



## ARTICLE

**Probable Cause Revisited**

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**Abstract.** Most judges, lawyers, and scholars take it for granted that to charge a criminal defendant, the government needs only probable cause of guilt. But in fact, probable cause represents a choice, not a fixed element of our legal tradition.

This Article begins with the history of the probable cause standard. It presents novel evidence that many Founding-era American judges rejected the idea, urged by a group of English lawyers and judges a century earlier, that criminal charges require only a “probable ground for accusation.” Many insisted that grand jurors should be *certain* of a suspect’s guilt before returning an indictment, a charging standard that was well suited to the Founding generation’s anxiety about concentrations of power and their informal criminal trials. Probable cause gained traction as a charging standard in the United States in the late nineteenth and twentieth centuries, when the criminal trial gained the appearance of reliability. Grand juries and magistrates no longer needed to be certain of a suspect’s guilt because a trial jury would be. Or so it must have seemed at the time.

The puzzle is that the probable cause standard survived even after the rise of plea bargaining exploded this logic. This Article offers three explanations for probable cause’s survival as a charging standard. First, policymakers may not have valued certainty of guilt, or, for that matter, constraint on prosecution, as much as they once did. Second, “voluntary” guilty pleas may have provided—or *appeared* to provide—adequate certainty of guilt. Third, policymakers may have failed to examine the fit between plea bargaining and probable cause, making probable cause’s survival a matter of unreflective path dependence. But while these explanations are descriptively plausible, they are also normatively troubling. Worse, the probable cause standard exacerbates plea bargaining’s innocence problem and its propensity for prosecutorial control of criminal justice. The time has come to revisit it.

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## Introduction

Most judges, lawyers, and scholars accept uncritically that to charge a criminal defendant, the government must present probable cause of his guilt to a grand jury or magistrate. The Supreme Court, for instance, treats the probable cause standard for federal criminal charges, like the reasonable doubt standard for convictions, as ancient and inevitable.<sup>1</sup> It is not. In reality, probable cause is just one of many criminal charging standards known in theory and history.

Charging standards are essential elements of criminal justice systems, yet the criminal procedure literature has paid surprisingly little attention to them.<sup>2</sup> By contrast, civil procedure scholarship focuses extensively on the analogous feature of civil litigation: pleading standards. Since the Supreme Court revised the civil pleading requirements in *Bell Atlantic Corp. v. Twombly*,<sup>3</sup> scholars have carefully examined the relationship between pleading regimes and other aspects of civil litigation, especially discovery and settlement.<sup>4</sup> Civil pleading rules and criminal charging standards serve a similar function—they determine which cases will be allowed into court. No less than their civil procedure colleagues, criminal procedure scholars should be attentive to the “fit” between a charging standard and the broader adjudicative system to which it belongs.

Part I of this Article begins that effort by offering a simple framework for understanding the relationship between criminal charging standards and adjudicative systems. I argue that charging standards have two primary effects on criminal justice systems: they inhibit erroneous convictions and they

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1. See, e.g., *Kaley v. United States*, 134 S. Ct. 1090, 1097-98 (2014) (“This Court has often recognized the grand jury’s singular role in finding the probable cause necessary to initiate a prosecution for a serious crime.”). The Court has also suggested that states—to which the Fifth Amendment’s Grand Jury Clause does not apply—might be able to initiate prosecution without any charging standard at all. See *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975) (“[T]he probable cause determination is not a constitutional prerequisite to the charging decision . . . .”); see also *Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring in the judgment) (“[T]he due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution.”).

2. The most substantial treatments are BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 42-113 (1991); and Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 478-79 (1980).

3. 550 U.S. 544, 548-49 (2007).

