.[9]

Victims drove eighteenth century criminal investigations

Criminal investigations in 2008 are very different than they were in 1791 in ways that have nothing to do with the modern technology displayed on the spate of television crime scene programs. (I have to believe that a proposed script for "CSI: Scarborough" is in some CBS producer's trashcan as I type.)

With the exception of murders, which were investigated by the person designated as the coroner, crimes were investigated by victims well into the nineteenth century.[10] After determining the identity of the perpetrator to their satisfaction, victims would appear before a justice of the peace and initiate a prosecution by seeking an arrest warrant. If the crime was theft, the victim could seek a search warrant, but the broad powers of search incident to arrest meant that either warrant would have permitted an effort to reclaim the goods stolen.[11] Once the suspect was arrested, the state took over the investigation. The suspect would be brought before a magistrate who, much like modern police detectives, would interrogate him to bolster the complainant's case.[12]

Victims were expected to initiate criminal investigations and were trusted to correctly identify perpetrators. A crime victim was required to swear that he had "probable cause to believe and do believe" that the suspect committed the crime in question—or, if he sought a search warrant, that the goods identified could be located in the place identified.[13] The victim was not, however, required to explain the facts he relied upon to support his conclusion that he had probable cause.[14] Magistrates relied on the credibility of the victim. Only when the victim appeared to be dishonest would magistrates deny the requested warrant or demand more than his oath that he had probable cause.[15] As a practical matter, the victim's allegation was sufficient to obtain a warrant. Probable cause was thus essentially a pleading requirement, not an evidentiary threshold.

This description of the historical standard likely seems off-base to modern criminal lawyers. Under current law, assessments of probable cause obviously turn on facts, not allegations.[16] Unless exigent circumstances require quick action, a neutral and detached magistrate is to evaluate the facts presented to him or her and determine whether they rise to a sufficient level of certainty to believe the suspect guilty of an offense—or that incriminating evidence will be uncovered in the search.[17] Any criminal defense lawyer can recite the Supreme Court's language forbidding warrants on the basis of "bare-bones" allegations.[18] Aside from situations in which the accuser witnesses the crime occurring, there must be an evaluation of the facts supporting an allegation of wrongdoing. Even when exigent circumstances exist, a government official—a police officer—must evaluate the facts providing probable cause and his evaluation will be reviewed by a judge.[19]

Those who are familiar with historical sources from the Framing Era are also likely to be surprised by the description of probable cause as a pleading requirement in the eighteenth and early nineteenth centuries.[20] Legal treatises dating back to the seventeenth century observed that magistrates were to examine the facts supporting an application for an arrest or search warrant. This rule—announced by such legal luminaries as Matthew Hale, William Hawkins, and William Blackstone—was, however, rarely if ever observed.[21] Evidence of actual practice reveals that the complainant's oath declaring his suspicion was sufficient to obtain a warrant.[22] Warrant applications that have survived from the Framing Era reveal that complainants were required to swear, or affirm, only that they had probable cause to support the requested warrant.[23] By the mid-nineteenth century, a variety of sources observed that it was the practice of magistrates to issue warrants on the mere allegation of a complainant.[24]

Victims thus possessed extraordinary discretion, and legal rules did little to ensure that they were exercising it properly. Some eighteenth century legal authorities suggested complainants were strictly liable if they sought a fruitless search, or the arrest of an innocent person.[25] By the mid-nineteenth century, however, it was clear that complainants were immune from civil liability unless the victim of an unlawful search or seizure met his burden of proving the complainant lacked probable cause.[26] Crime victims were thus able to determine who should be arrested, or which home should be searched for evidence of a crime, as well as the sufficiency of the evidence required to justify the arrest or search.

So long as prosecutions were initiated by crime victims who identified single culprits, there was no pressure to require more than a complainant's oath. Victims, particularly victims of property crimes, were presumed to be motivated by solving the crimes against them and, barring unusual circumstances, would get the opportunity to seek the state's assistance in investigating only one suspect.[27] False searches were a risk during this era; dragnet searches were not. The limited capacity of eighteenth- and early nineteenth-century law enforcement made tolerance of this risk a practical necessity. The eighteenth-century process of criminal investigations therefore survived until the creation of modern police forces and the adoption of new laws giving complainants an opportunity to initiate mass searches for fungible goods.

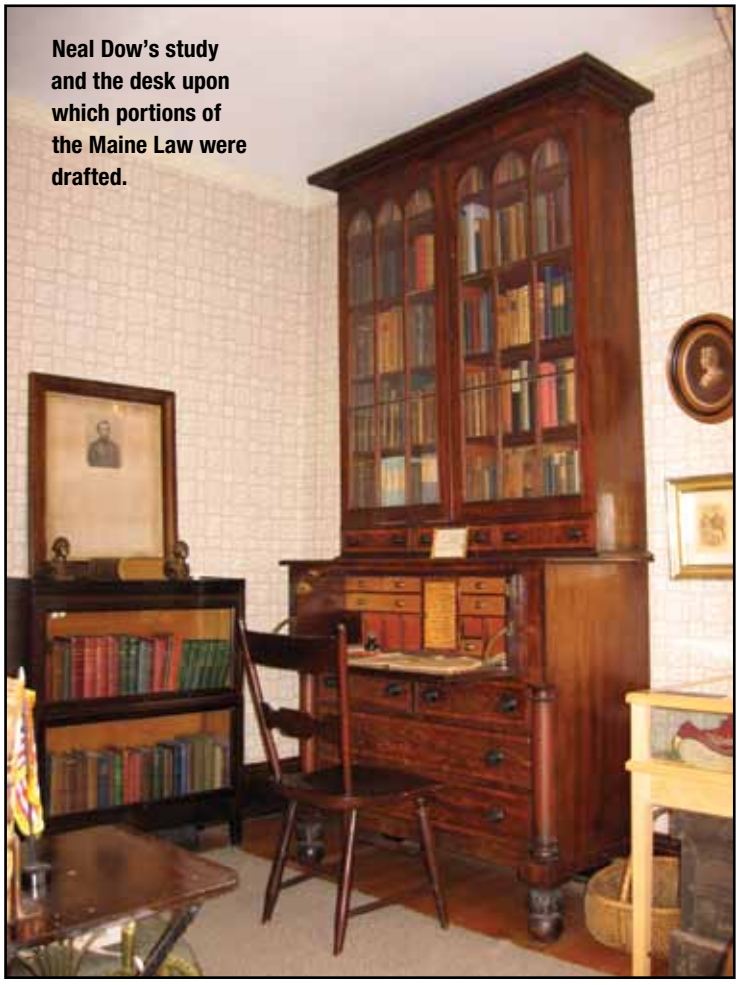
Professional police create pressure for modern probable cause standard

Police forces, created in the mid-nineteenth century, were expected to investigate and prevent crime. Tort law at the time, however, still required an officer to wait for a victim's complaint to avoid liability for false arrest. Early police departments therefore proposed granting immunity to officers whenever they had probable cause to arrest.[28] The standard they advocated did not, however, accompany the creation of many of the new forces.[29] In most jurisdictions, probable cause would be accepted as a basis for an arrest after it had been accepted as a basis for a search, specifically a search for liquor under the Maine Law. Prohibition, not the modern police department, was the catalyst for a new search and seizure standard.