4. See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300 (2010) (“[T]he relationship between pleading standards and discovery costs . . . drives so much of the contemporary debate.”); William H.J. Hubbard, *A Fresh Look at Plausibility Pleading* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 663, 2015), [http://chicagounbound.uchicago.edu/law\\_and\\_economics/743](http://chicagounbound.uchicago.edu/law_and_economics/743) (focusing on the relationship between pleading and settlement).

constrain the delegation of prosecutorial authority. Strict charging standards are attractive to criminal justice policymakers for whom certainty of guilt and prosecutorial constraint are important. And they are especially appealing when certainty and constraint are not otherwise provided for in the adjudicative system.

Part II uses this framework to explore the history of charging standards in the United States from the Founding to the twentieth century, when “probable cause” came to dominate in the federal courts and the majority of the states. Important parts of this history have not before been told. The history demonstrates that, contrary to commonly held intuitions, probable cause is neither inevitable nor ancient, but instead contingent and of fairly recent vintage.

Part II.A presents novel evidence that many judges of the Founding era rejected the idea, urged by a group of English lawyers and judges a century earlier, that criminal charges require only a “probable Ground for an Accusation.”<sup>5</sup> Several Founding-era judges told grand juries that they could indict only if they were *certain* of a suspect’s guilt. Part II.A draws on—but complicates—the leading historical study of criminal charging standards, which found that there was no commonly accepted approach during the Founding era.<sup>6</sup> The recent publication of every surviving grand jury charge from colonial, state, and lower federal courts prior to 1801 makes it possible to revisit that conclusion.<sup>7</sup> From a careful review of the surviving charges, I have identified the positions of twenty-eight Founding-era judges, the vast majority of whom instructed grand juries to use evidentiary standards more demanding than probable cause.<sup>8</sup> Their insistence on a strict charging standard fit the

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5. BILLA VERA: OR, THE ARRAIGNMENT OF IGNORAMUS 13-14 (London 1682).

6. SHAPIRO, *supra* note 2, at 93.

7. See generally GENTLEMEN OF THE GRAND JURY: THE SURVIVING GRAND JURY CHARGES FROM COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801 (Stanton D. Krauss ed., 2012).

8. A note on methods: to identify Founding-era grand jury charges implicating the evidentiary standard for an indictment in *Gentlemen of the Grand Jury*, I relied on Krauss’s extensive and meticulous index. 2 *id.* at 1443 (index entry for grand jury and standard of proof). I also reviewed a sample of charges not marked in the index as pertaining to the standard and found no charges with significant discussion of the charging standard that had been omitted from the index. In an Appendix, on file with the Author and available on request, I provide the relevant charging language of each of the twenty-eight judges. In addition to charges from *Gentlemen of the Grand Jury*, the Appendix contains materials from 2 & 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 (Maeva Marcus ed., 1988) [hereinafter DOCUMENTARY HISTORY]. Part A of the Appendix identifies the judges whom I classify as requiring more than “probable cause” for an indictment. When the language of the charge is not entirely clear, I include a note explaining the reasons for my classification. Part B of the Appendix lists the six Founding-era American judges who advocated that a grand jury should return an indictment based on probable cause alone. These judges are discussed below in Part II.A.3. Part C of the Appendix collects

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criminal justice system of their day well. Trials during the Founding era were summary affairs,<sup>9</sup> making an additional check against erroneous conviction useful. Likewise, the constraint that a strict charging standard imposes on prosecutors aligns with the Founding generation's anxiety about concentrations of power.

Part II.B then examines the slow but steady adoption of the probable cause standard during the late nineteenth and twentieth centuries. Previous scholarship has characterized the emergence of probable cause during this period as mysterious.<sup>10</sup> I argue that probable cause's rise can be understood as a corollary of the formalization of criminal procedure, particularly the criminal trial, during the same time period. Procedural devices like extensive voir dire and error preservation emerged during the same period that probable cause became the dominant charging standard.<sup>11</sup> By the late nineteenth and twentieth centuries, criminal procedure carried the appearance of reliability. Because the criminal justice system had found a different way to accurately judge guilt, it no longer needed a strict charging standard to satisfy its demand for certainty—or so it must have seemed to decisionmakers.