The extraordinary changes in law enforcement in the nineteenth century surely created pressure for an arrest standard that gave police greater discretion. Professional police forces were not known in the eighteenth or early nineteenth century.[30] Unpaid, understaffed, part-time constables, who often required civilian assistance in making arrests, were alone assigned the task of maintaining law and order in early American cities and towns during the day.[31] In the evening, part-time night watchmen were typically posted at various locations and occasionally patrolled.[32] These watchmen had day jobs—a watchman lost time from work if he had to appear before a magistrate and explain the basis for an arrest he made the night before. With the exception of arrests to solve property crimes for which appreciable rewards were offered, economic incentives and sheer inconvenience discouraged them from discovering information that might require them to make an arrest.[33]

The law reinforced this system's inefficiency. Eighteenth-century tort law encouraged officers to rely on victims rather than to gather and act on their own information. Constables and watchmen were liable for damages for false arrests and illegal searches, even if they acted on reasonable information.[34] If, however, one of these officers reasonably relied on a victim's complaint—one made either to a magistrate or directly to an officer—he was immune from liability.[35] He also had a valid defense if he had probable cause to believe the suspect committed an offense and a crime had actually occurred. Unless he witnessed the crime, however, there was no way for the officer to assure judicial authorities that the crime had actually occurred.[36] To protect themselves from being sued, officers most often made arrests only after victims charged suspects, or after a magistrate issued a warrant for an arrest.

This law enforcement structure became incompatible with the needs of a growing society. A series of riots in northern cities in the 1830s prompted calls for police forces that would operate twenty-four hours a day and be staffed with full-time officers modeled on the military-styled police department Sir Robert Peel developed in London in 1829.[37] The new officers would be charged with a far more aggressive task than officers of prior generations had been: the task of preventing and investigating crime. Though legislatures enacted statutes creating these new police departments, and thus enhancing the manpower and organization of law enforcement, they did not alter the tort laws that had, in part, hampered their predecessors.[38] Police chiefs recognized the need for an arrest standard that depended on an officer's interpretation of the facts he gathered from all sources, not just complainants. Early police manuals therefore asserted that an officer could arrest any person he had reasonable ground to believe guilty of a felony, but these manuals certainly were not binding on the courts.[39]



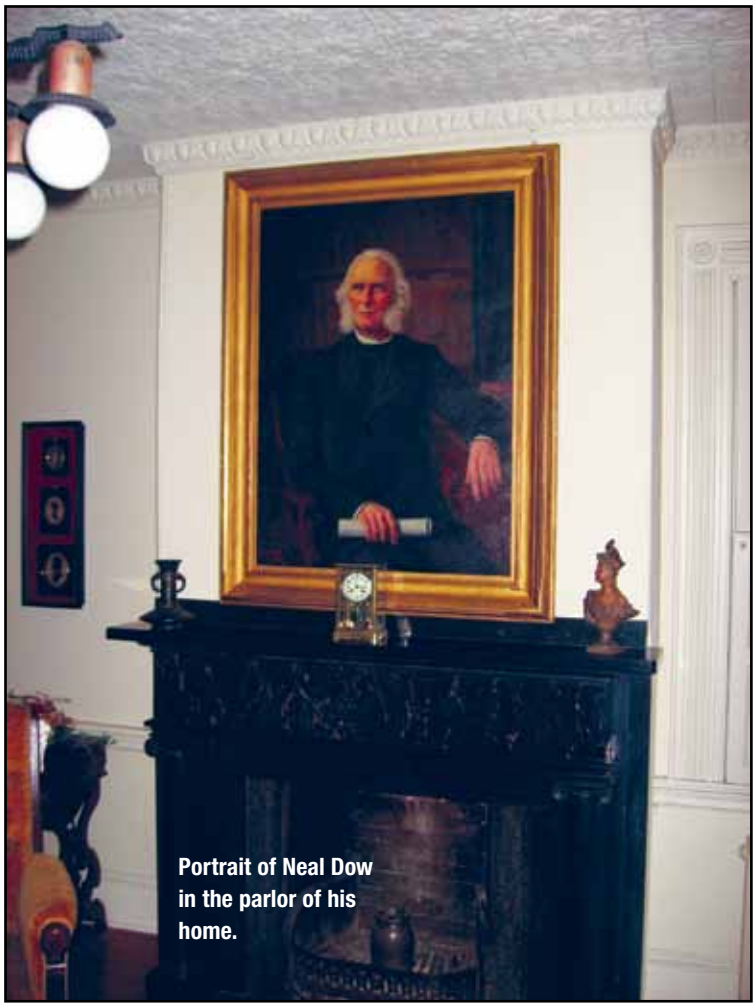
Neal Dow's study and the desk upon which portions of the Maine Law were drafted.

Even though a new arrest standard was all but essential to these departments, it is not surprising that a new search-and-seizure standard did not accompany the creation of modern police forces. Concerns about the discretion possessed by officers led to one of the earliest colonial grievances against the mother country.[40] The Revolutionary War had further left Americans with a fear of standing armies—a concern that stalled the development of modern police forces for decades.[41] A standard that justified arrests on the basis of probable cause shifted discretion from those claiming to be victims to members of these new—and distrusted—police departments. History doubtless made American courts and legislatures reluctant to accept a standard that allowed an officer to arrest whenever he had probable cause, a standard recognized by English courts since 1827.[42] Prohibition, however, would demonstrate a comfort level with a legal standard very similar to the one the police were advocating.

Framing Era search-and-seizure law meets prohibition

This nation's first effort at a statewide ban on alcohol occurred in mid-nineteenth century Portland, Maine, and ushered in a revision of criminal procedure completing the transfer of the duty of investigation from victims to policemen. Portland in the 1850s may seem an unlikely location for a major social movement or legal reform, and, in many ways, it was. In terms of population, Maine was a relatively small state, as it is now. Portland, however, was a major port—a blessing and a curse to the city of twenty thousand residents in the antebellum era.[43] Trade benefited the city while drunken sailors created a market for the ready flow of cheap rum. More than three hundred bars and taverns operated within the city limits, some serving out of open troughs.[44] Minors as well as adults were intoxicated on Portland's streets at all hours of the day and night.[45]

Portland was also the home of one very determined man whose name for decades would be synonymous with Prohibition. Neal Dow was a Quaker, businessman, leader in his local fire department, and firebrand orator prone to lobbing personal attacks against his opponents.[46] Long a temperance advocate of powerful constitution, very early in his adult life he was heard to object to the excesses of alcohol use, particularly rum, in his city.[47] Inspired by a failed effort at statewide prohibition in Massachusetts in the 1830s, he embarked on a tireless campaign to create a criminal penalty for the sale, manufacture or possession of alcoholic beverages in Maine in the 1840s.[48]



Portrait of Neal Dow in the parlor of his home.

In form, Dow's idea was unusual; in substance, it was revolutionary. There were few victimless crimes in the first half of the nineteenth century, and they were rarely enforced. Dow had not, however, proposed creating a run-of-the-mill victimless crime. Since the colonial era, alcohol had been regulated by local licensing laws, which ensured lenient liquor laws in towns in which demand for alcohol was high.[49] Port cities and rural villages under the new law would be treated alike: neither would be allowed to permit any sales of alcohol. This was an attempt at a social revolution to be achieved through the criminal justice system. For somewhat obvious reasons, prohibition would become the most prosecuted victimless crime of the nineteenth century.[50]

Maine adopted Dow's first prohibitory bill in 1846. But the law failed to put a meaningful dent in the amount of alcohol in the state, even by its proponents' estimates, as it did nothing to authorize liquor searches.[51] Witnesses alleging violations of liquor laws—often informants paid by Temperance Men—would testify to observing sales, but were seldom believed.[52] Prosecutions frequently suffered from a lack of physical evidence, as existing search-and-seizure doctrines did not permit searches for illegal alcohol.[53] There were no victims who could complain of an injury from a violation of the liquor law.

Dow would therefore return to the legislature in 1849 with a proposal to permit a search for evidence of this victimless crime.[54] Under the bill, any three persons could appear before a magistrate, allege that they had probable cause to believe liquor was in the location specified in the complaint, and obtain a warrant.[55] This was, of course, essentially the procedure in Maine, as in all other early American states, for obtaining a search warrant to recover stolen goods.[56] There were some differences in the requirements for warrants, depending on whether an applicant wanted to search for alcohol or stolen goods. Dow's proposal required three complainants while a search warrant for stolen goods could be obtained by only one person. A complainant alleging stolen goods had to be a victim of the crime while there were obviously no victims of

the prohibitory laws. Each type of warrant, however, required only the complainant's allegation of his suspicions. Applicants for search warrants under Dow's proposal, just as applicants for search warrants to recover stolen goods, were not required to explain the basis of their suspicion.

Both houses of the legislature passed Dow's bill, but not enthusiastically. Alcohol searches threatened a new degree of government intrusion. A search for a stolen item could be initiated only if a victim identified missing property, presumably located in a single location, while an alcohol complainant could contend that liquor was housed in any number of locations. The character of applicants who would seek warrants for illegal liquor was a further concern. The same witnesses Dow and others had hired to bear witness against their neighbors under the old law were expected to appear as complainants under this new law.[57]

Many Maine lawmakers voted against the measure. Others, however, from pro-temperance districts, voted for the bill even though they opposed prohibition entirely or feared expanding the government's authority to conduct searches. Legislators appear to have struck a deal with the outgoing Governor John Dana to veto the bill if it passed.[58]

After the legislature passed the bill, Governor Dana issued a preliminary statement summarily expressing his concern about the search-and-seizure provision.[59] Months later, he issued a remarkably thorough veto message to the legislature. Near the end of his life, Neal Dow paid this document a strong compliment, writing in his memoirs that "[f]rom that day to this, nothing has been urged against Prohibition that was not expressed or implied in what Governor Dana had to say nearly half a century ago."[60] It could certainly be argued that Dow, a man with unwavering belief in the righteousness of his cause, was noting the lack of arguments that could be made against his reform. Far more likely, though, he was paying a genuine compliment to the thoroughness of a deceased and respected adversary. Dow also noted in his memoirs that Dana was "a man of ability and influence, and justly entitled to leadership among his political associates."[61]

In the portion of his veto message dealing with the search provision, Governor Dana observed that common law protections against unreasonable searches were inapplicable to searches for evidence of this crime.[62] He acknowledged that searches for other items could be initiated by a mere complaint, but observed that most frequently, searches were to recover stolen goods. In order to initiate this most common search,

> there must be a pre-existing fact, not merely suspected, but *known* to the complainant, to wit; the loss of the goods; and when such a fact exists, the person suffering the loss, in instituting the search, will give to it only that direction which the circumstances may indicate, as most likely to result in the recovery of property.[63]

With no victim to swear to an injury, and no specific goods to search for, Governor Dana contended that there was no limit on the number of searches that could be authorized and no end point to a search for liquor.[64] The governor recognized that the Maine Legislature had previously authorized searches for some victimless crimes—crimes for which no one could swear to an injury. Searches were permitted, for instance, for pornography,[65] prostitutes,[66] gambling instruments,[67] and illegally stored gunpowder.[68] Of these, only gunpowder searches were conducted with any degree of frequency, and this was likely due to the extraordinary number of gunpowder mills that had cropped up shortly before Maine's statehood.[69] Governor Dana noted that, unlike in the case of alcohol searches, there was "no danger of general abuse" of the gunpowder warrant as "the number is small to whom the suspicion could possibly attach, of violating the law which regulates the keeping of gunpowder."[70]

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

Reliance on facts, not victim's allegations

A year after Governor Dana's veto, Neal Dow returned to the legislature with a bill that would not only be enacted in Maine, but would be adopted in several American jurisdictions. This bill, like Dow's previous bill, permitted magistrates to issue warrants to search for liquor when three voters alleged they had probable cause to believe alcohol could be located in the

specified location.[71] The bill, however, forbade a search of a dwelling house unless at least one of the three complainants swore that he witnessed an alcohol sale out of the house.[72] Like Dow's previous attempt, this bill passed both houses of the legislature. Dana's successor, Governor John Hubbard, signed it into law on June 2, 1851.[73] This law forever linked the state with the prohibition movement—around the world, prohibitionists would advocate adopting the "Maine Law."[74]

The provisions of the new law obviously required a magistrate to review a complaint containing facts supporting the affiant's conclusion that a crime had been committed. This, of course, was the process Hale, Hawkins, and Blackstone had prescribed for all search warrants, but which was rarely if ever followed in practice.[75] For many members of the legislature, this standard not only provided a mechanism to prevent false searches, it also may have seemed a comfortable resort to a procedure deeply rooted in Anglo-American history. The statute, that is, may have evoked a sense of nostalgia for a past that never existed.

Edward Fox, author of the search-and-seizure provision of the Maine Law of 1851. Photograph courtesy of the Cleaves Law Library.

Neal Dow was widely (and mistakenly) credited with authoring this new search provision.[76] It would have been surprising if Dow had developed a standard that would have been so familiar to lawyers. Dow, a tanner by trade, never studied law.[77] His father, who had great disdain for lawyers, insisted that his son not attend college, thwarting his dream of studying law.[78]

In his memoirs, Neal Dow noted that he received some "technical" assistance in writing the Maine Law from Edward Fox, a prominent Portland lawyer who later was appointed a federal district judge by Andrew Johnson.[79] A graduate of Harvard College and Harvard Law School, Fox was extremely well regarded as a scholarly and knowledgeable lawyer.[80] He was therefore likely either already familiar with Blackstone's description of the process for seeking a search warrant, or became familiar with his description. Even if he never handled a criminal case, he would have had ready access to a volume with this description of the warrant application process. One of the earliest American versions of Blackstone's *Commentaries on the Laws of England* was published in Portland, and early Maine manuals for justices of the peace reiterated this description—which was, as a practical matter, never followed.[81] Blackstone's *Commentaries* was a staple in the libraries of mid-nineteenth-century lawyers, and Fox's own library was surely no exception.[82] These facts alone suggest that Fox was the most likely author of the new search and seizure provision.

Open letters published in Portland newspapers between Neal Dow and his cousin, John Neal, confirm Fox's role in creating the new search provision. John, also a Portland lawyer, had initially been a supporter of his cousin's efforts to enact the Maine Law, but a feud developed between the two, largely over a client of John's. A notorious Portland prostitute, Margaret Landigren, alias "Kitty Kentuck," was convicted of violating the new liquor law—a charge John Neal believed to be false.[83] When he personally put up bond for her appeal, Neal Dow alleged that his cousin was having an affair, or at least a series of commercial transactions, with Kitty.[84] Angry letters between the two contained a variety of allegations, one of which Neal Dow never refuted.[85] John Neal alleged that his cousin was accepting accolades from all over the globe for drafting a search and seizure law everyone in the Portland community knew had been drafted by Ed Fox.[86]

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

A generic standard for evaluating facts

Prohibitionists turned to the Maine Legislature two years later to amend the statute they had successfully passed, seeking to ease the requirements for a liquor search. They attempted to install the original standard Neal Dow had

proposed in 1849: a search whenever a sole complainant swore he had probable cause. Ironically, this effort produced a rule requiring a magistrate to review whatever facts a complainant offered in support of a search and determine whether sufficient suspicion existed to justify it. In this generic form, the standard could be applied to search (or arrest) warrants for anything, not just liquor. It would be no great leap from this standard to permit officers to make arrests when the facts available to them provided probable cause to believe a crime had occurred and the suspect had committed it.

The prohibitionists' proposed amendment used vague language in an apparent attempt to dupe legislators into passing a law permitting a liquor search on the oath of complainants that they possessed probable cause. Under the 1853 bill, three persons who were competent to be witnesses in civil cases were required to allege that alcohol could be discovered in the requested search.[87] A magistrate could not issue a warrant to search a dwelling unless he was convinced "by the testimony of witnesses upon oath, that there is reasonable ground for believing" that unlawfully possessed liquor was in the house.[88] The new bill imposed a hefty penalty for perjury—one year in the state penitentiary.[89] Magistrates were required to record the statements of these complainants and the complainants were required to sign the transcriptions of their testimony.