Part III applies the framework developed in Parts I and II to the contemporary use of the probable cause standard. By the second half of the twentieth century, it had become clear to all that plea bargains, not trials, had become the primary mechanism of criminal adjudication.<sup>12</sup> The rise of plea bargaining undercut the probable cause standard's basic logic: that grand juries and magistrates need not be certain of a suspect's guilt because trial juries will be. As Part III.A explains, a substantial body of literature identifies

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additional charges (not counted in the twenty-eight) that touch briefly on the charging standard without clearly articulating a position on the probable-cause-to-certainty continuum. This includes, for instance, judges who told a grand jury that the evidence should be "satisfactory" without explaining what counts as satisfactory. *See, e.g.*, John Sloss Hobart's Charge, City and County of New York, January 1791, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 682, 683 ("They should be equally as careful not to bring forward an indictment upon uncertain conjecture or slight presumption, as to present offenders against the laws, of every degree and description, whenever the charge is satisfactorily supported.").

9. James D. Rice, *The Criminal Trial Before and After the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837*, 40 AM. J. LEGAL HIST. 455, 463 (1996).
10. *See* SHAPIRO, *supra* note 2, at 101-11 (arguing that as preliminary hearings replaced grand juries, the Fourth Amendment's probable cause standard for arrest was imported to the charging context without anyone giving it much thought); Niki Kuckes, *Retelling Grand Jury History*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 125, 146 (Roger Anthony Fairfax, Jr. ed., 2011) ("How the modern federal courts came to abandon the *prima facie* standard in favor of the modern 'probable cause' test is not clear.").
11. *See infra* notes 208-16 and accompanying text.
12. *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979).

consequences of the criminal justice system's pivot to plea bargaining. According to many commentators, plea bargaining spawned (i) strong prosecutorial control over criminal justice,<sup>13</sup> and (ii) chronic uncertainty about the factual and/or legal guilt of the individuals punished.<sup>14</sup> To the extent these critiques are right, plea bargaining diminishes both of the criminal justice values that strict charging standards offer. The probable cause standard, moreover, exacerbates these consequences of plea bargaining in important ways not fully explored in the literature, as Part III.B describes.

Once plea bargaining's domination of the criminal justice system had become apparent, one might have expected to see a reversion to a stricter charging standard. That is not, of course, what happened. Part III.C identifies three ways to understand probable cause's survival in the age of plea bargaining. First, it may be that policymakers no longer valued certainty of guilt or constraints on prosecutors as much as they once did. Second, "voluntary" guilty pleas may have provided, or appeared to provide, an adequate amount of social certainty of guilt. Third, perhaps policymakers never reexamined the fit between charging standards and the plea bargaining regime. This too is plausible. American criminal justice backed into plea bargaining, and formal law has long been ambivalent about it.<sup>15</sup> It is altogether possible that probable cause's survival is nothing more (or less) than path dependency.

A brief Conclusion considers normative implications of the analysis. The crucial implication is that probable cause is a choice, not a fixed element of our legal tradition. While the explanations for probable cause's survival in Part III are descriptively plausible, they are normatively troubling. Charging standards should fit the criminal justice systems of their day, and ours does not. The time has come to recalibrate the charging standard to fit the criminal justice system as it exists now.<sup>16</sup>

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13. See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004) ("[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys.").

14. See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1985-86 (1992).

15. See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1122 (1998) ("Plea bargaining occupies an ambivalent position in the criminal justice system.").

16. A word on scope: my focus is on the charging standard itself, not the institutional mechanism for enforcing it. Because grand juries were long tasked with instituting criminal charges—and still are in the federal courts and many states—the discussion inevitably revolves heavily around them. As the rise of information charging in the late nineteenth century demonstrates, however, grand juries need not be the enforcers of charging standards. See *infra* notes 178-90 and accompanying text (describing the growth of charging by prosecutor's "information" rather than indictment). A substantial body of scholarship identifies reasons separate and apart from the charging standard why grand juries have been rendered irrelevant in modern criminal justice.