Opponents of the new bill alleged that the vague language in this provision would permit a search warrant on the mere oath of a complainant that he had reasonable grounds for his belief. Supporters of the bill suggested that the vague language did not change the law and pointed to the severe perjury penalty.[90] The final version adopted by the legislature, and signed by Governor Hubbard on April 1, 1853, differed from the initial bill only in punishment for perjury—two years in the final bill.[91]

Temperance forces quickly tested the parameters of the new law, seeking warrants to search dwellings for liquor without providing any facts to support the complainants' conclusion that alcohol was indeed present. A number of decisions from the state's highest court concluded that complainants were required to provide facts supporting their suspicions. When these facts had not been memorialized in the warrant applications, the court arrested the judgment of conviction against the defendant and returned his alcohol.[92] The court thus interpreted the amendment to the liquor law to have created a generic standard for warrant applications. Complainants were no longer required to observe, and testify to, a liquor sale to obtain a search warrant. They were, however, required to testify to the facts they alleged provided reasonable grounds to believe alcohol present.

The remedy the court afforded for the violation was certainly novel. Arresting the judgment of a lower court because of a defect in the warrant effectively forbade a court to consider the fruit of an unlawful search.[93] These decisions appear to be the first American decisions based on the principle modern lawyers know as the exclusionary rule. Two decades later, however, the court would hold that the fruits of an officer's unlawful warrantless search were admissible, retreating from the full implications of the new remedy it had fashioned.[94] Even this limited version of the exclusionary rule, however, represented a substantial innovation in the law; reliable evidence had always been admissible throughout Anglo-American history.[95]

Much of the fossil record of modern criminal procedure can thus be found in the Maine Supreme Judicial Court's interpretation of the nation's first prohibitory laws. With this 1853 modification to the liquor law, and its interpretation by the court, Maine had fashioned a standard for search warrants that would be familiar to any twenty-first century lawyer. Affiants were no longer permitted to provide what modern U.S. Supreme Court decisions describe as "bare bones" affidavits. The actual practice of justices of the peace—at least in liquor cases—now conformed with Blackstone's description of a magistrate's role in reviewing requests for search warrants. Treatises in Maine for the first time contained forms for magistrates to record the facts supporting the allegations of complainants.[96] And suppression of evidence replaced tort suits as the mechanism for preventing at least a category of illegal searches.

The mid-nineteenth century wave of temperance sentiment spread this search standard far beyond Maine's borders. Versions of the Maine Law including this, or a very similar, search standard, would be considered in several American jurisdictions, adopted in twelve, and discussed in several foreign countries within a couple of years.[97]

The modern probable cause standard for warrantless arrests

The Maine Law introduced the probable cause standard to a wide audience. This was a standard that relied on a government official to review facts, rather than a standard that placed its faith in the honesty of injured citizens. Legislatures across the country embraced a rule that allowed magistrates to approve warrants on the basis of anyone's information.

Legislatures did not have a custom of modifying search-and-seizure standards before the Maine Law. In fact, Anglo-American legislatures had not previously altered the procedures to be followed, or the standard that applied, to a search or arrest. Legislatures previously acted to increase the crimes for which warrants could be sought—allowing searches for pornography, instruments of gambling, and lottery tickets—but legislatures had not previously created new standards for these or other searches.[98] Opponents and advocates of the Maine Law recognized that a new method of authorizing searches was being proposed, as well as a new method of preventing unreasonable ones.[99]

Within a few years of the Maine Law's introduction to the nation, the probable-cause standard for police arrests became widely accepted throughout the country. In some states, courts adopted the standard; in others, legislatures modified the arrest standard, just as they had done when they adopted the nation's first prohibitory law.[100] Surely, new police departments created pressure for this new standard, but these pressures had existed since the creation of modern police forces, and the probable cause standard had not accompanied the creation of these forces.[101]

Acceptance of the Maine Law seems to have put to rest reluctance on the part of courts and legislatures to accept a standard that granted the government the right to intervene in a citizen's life, even when no one could swear a crime had actually occurred. The Maine Law trusted a government official—a magistrate—to assess the appropriateness of a search where the common law had, as a practical matter, trusted injured citizens to make this determination. Police officers in the 1850s were taking over many of the tasks that had previously been uniquely or jointly assigned to magistrates. Police were beginning to interrogate suspects, a task solely entrusted to magistrates during the Framing Era.[102] Police (and victims) were, by the mid-nineteenth century, alone performing arrests, even though magistrates had been expected to make arrests in the early republic—and continued to possess the power.[103]

Nineteenth-century police were beginning to look more like eighteenth-century magistrates, and magistrates were looking less like police. The Maine Law had demonstrated society's willingness to transfer discretion from crime victims to magistrates. It was no great leap, then, to transfer the trust placed in crime victims to a different sort of government official—a member of the new corps of trained, professional officers.

1. Frank F. Byrne, Prophet of Prohibition: Neal Dow and His Crusade, at v (1969). Neal Dow's cousin and arch-enemy scoffed at the description of the state's liquor law as the "Maine Law," suggesting that it was "as if there were no other law in Maine; or if Maine legislation were distinguished for nothing else." John Neal, *The Liquor Law of Maine,* Maine Expositor, Aug. 31, 1853, at 2.

2. *See* Stewart Mitchell, Horatio Seymour of New York 154 (1938) ("One state after another played with the reform until Maine laws were being argued over almost everywhere."); Henry S. Clubb, The Maine Liquor Law: Its Origin, History, and Results, Including a Life of Hon. Neal Dow 93-98 (New York, Fowler and Wells 1856) (noting worldwide consideration of Maine Law).

3. Daniel Davis, A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions 7–49 (Boston, Cummings, Hilliard 1824).

4. George C. Thomas, III, *Time Travel, Hovercrafts, and the Framers: James Madison See the Future and Rewrites the Fourth Amendment,* 80 Notre Dame L. Rev. 1451, 1462 (2005) (describing crime-in-fact requirement). Thomas Davies observes that officers in this country first acquired the right to arrest a suspect on the charge made by a complainant in the late 1820s. *See* Thomas Y. Davies, *Correcting Search-and-Seizure History: Now Forgotten Common Law Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 Miss. L.J. 1, 186 (2007). There had, however, been a mechanism at common law that permitted anyone to arrest on a charge made by a complainant to a constable. This complaint was known as the hue and cry. *See* William Dickinson, A Practical Exposition of the Law Relative to the Office and Duties of a Justice of the Peace 111 (London, Reed and Hunter 1813) (noting that arrest is justified if made after hue and cry even if crime has not actually been committed).

5. David R. Johnson, Policing the Urban Underworld: The Impact of Crime on the Development of American Police 1800–1877, at 9 (1979).

6. In describing the development of police departments, I rely primarily on the experience in New York City, as it appears that better records have been kept for this department than for any other, and, as New York became America's largest city by the mid-nineteenth century, it was the first to encounter many of the urban problems that prompted calls for professional police forces. *See*, e.g., Herbert Asbury, The Gangs of New York: An Informal History of the Underworld (1928) (describing rise of crime and gangs in nineteenth century). The first modern police force created in New York, the Municipal Police, was established in 1845. *See* James F. Richardson, The New York Police: Colonial Times to 1901, at 51 (1970). The crime-in-fact requirement remained in effect until a statutory modification in 1857. *See* Oliver L. Barbour, A Treatise on the Criminal Law of the State of New York 543 (Albany, Goulds, Banks 2d ed. 1852) (observing that felony arrests on probable cause of officer justified only if crime has in fact occurred). The Metropolitan Police Act of 1857 would then grant an officer the right to arrest any person he had probable cause to believe guilty of a felony. *Burns v. Erben,* 26 How. Pr. 273 (N.Y. Super. Ct. 1864), *aff'd,* 40 N.Y. 463 (1869). Subsequent decisions would suggest that the very creation of a police department conferred the right to arrest on probable cause, but these decisions certainly were not contemporaneous with the creation of the new professional forces. *Hawley v. Butler,* 54 Barb. 490 (N.Y. Gen. Term 1868) (recognizing that police authority would be a sham if officers could not arrest when they had probable cause to believe a suspect guilty).