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## I. A Framework for Understanding Criminal Charging Standards

Imagine a criminal justice system with no criminal charging standard whatsoever.<sup>17</sup> Prosecutors can file formal criminal charges at will, with or without evidence or suspicion. Cases then proceed to disposition by plea or trial.

Such a system would differ from one with a charging standard in two significant ways. First, it would likely have more false positives. That is, it would probably convict more innocent defendants.<sup>18</sup> Under realistic assumptions, charging standards prevent some number of innocent defendants from being charged.<sup>19</sup> Sometimes this is because a magistrate or grand jury, applying the charging standard, rejects a case.<sup>20</sup> More generally, because prosecutors make charging decisions in the shadow of the charging standard, they sometimes decline to file cases where the evidence falls short. A system without a charging standard lets more innocents proceed to final disposition. Because all adjudicative systems make mistakes, some innocents will inevitably be erroneously convicted.<sup>21</sup> In more formal terms, the combination of a charging standard with a separate merits adjudication is a “second-opinion”

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*See* Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2352 (2008) (“Despite the widespread belief that the grand jury’s role is to serve as a check on the prosecutor, the grand jury is widely criticized for failing to live up to this role.”); *see also* Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 *CORNELL L. REV.* 260, 311 (1995) (“As long as the grand jury proceeding is nonadversarial, and as long as the jurors are asked to make a legal determination based on a single set of facts, there will be no reason to believe that prosecutors will refrain from submitting cases because they fear a no bill.”). To the extent these accounts are correct, they are reasons why charging standards might be better enforced by some other institutional mechanism. *See infra* note 323 (sketching such an institutional mechanism).

17. As noted, the Supreme Court has suggested that it may be constitutionally permissible for states to have such a criminal justice system. *See supra* note 1.
18. It may also have more false negatives of a particular kind. On false positives and false negatives in criminal law, see generally Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 *HARV. L. REV.* 1065 (2015).
19. The crucial assumption is that charging standards act as a constraint on prosecutors. In other words, the framework assumes that there is some set of cases that prosecutors would bring in a world without a charging standard that they would or could not bring in a world with one.
20. In the contemporary American criminal justice system, this happens *very* rarely. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *WASH. & LEE L. REV.* 1413, 1418 & n.18 (2010).
21. *See* FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* 108 (1927) (“All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men.”); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1943 (1992) (“Unfortunately, trials make mistakes. Some innocent defendants—no one knows how many—are convicted.”).

mechanism.<sup>22</sup> When both opinions signal that the defendant is guilty, there is more reason to be confident that he is.<sup>23</sup>

Second, prosecutors in a world without charging standards would possess an unchecked power to subject people to the rigors and risks of the criminal process. A standard imposes a constraint. The constraint may be internal—if the prosecutor feels bound to abide by it.<sup>24</sup> It may be external—if it is enforced by a magistrate, grand jury, or some other independent body. Or it may be both.

Criminal charging standards thus have two significant effects on criminal justice systems: they make them more accurate (with respect to false positives), and they check prosecutorial authority. The stricter the charging standard, the greater the effects. The more one ratchets up a charging standard, that is, the more confident one can be that prosecutors are constrained and that convicted defendants are actually guilty.

This is a simple framework by design, and it does not purport to “predict” the selection of a charging standard.<sup>25</sup> A predictive model would necessarily account for additional variables, especially the social costs of charging standards.<sup>26</sup> But while certainty of guilt and constraint on prosecutorial delegations are not the only considerations bearing on the choice of a charging standard, they are important ones. If demand for one or the other rises or falls, or if their supply elsewhere in the criminal justice system changes, there is a reason to expect a modification in the charging standard. And if the charging

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22. See Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1435 (2011).