7. One commentator has suggested that the standard allowing a warrantless arrest on probable cause alone "may well have been a crucial step in making a police force feasible" in London. *See* Davies, *supra* note 4, at 187 n.589. An English court would first recognize the right of an officer to arrest whenever he had probable cause to believe a felony had occurred two years before the creation of the first modern police force in London. *See Beckwith v. Philby,* (1827) 108 Eng. Rep. 585, 586 (K.B.) (adopting probable cause standard); Elaine A. Reynolds, Before the Bobbies: The Night Watch and Police Reform in Metropolitan London 1720–1830 (1998) (describing the development of modern police force in London).

8. *See* City of New York, Rules and Regulations for the Government of the The Police Department of the City of New

York 35 (1848) ("[I]f the Policeman has good cause to suspect a person has committed a felony, he should arrest him, and if he have reasonable grounds for his suspicions, and the arrest is made discretely and fairly, in pursuit of the offender, and not from any malice or ill-will.").

9. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 Mich. L. Rev. 547, 637 n.245 (1999) (recognizing that beginning in the second half of the nineteenth century, courts and legislatures began to adopt the probable cause standard for arrests); Horace L. Wilgus, *Arrest Without Warrant,* 22 Mich. L. Rev. 541, 550 (1924) (describing statutory enlargement of power of police to arrest without a warrant in the nineteenth century).

10. *See* 1 Joseph Chitty, A Practical Treatise on the Criminal Law 158–59 (London, A.J. Valpy 1816) (observing different method of investigation for murders); John Impey, The Practice of the Office of Sheriff and Under Sheriff 440–41 (London, W. Clark and Sons 4th ed. 1817) (describing duties of coroner); Julius Goebel, Jr., Cases and Materials on the Development of Legal Institutions 59 (1946) (describing process of murder investigation); George C. Thomas, III, *Colonial Criminal Procedure: The Royal Colony of New Jersey 1749–57,* 1 N.Y.U. J.L. & Liberty 671, 679–80 (2005) (describing a proceeding under coroner's inquest).

11. *See* William J. Stuntz, *Implicit Bargains, Government Power and the Fourth Amendment,* 44 Stan. L. Rev. 553, 561 n.31 (1992) ("[A]t common law, search incident to arrest doctrine authorized a top-to-bottom search of the home of anyone arrested for a felony (if the arrest occurred in the suspect's home)."). Warrants to arrest a suspect who allegedly stole goods appear to have been far more common than search warrants for the missing goods. There appears to be only one remaining collection of magistrates' papers in the United States from the late eighteenth and early nineteenth century. In this collection, the number of arrest warrants for stolen goods vastly outnumbers the number of search warrants. *See* Adlow Collection, Barrett Warrants (1787–1791) and Gorham Warrants (1816–1818), Boston Public Library.

12. *See* Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree,* 30 Mich. L. Rev. 1224, 1231–35 (1932); Wesley MacNeil Oliver, *Magistrates' Examinations, Police Interrogations, and Miranda-Like Warnings in the Nineteenth Century,* 81 Tul. L. Rev. 777, 784–95 (2007).

13. Fabio Arcila, Jr., *In the Trenches: Searches and the Misunderstood Common-Law History of Suspicion and Probable Cause,* 10 U. Pa. J. Const. L. 1, 8 (2007); David A. Sklansky, *The Fourth Amendment and the Common Law,* 100 Colum. L. Rev. 1739, 1788–89 (2000); James Etienne Victor, *The Fourth Amendment in the Nineteenth Century in* The Bill of Rights: Original Meanings and Current Understanding 176 (Eugene W. Hickok, ed., 1991).

14. This conclusion is actually fairly controversial and has been the subject of some recent debate in the academy. Fabio Arcila and William Cuddihy have concluded that magistrates in the Framing Era did not review the factual predicate of a complainant's suspicion. Arcila, *supra* note 13, at 8; 3 Willliam John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1192 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School). Thomas Davies, certainly one of the country's most thorough scholars of Framing Era criminal procedure, concludes that magistrates during this period were reviewing the adequacy of the facts supporting complainants' allegations. Davies, *supra* note 9, at 589. The fact that the Maine Law was regarded to provide a type of protection for homes against liquor searches not provided for searches for stolen goods reveals at a minimum that by the mid-nineteenth century, magistrates were not reviewing the facts supporting ordinary searches. Actual warrant applications discovered in researching this article further confirm Arcila's conclusions that magistrates during the Framing Era were not recording any facts supporting complainants' suspicions. *See* discussion *infra* note 23 and accompanying text.

15. J.C. Bancroft Davis, The Massachusetts Justice: A Treatise Upon the Powers and Duties of Justices of the Peace: with Copious Forms (Worchester, Mass., Warren Lazell 1847) ("Where a magistrate has reasonable grounds to believe that the charge preferred is the offspring of malice and a corrupt heart, he may require further evidence of its truth than the oath of the complainant. And he may, also, upon deliberate consideration, refuse to institute a criminal process."); Barbour, *supra* note 6, at 454 (stating that a magistrate "ought not … to proceed upon a complaint solely because such complaint has been made; for though there be a positive charge on oath by a competent witness, if the justice *See*s that no credit is to be given to it, he may, and should doubtless, decline acting on it"). As a corollary, the reputation of the suspect was expressly identified as a sufficient basis for a magistrate to determine that the complainant had demonstrated probable cause. *See* Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. Mich. J.L. Reform 465, 480 n.94 (1983–84) (quoting William Hawkins' treatise). Modern law since *Illinois v. Gates,* 462 U.S. 213 (1983) has returned to much of the trust the Framing Era placed in complainants. When an informant identifies himself, many courts do not require any corroboration of the facts offered. *See* Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure: Cases and Commentary 112 (8th ed. 2007).

16. *Byars v. United States,* 273 U.S. 28, 29 (1927) (finding affiant's statement that he "has good reason to believe and does believe" that defendant possessed contraband inadequate for warrant); *Nathanson v. United States,* 290 U.S. 41, 47 (1933) (finding "mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances" insufficient for issuing customs warrant).

17. 3 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 193–201, 229–240, 309–329, 337–342, 392–437 (4th ed. 2004) (describing exigent circumstances justifying exception to warrant requirement).

18. *See* Abraham S. Goldstein, *The Search Warrant, the Magistrate, and Judicial Review,* 62 N.Y.U. L. Rev. 1173, 1198–1200 (1987).

19. There may be reason to believe that police officers will more cautiously evaluate the facts supporting their suspicions when they engage in warrantless searches than they will when they seek warrants. If an officer is wrong about his belief that probable cause exists and proceeds without a warrant, he loses the fruits of the search. If he is wrong about his conclusion that probable cause exists, but made a reasonable mistake, and first obtained a warrant, he will not lose the fruits of the search. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure,* 88 Va. L. Rev. 1229, 1247 (2002) (describing warrant as "safe harbor"). Of course, the time required to obtain a warrant discourages an officer from obtaining one unless he is fairly certain the search will yield the evidence of a crime that he expects. Donald Dripps, *Living with* Leon, 95 Yale L.J. 906, 926 (1986).