23. See *id.* at 1456-57.

24. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 51-53 (2002) (arguing for efficacy of internal controls on prosecutorial screening).

25. A more complicated model would account for dynamic interactions of the charging standard and the adjudicative system. For instance, it may be that juries would be more careful to avoid erroneous convictions if they knew that there had been no charging-stage review. On the other side of the coin, if a trial jury knows that the prosecution’s case had already survived a demanding charging standard, it might be *less* careful in its review of the evidence. Sorting through these dynamic interactions will be necessary to any effort to reform the charging standard. Because I do not propose a specific reform in this Article, I set them to the side.

26. Social costs fall into three categories: First, strict charging standards mean that the government must (in some cases) expend more resources on criminal investigations, or at least it must expend more earlier. Second, a strict charging standard will sometimes cause delay in filing cases, which can be psychologically taxing to existing crime victims, see Rachel I. Wollitzer, *Supreme Court Review—Sixth Amendment: Defendant’s Right to Confront Witnesses: Constitutionality of Protective Measures in Child Sexual Assault Cases*, 79 J. CRIM. L. & CRIMINOLOGY 759, 786 n.226 (1988) (“Even an adult victim who thoroughly comprehends the importance of careful investigation and procedural safeguards in the criminal justice system would feel frustration, pain, and helplessness at the delays and complexities of the system.”), and costly to victims of crimes committed by a suspect during the delay. Third, if a strict charging standard is externally enforced by a judge or grand jury, there will be process costs associated with the review.



standard stays the same despite such changes, that merits further investigation. As we will see in Part II, the framework helps make sense of the peculiar history of charging standards in the United States, and Part III demonstrates that this framework provides useful new ways to understand and evaluate the probable cause standard under modern criminal justice conditions.

## II. A History of Charging Standards

On April 20, 1790, Justice James Wilson charged the first federal circuit grand jury to sit in Pennsylvania.<sup>27</sup> Recognizing that “little business of a particular nature” would come before the grand jurors—the first federal crimes would not be created until later that month—Wilson spoke generally about the American system of grand and petit juries.<sup>28</sup> He especially wished to discuss the “manner[] in which grand juries ought to make enquiries,” a topic that “well deserves to be attentively considered.”<sup>29</sup> Wilson acknowledged that it had been “declared by some, that grand juries are only to enquire, ‘whether what they hear be any reason to put the party to answer,’—‘that a probable cause to call him to answer is as much as is required by law.’”<sup>30</sup> Wilson found this unacceptable: “Ought not moral certainty to be deemed the necessary basis, of what is delivered under the sanction of an obligation so solemn and so strict [as a grand jury’s verdict]?”<sup>31</sup> Then he condemned the “probable cause” doctrine in the strongest possible terms:

The doctrine, that a grand jury may rest satisfied merely with probabilities, is a doctrine, dangerous as well as unfounded: It is a doctrine, which may be applied to countenance and promote the vilest and most oppressive purposes: It may be used, in pernicious rotation, as a snare, in which the innocent may be entrapped, and as a screen, under the cover of which the guilty may escape.<sup>32</sup>

Fast forward to 1978. In September, the Federal Judicial Conference approves a “model grand jury charge” designed for use in district courts around the country.<sup>33</sup> It informs grand jurors that the trial jurors, not them, “decide[]

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27. James Wilson, Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania (April 12, 1790) [hereinafter *Wilson’s Charge*], in 2 DOCUMENTARY HISTORY, *supra* note 8, at 33, 33.

28. On the timing of the first federal crimes, see An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112 (1790); and Paul Taylor, *Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts*, 37 PEPP. L. REV. 847, 889 (2010) (“[T]he Crimes Act of 1790 defined the nation’s first federal crimes.”).

29. *Wilson’s Charge*, *supra* note 27, at 35.

30. *Id.* at 35 & n.7 (quoting sources the book’s editor could not locate).