20. *See* Davies, *supra* note 9, at 589; Barbara Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence 131–47 (1991) (describing treatises); Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance,* 30 Suffolk U. L. Rev. 53, 62 (1996) (suggesting that during the Framing Era probable cause sufficient to obtain a search warrant meant "a high likelihood … that a particular place contained stolen goods").

21. 2 Matthew Hale, The History of the Pleas of the Crown 110–11 (London, Sollom Emlyn ed. E. & R. Nutt & R. Gosling 1736); 2 Serjeant William Hawkins, A Treatise on the Pleas of the Crown 134–36 (London, Thomas Leach ed. 6th ed., His Majesty's Printer 1787); 4 William Blackstone, Commentaries on the Laws of England 290 (Worchester, Mass., Isaiah Thomas 1790).

22. Fabio Arcila looked to forms used by justices of the peace for complainants seeking search and arrest warrants to demonstrate that complainants were not required to provide facts supporting their allegations. The forms were for complainants to use to create what we would today call the affidavit in support of the search warrant. None of these forms provided a space for the complainant to include the facts supporting his suspicion or referred to place where an applicant for a warrant might attach a statement of those facts. *See* Arcila, *supra* note 13, at 32–36. Forms in early nineteenth century justice-of-the peace manuals in Maine, and in Massachusetts before Maine's statehood, contained no place to include facts in support of a search or arrest warrant. *See* Jeremiah Perley, The Maine Justice 77–78 (Hallowell, Goodale, Glazier

1823); Samuel Freeman, The Massachusetts Justice 6364 (Boston, Thomas & Andrews 1810).

23. Few actual search warrants or applications for search warrants have survived from the eighteenth or early nineteenth centuries. A collection of magistrates' papers barely managed to escape destruction when a Boston judge in the 1950s discovered its existence. *See* Elijah Adlow, Threshold of Justice: A Judge's Life Story (1973) (describing discovery of the papers). This collection contains applications made to magistrates as well as the search and arrest warrants from a justice of the peace in Boston in the late eighteenth century and another justice in the early nineteenth century. In none of the applications for search or arrest warrants did a complainant offer the factual basis for his suspicion. *See* Barrett Warrants (1787–1791), Gorham Warrants (1816–1818), Adlow Collection, Boston Public Library. On occasion, in a court opinion, a search or arrest warrant was reproduced in its entirety. These reproductions of warrants confirm that magistrates were not recording any factual descriptions that the complainants were orally offering, if any were being offered orally at all. *See e.g., Mills v. McCoy,* 4 Cow. 406 (N.Y. Sup. Ct. 1825); John A. Dunlap, The New York Justice 370 (1815) (summarizing court decision involving search warrant noting that the "warrant had all the essential qualities of a legal warrant" as it was "founded on oath, specific as to place and object" without observing any recitation of facts by the complainant). For reasons discussed below, it is highly unlikely that such facts were being orally described. *See* discussion *infra* note 24 and accompanying text.

24. The Massachusetts Supreme Judicial Court in 1842 rejected a contention that a complainant's allegation of a suspect's guilt should be insufficient for an arrest warrant to issue. The court concluded that the only protection from an erroneous search was the remote threat of a civil action for wrongful prosecution:

> The great security of the citizen from unreasonable arrest or seizure of goods is this, that the warrant is only to issue upon the oath of the complainant alleging a larceny, &c., and his belief that the party accused is guilty of the offence; or in the case seizure on a search warrant, that he believes the property stolen, embezzled, &c., to be in the place searched. If such oath can be properly taken, it lays the foundation for a criminal proceeding which, however unfortunate and injurious it may be to the party upon whom it bears, does not subject wither the complainant or the officer to an action of trespass. If the prosecution be malicious and without probable cause, an action on the case will lie for the party aggrieved; but if it be honestly and properly instituted, the party accused, though innocent, may be remediless.

Stone v. Dana, 46 Mass. (5 Met.) 98, 109–10 (1842); *See also Lowrey v. Gridley,* 30 Conn. 450 (1862) (recognizing that "solemn oath" of "truth of complaint" is sufficient to obtain search warrant for stolen goods); *Adams v. McGlinchey,* 66 Me. 474 (1876) (stating that neither state constitution's search and seizure clause, nor Fourteenth Amendment's due process clause, requires magistrate to consider facts supporting complainant's suspicion); 1 Henry Dutton, A Revision of Swift's Digests of the Laws of Connecticut 505 (New Haven, Durrie & Peck 1851) ("A justice of the peace may issue a warrant to search for stolen goods; but to authorize this, there must be the oath of the applicant that the goods have been stolen, and that he strongly suspects they are concealed in a certain place, and direct the officer to arrest such person only, if the goods are found with him."); N.Y. Assemb., Comm'rs on Pleading and Practice, Report of Select Committee on Pleading and Practice, Rep. No. 78–150, at 79 (1855) (observing that, as a matter of practice, in the depositions recording the testimony of complainants seeking warrants, "instead of stating the particular facts, conclusions of law are stated," namely, that the complainants have probable cause). It seems most unlikely that the magistrates had required victims to provide a factual basis supporting their allegations in the Framing Era and had ceased doing so. A judicial assessment of the factual basis of the complainant's suspicion would be more essential as complainants were no longer strictly liable when the searches they directed turned out to be fruitless. *See* discussion *infra* notes 27–28 and accompanying text.

25. *See Entick v. Carrington,* (1765) 95 Eng. Rep. 807, 818 (C. P.) (concluding that after obtaining a search warrant for stolen goods, "if the goods are not found, [the complainant] is a trespasser.") *Entick,* for legal history buffs, is one of the most famous cases in the development of search and seizure law and involved a search warrant to seize the papers of a confederate of the infamous pamphleteer John Wilkes. *Entick* held that search warrants could never be issued for papers, a principle that was gradually eroded during the first half of the twentieth century. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure,* 105 Yale L.J. 419–33 (1995) (observing that prohibition on obtaining documents could not co-exist with rise of the regulatory state). For an excellent and entertaining description of John Wilkes' life and the landmark search and seizure rules his exploits produced, *See* Arthur H. Cash, John Wilkes: The Scandalous Father of Civil Liberty (2006).

26. *See* e.g., *Dana,* 46 Mass. at 109–10; *Wheeler v. Nesbit,* 65 U.S. (24 How.) 544, 550 (1860).

27. *See* Acts and Resolves Passed by the Thirtieth Legislature of the State of Maine A.D. 1850, at 298 (Augusta, William T. Johnson 1850) [hereinafter Acts] ("[T]he person suffering the loss, in instituting search, will give to it, only that direction, which the circumstances may indicate, as most likely to result in the recovery of property.").

28. *See* City of New York, *supra* note 8, at 35.

29. The probable cause arrest standard for officers had been accepted in Pennsylvania and Massachusetts prior to Prohibition and before the development of professional police forces in those states *See Russell v. Shuster,* 8 Watts & Serg. 308, 309 (Pa. 1844); *Rohan v. Swain,* 59 Mass. (5 Cush.) 281, 284 (1850). This was, of course, roughly twenty years after the standard was accepted in England, and the standard was adopted prior to creation of a modern police force in either state. These decisions therefore were not prompted by the needs of the new police, nor do the decisions appear to have prompted legislative or judicial changes in other jurisdictions that were creating modern police forces. For a discussion of the development of these early police forces, *See* Allen Steinberg, The Transformation of Criminal Justice: Philadelphia, 1800–1880 (1989); Roger Lane, Policing the City: Boston, 1822–1885 (1967).

30. Seldon D. Bacon, *The Early Development of American Municipal Police: A Study of the Evolution of Formal Controls in a Changing Society* (1939) (unpublished Ph.D. dissertation, Yale University) (describing emergence of modern police forces in New York, Boston, Philadelphia, New Orleans and Charleston).