31. *Id.* at 36.

32. *Id.*

33. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 77 (1978).

whether the accused person is guilty or not guilty of the crime charged in the indictment.”<sup>34</sup> Their task is narrower: “[Y]our duty [is] to see to it that indictments are returned against those who you find probable cause to believe are guilty . . . .”<sup>35</sup> Wilson’s nightmare had been realized.<sup>36</sup>

This Part seeks to recover the peculiar history of criminal charging standards in the United States between the Founding and the twentieth century. Subpart A looks closely at the charging standard at the Founding. The surviving grand jury charges from the era show that judges who considered the evidentiary standard overwhelmingly agreed with Justice Wilson. Subpart B then examines the slow but steady ascent of “probable cause” during the late nineteenth and twentieth centuries.

### A. The Founders’ Charging Standard

According to Barbara Shapiro’s leading historical analysis of Anglo-American charging standards, no commonly accepted understanding of the evidentiary standard for an indictment existed during the Founding era. In her superb study of grand jury charging standards, Shapiro reports that “[d]espite the constitutional provision and the ringing statements of [Justice] Wilson, no commonly accepted evidentiary standard emerged in the early years of the Republic.”<sup>37</sup> New evidence casts new light on this conclusion.

In 2012, Stanton Krauss published *Gentlemen of the Grand Jury*, containing every surviving grand jury charge given by American judges prior to 1801.<sup>38</sup> As detailed in this Part, a careful examination of these charges reveals that among the American judges of the Founding generation who expressed a view, Justice Wilson’s position—that a grand jury should return an indictment only upon an evidentiary showing more demanding than probable cause—dominated. While the anti-probable-cause view may or may not rise to the level of a “commonly accepted evidentiary standard,” the newly available charges demonstrate, at a minimum, that it circulated much more widely than

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34. COMM. ON THE OPERATION OF THE JURY SYS., JUDICIAL CONFERENCE OF THE U.S., REPORT ON THE OPERATION OF THE JURY SYSTEM app. A at 12 (1978) [hereinafter JURY COMMITTEE REPORT]. I am grateful to the Administrative Office of the U.S. Courts for providing the report, which is on file with the Author.

35. *Id.*

36. In 1986, the model grand jury charge was updated. See REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1986). The new version (which is still in use) tells grand jurors that their job is “to determine whether the government’s evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the offense charged.” FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 252 (6th ed. 2013).

37. SHAPIRO, *supra* note 2, at 93; see also Kuckes, *supra* note 10, at 144 (“In the very early years of the new American republic, there was apparently no accepted evidentiary standard for grand jury indictment.”).

38. See GENTLEMEN OF THE GRAND JURY, *supra* note 7.

previously thought. The resistance of many Founding-era judges to criminal charges based on bare probable cause is powerful evidence, moreover, that the probable cause standard is not an inevitable or necessary feature of the American legal tradition.

The Founding-era judges were not writing on a blank slate. They were responding—sometimes explicitly and more often implicitly—to a vigorous debate between two groups of English lawyers and judges from the late seventeenth century. As such, our story begins on the other side of the Atlantic, in the Restoration-era English contests between Tories—who favored a precursor of probable cause—and Whigs—who demanded a stricter standard.

Part II.A proceeds as follows: Subpart 1 explains the English debate and its transmission to America. Subpart 2 describes the charges of the Founding-era American judges who, like the English Whigs, told grand juries to return indictments based on evidentiary criteria stricter than probable cause. Subpart 3 considers the handful of Founding-era judges who gave probable cause instructions. Finally, Subpart 4 offers an explanation of why many Founding-era judges gravitated towards the Whig/Wilson view.