31. *See* Edwin G. Burrows & Mike Wallace, Gotham: A History of New York City to 1898, at 637 (1999). In the late eighteenth century and early nineteenth century, magistrates, in addition to the constables and watchmen, were expected to personally make arrests and maintain order. *See id*. at 402; 2 Richard Bache, The Manual of a Pennsylvania Justice of the Peace 44 (Philadelphia, W.P. Ferrand 1810).

32. Burrows & Wallace, *supra* note 31, at 637.

33. *See id*.; *City Bank v. Bangs,* 2 Edw. Ch. 95 (N.Y. Ch. 1833) (delineating when officers are entitled to collect rewards for official actions).

34. *See* Davies, *supra* note 9, at 627-28.

35. Immunity from civil liability when officers acted on a complaint, and had probable cause, actually developed in the early nineteenth century, as Thomas Davies traces. Davies, *supra* note 4, at 183. English courts had long recognized a similar basis of immunity under the hue-and-cry procedure. *See* Dickinson, *supra* note 4, at 111. Even if American courts were generally unwilling to acknowledge the hue and cry as a basis for immunity in making an arrest, victims possessed no less discretion before American courts developed the on-charge basis for immunity. Before this development, a victim would be required to make his complaint to a magistrate rather than to a constable. Davies, *supra* note 4, at 183. This change merely gave an injured party an additional set of public officials who could assist them.

36. The common law specifically recognized an officer's immunity from civil liability for wrongful arrest if he arrested a suspect he personally observed committing an offense. Davies, *supra* note 9, at 630. It is difficult to imagine how this exception would be necessary if the test were interpreted literally. If the officer actually observed the commission of an offense, obviously the defendant would not have been falsely

arrested. The exception effectively meant that if the officer personally observed facts that led him to reasonably conclude that he had witnessed the suspect commit a crime, he would face no liability if the suspect successfully offered, for instance, an affirmative defense.

37. *See* Johnson, *supra* note 5, at 9 (describing development of American police); Clive Emsley, Crime, Police, and Penal Policy: European Experiences 1750–1940, at 107–09 (2007) (describing development of London police).

38. *See*, *e.g.,* An Act for the Establishment and Regulation of the Police of the City of New-York, ch. 315, 1844 N.Y. Laws 469.

39. *See*, *e.g.,* City of New York, *supra* note 8, at 35. In the late nineteenth and early twentieth centuries, some courts recognized that power of cities, through local ordinances or rules for police, to enlarge the power of officers to make arrests without warrants. Wilgus, *supra* note 9, at 551–52. In the mid-nineteenth century, courts do not appear to have cited police regulations developed by city officials as a basis for enlarging the power of officers. By the end of the nineteenth century, when courts began to consider the effect of cities fashioning rules for police, there was considerable disagreement among courts as to the legal effect of such rules. *Id*.

40. *See* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review,* 77 B.U. L. Rev. 925, 939–50 (1997) (describing colonial search and seizure issues).

41. *See* Burrows & Wallace, *supra* note 33, at 636; Wilbur R. Miller, Cops and Bobbies: Police Authority in New York and London, 1830–1870, at 19 (1973).

42. *Beckwith,* 108 Eng. Rep. at 586.

43. Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States:* 1790 to 1990 Table 8 (Population Division, U. S. Bureau of the Census, Population Division Working Paper No. 27, 1998), available at http://www.census.gov/population/www/documentation/twps0027/twps0027.html (last visited Sept. 10, 2008).

44. Neal Dow, The Reminiscences of Neal Dow: Recollections of Eighty Years 29 (1898).

45. *Id*.

46. *See* Byrne, *supra* note 1, at 9–16.

47. *Id*. at 12–24.

48. *Id*. at 24. General James Appleton made the attempt in Massachusetts and his family would insist that he had not received his due for the later success in Maine. *See* Daniel F. Appleton, The Origin of the Maine Law and of Prohibitory Legislation with a Brief Memoir of James Appleton (1886).

49. *See generally* John A. Krout, The Origins of Prohibition (1925) (tracing history of prohibition from colonial era to enactment of the Maine Law).

50. One piece of data confirming this conclusion can be found in a late nineteenth century digest. The search and seizure entry refers the reader to the section on intoxicating liquors. Albert R. Savage, An Index-Digest of the Reports of Cases Decided by the Supreme Judicial Court of Maine (1897). There were victimless crimes in the mid-nineteenth century, all of which obviously depended on searches and seizures for prosecution. *See*, *e.g.,* Benjamin Kingsbury, The Justice of the Peace: Designed to be a Guide to Justice of the Peace for the State of Maine 180 (Portland, Sanborn & Carter 1852) (describing types of items that could be sought under search warrant); Me. Rev. Stat. tit. III, ch. 34, § 5 (1841) (permitting searches for improperly stored gunpowder); id. tit XII, ch. 160, § 18 (allowing search warrant to discover young women in bawdy houses); *id*. § 20 (permitting warrants for obscene publications). Yet the digest entry for search and seizure notes that all of the cases decided in Maine on this topic have been considered in the context of intoxicating liquors.

51. Neal Dow himself recognized that without the search mechanism, his efforts would have been doomed to failure. *See Prohibitory Laws of Maine,* New York Times, Feb. 3, 1896, at 5.

52. Byrne, *supra* note 1, at 39.

53. *Id*.

54. *Id*. at 42–43.

55. *The New Liquor Law,* Kennebec Journal, Aug. 23, 1849, at 3.

56. *See* sources *supra* note 15.

57. *See* Byrne, *supra* note 1, at 42 (observing Dow's difficulty in finding credible witnesses to liquor sales).

58. This inference is supported by the fact that a similar development occurred with the passage of the liquor law of 1851, which was successful. Several members of the legislature who voted for the bill counseled then-Governor John Hubbard to veto it, noting that they could not have voted for it and retained their seats. They advised him to follow the course of his predecessor. *See* Dow, *supra* note 44, at 340–43. Neal Dow also observed that Governor Dana had taken the "counsel of some of the leaders in his party" in vetoing the bill. *Id*. at 320.

59. *Closing Proceedings of the Legislature,* Kennebec Journal, Aug. 23, 1849, at 3.

60. Dow, *supra* note 44, at 319.

61. *Id*.

62. *See* Acts, *supra* note 27, at 298.

63. *Id*.

64. *Id*. at 297–98.

65. Me. Rev. Stat., tit XII, ch. 160, § 18 (1841).

66. *Id*. § 20.

67. *Id*. § 39.

68. One of the earliest statutes of Maine provided that a search warrant could be obtained by a selectman of the town to investigate the possibility that gunpowder was being stored contrary to the regulations of the town. An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, ch. 25, § 5, 1821 Me. Laws 112, 114 (Brunswick, J. Griffin 1821); John Maurice O'Brien, The Powers and Duties of the Town Officer, as Contained in the Statutes of Maine (Hallowell, Glazier & Co. 2d ed. 1824). Statutes regulating the possession of gunpowder in early American states were somewhat common. *See* Saul Cornell, *A Well-Regulated Right: The Early American Origins of Gun Control,* 73 Fordham L. Rev. 487, 510-13 (2004).

69. *See* Maurice M. Whitten, The Gunpowder Mills of Maine 3 (1990).

70. *See* Acts, *supra* note 27, at 298. Governor Dana analysis was not unlike the justification for warrantless searches of closely regulated businesses. *See* 5 LaFave, *supra* note 17, at 37–95.

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

72. An Act for the Suppression of Drinking Houses and Tippling Shops, ch. 211, § 11, 1851 Me. Laws 210, 214–15.

73. *Id*. at 215.

74. *See* Documentary History of the Maine Law 85–86 (New York, Hall & Brother 1855).

75. *See* sources *supra* note 21.

76. *See e.g.* Byrne, *supra* note 1, at 45 ("Dow's greatest innovation was the provision for search and seizure."); Clubb, *supra* note 2, at 23 ("Still persevering, Neal Dow again appeared in the Hall of Representatives in August, 1850, with a bill of his own drafting, subsequently known as the 'Maine Law.'"); Allan Levinsky, A Short History of Portland 79 (2007).

77. Though he had no legal training, Dow did once appear as counsel to defend a woman who was charged with horsewhipping a rumshop keeper for selling liquor to her husband. The woman requested that Dow be permitted to act as her attorney, and notwithstanding his lack of training in the law, the judge permitted him to do so. The jury found her guilty but recommended mercy, and she was required to pay, as Dow later recalled, "a slight fine," which he paid. Dow, *supra* note 44, at 99.

78. *See id*. at 57–58; S.M. Watson, The Maine Historical and Genealogical Recorder 1884–1898, at 226 (1973). It was boasted in his father's obituary that he had only once resorted to the legal system in a lawsuit to successfully recover a debt against the advice of his attorney.

Death Notice of Josiah Dow, Fox Family Scrapbooks, Vol. 3, Collection 849, Maine Historical Society (describing father's sole resort to the law). Josiah Dow's lawyer in that case had been Salmon Chase, the uncle of the future chief justice of the United States.

79. *See* Dow, *supra* note 44, at 35 ("Having completed [the bill] to my own satisfaction, I submitted it to Edward Fox [who] … suggested a few changes, principally on technical points, which I accepted.").

80. For biographical information on Edward Fox, *See* Herbert T. Silby, II, Memorable Justices and Lawyers of Maine 188–91 (2006); N. M. Fox, A History of that Part of the Fox Family Descended from Thomas Fox of Cambridge, Mass. 47 (St. Joseph, Mo., Union Printing 1899); William Willis, A History of the Law, the Court and Lawyers of Maine 1636–1863, at iv (Portland, Bailey & Noyes 1863).

81. *See* Sir Wm. Blackstone, Knt., Commentaries on the Laws of England (Portland, Thomas B. Wait 1807); Perley, *supra* note 22, at 75 (stating standard from Blackstone). I am grateful to Chris Livesay, who allowed me to spend a day going through these and other original nineteenth century treatises he has collected in his Brunswick law office.

82. *See* Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 47–48 nn. 36–37 (1983) (observing that Blackstone's *Commentaries* provided the curriculum for early American law schools); Lawrence M. Friedman, A History of American Law 463 n.1 (3d ed. 2005) (describing Lincoln's reliance on Blackstone).

83. *See* Matthew J. Baker, *The Saga of Portland's Unsinkable, Irish Kitty Kentuck,* Portland Monthly 24, 25–27 (Dec. 1996); James Mundy, Hard Times, Hard Men: Maine and the Irish 90–91 (1990).

84. *See* John Neal, *The Liquor Law of Maine—No. 2,* Maine Expositor, Sept. 7, 1853, at 1; John Neal, Wandering Recollections of a Somewhat Busy Life 370–72 (1869).

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

86. John Neal stated that in drafting the Maine Law, Dow "had the help of a legal personage, for whom we profess to feel a sincere regard, in preparing the very portions which are most offensive and preposterous, and which mainly distinguish it from the old law. What those are, will be seen hereafter, as we proceed with the 'searching analysis' we have in our mind." John Neal, *The Liquor Law of Maine,* Maine Expositor, Aug. 31, 1853, at 2. Given Dow's reference to Fox's "technical assistance," the reference is not difficult to decode, but subsequent writings from Neal would clarify any ambiguity. John Neal would quickly grow considerably less charitable toward Fox when he, one week later, specifically named him, noting that was "the gentleman who ranks among one of the putative fathers of the Maine Liquor Law, and is rather disposed to glory in the co-partnership, though he thinks it too merciful." Neal, *Mr. Neal's Reply, supra* note 85.

87. With the exception of women, this did not substantially open up the pool of potential complainants, given Maine's otherwise very liberal suffrage laws. Women, of course, played a substantial role in the Temperance Movement, so this provision may have been perceived to greatly enlarge the number of informants appearing before magistrates. *See generally* Holly Berkley Fletcher, Gender and the American Temperance Movement of the Nineteenth Century (2008). One member of the Maine Legislature objected to permitting women and aliens to seek search warrants. *Speech of Hon. Geo. M. Chase of Washington, In Opposition to the Additional Bill for the Suppression of Drinking Houses and Tippling Shops,* Maine Expositor, April 27, 1853, at 1.

88. *See* Report of Joint Select Committee on So Much of The Address of the Governor as Relates to the Act for the Suppression of Drinking Houses and Tippling Shops, 23 Documents Printed by Order of the Legislature of the State of Maine 26 (1853) (reciting bill).

89. *Id.* at 27.

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

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

92. *See*, e.g., *State v. Staples,* 37 Me. 228 (1854); *State v. Spirituous Liquors,* 39 Me. 262 (1855).

93. The Maine Supreme Judicial Court previously concluded that complaints seeking warrants that failed to allege that the alcohol was intended for sale in the town where housed were defective and the proceedings under them must be quashed. *See State v. Spirituous Liquors,* 33 Me. 527 (1852). The exclusionary rule had thus been previously established in a case in which the pleadings in the complaint were inadequate. The cases following the 1853 law applied this remedy to a failure in the sufficiency of the proof supporting the allegations in the complaint.

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

95. Akhil Reed Amar, *Fourth Amendment First Principles,* 107 Harv. L. Rev. 757, 785–87 (1994).

96. Benjamin Kingsbury, Jr., The Justice of the Peace: Designed to be a Guide to Justices of the Peace for the State of Maine 298 (Portland, Sanborn & Carter 1859).

97. *See* Byrne, *supra* note 1, at v.

98. The British Parliament had, for instance, permitted a search warrant in the seventeenth century for illegally killed game. *See* Grano *supra* note 15, at 480; *See also* E. P. Thompson, Whigs and Hunters: The Origins of the Black Act 63 (1976) (describing eighteenth century law punishing deer hunting by commoners with death). In the nineteenth century, American legislatures, as discussed previously, authorized searches for unlawfully stored gunpowder, pornography, gaming instruments, prostitutes, and lottery tickets. *See* notes *supra* 65–68 and accompanying text; Charles W. Hartshorn, New England Sheriff: Being a Digest of the Laws of Massachusetts Relating to Sheriffs, Jailors, Coroners, and Constables 242 (Worchester, W. Lazell 1844).

99. Governor Horatio Seymour's message vetoing the Maine Law in New York recognized, for instance, that the bill contained a new protection provided for dwelling searches. 4 Charles Z. Lincoln (ed.), Messages from the Governors 758 (1909). *See also* American Temperance Union, Strictures on Governor Seymour's Veto of the Bill for the Suppression of Intemperance 8 (New York, American Temperance Union 1854) (criticizing Seymour for acknowledging new type of protection but dismissing its potential effectiveness).

100. *See* Davies, *supra* note 9, at 637 n.245.

101. Interestingly, this new standard for search warrants (other than liquor) took longer to take hold, likely because police did not have as great an interest in a modern search standard. In New York, for instance, the generic version of the Maine Law was not adopted until 1881. N.Y. Code Crim. Proc. 46–47 (1881). And, as a practical matter, courts in the mid-nineteenth century had begun to issue warrants to search for evidence of crimes other than theft, thus implicitly recognizing that a search warrant could be issued on grounds other than a victim's oath. *See* Abraham Oakey Hall, A Review of the Webster Case, by a Member of the New-York Bar 25 (New York, J.S. Redfield 1850) (describing search warrant for prisoner's house for clothes matching the description of those eyewitness described him to be wearing at time of murder).

102. *See* Oliver, *supra* note 12, at 795.

103. *See* Barbour, *supra* note 6, at 541.