#### 1. The English debate and its transmission

At common law, the job of charging crimes belonged to grand juries.<sup>39</sup> Although the grand jury is traditionally dated to the Assize of Clarendon in 1166,<sup>40</sup> for the first 500 years of its existence, no one gave the evidentiary standard for an indictment the “attentive consideration” that Justice Wilson thought it deserved.<sup>41</sup> Even the great jurist-scholars of the early and mid-seventeenth century, Edward Coke and Matthew Hale, addressed it only in passing. Coke averred vaguely that “seeing the indictment is the foundation of

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39. There was a limited exception in medieval law: prosecution by “appeal.” As Daniel Klerman explains, “Presentment [by a jury] . . . can be seen as an early form of public prosecution. An appeal, on the other hand, was a private prosecution by the victim herself or, in homicide cases, by a relative of the victim.” Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 *YALE J.L. & HUMAN.* 271, 277 (2002).

40. Assize of Clarendon (1166), reprinted in 2 *ENGLISH HISTORICAL DOCUMENTS* 1042-1189, at 440 (David C. Douglas & George W. Greenaway eds., 2d ed. 1981); see MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 6 (1977) (“The ancestor of the grand jury is said by historians to date from 1166, the year of King Henry II’s Assize of Clarendon.”). Some historians find precursors in pre-Norman England. See Wayne L. Morse, *A Survey of the Grand Jury System (Part I)*, 10 *OR. L. REV.* 101, 102-09 (1931); J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 *HARV. L. REV.* 150, 156 (1896) (explaining that the Assize of Clarendon was “simply a revival, in an expanded form, of the old English institution analogous to a Grand Jury, which . . . had existed at least since the time of Ethelred II”).

41. Wilson’s Charge, *supra* note 27, at 35. At least, no record of sustained attention to the issue has survived.

all, it is most necessary to have substantial proof.”<sup>42</sup> Somewhat in tension with Coke, Hale wrote that “in case there be *probable* evidence,” a grand jury “ought to find the bill, because it is but an accusation, and the party is to be put upon his trial afterwards.”<sup>43</sup>

Sustained attention to the grand jury’s evidentiary standard began in 1677, when Zachary Babington published *Advice to Grand Jurors in Cases of Blood*.<sup>44</sup> Babington, the longtime assize clerk at Oxford, was worried that grand juries too often returned indictments for manslaughter rather than murder.<sup>45</sup> Grand jurors, he believed, typically lacked the legal knowledge to grade homicides.<sup>46</sup> Unlike trial jurors, moreover, they had no access to the defendant’s evidence.<sup>47</sup>

The grand jury’s deficient legal and evidentiary tools translated, for Babington, into a minimalist epistemological conception of indictments. “[I]t is the duty of all Grand Jurors, in all Cases of blood,” Babington explained, “where the Bill of Indictment is brought unto them for Murther, in case they find, upon the Evidence, *any probability* that the person said to be killed in the Indictment[] was slain by the person charged to do it in the Indictment[,] to put *Billa vera* [true bill] to that Indictment.”<sup>48</sup> Any higher evidentiary standard, in Babington’s view, and the grand jury risked usurping the role of the trial judge or jury:

[H]ow exceeding dangerous and inconvenient were it for Grand Jurors, so far to anticipate the Judgment of the Court, and to take upon themselves . . . the sole Judgment of Law in all these Cases, by not finding the Indictment[,] . . . especially . . . where they have probable Evidence (for they need no more) to prove such a person killed by the hands of such a person . . .<sup>49</sup>

While Babington sought throughout *Advice to Grand Jurors* to minimize the grand jury’s interference in the administration of criminal justice, he never

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42. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 25-26 (London 4th ed. 1669). The Third Part of Coke’s *Institutes* was first published in 1644.

43. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 157 (Sollom Emlyn ed., Savoy, E. & R. Nutt & R. Gosling 1736).

44. See ZACHARY BABINGTON, ADVICE TO GRAND JURORS IN CASES OF BLOOD (London 1680).

45. SHAPIRO, *supra* note 2, at 56.

46. See BABINGTON, *supra* note 44, at 81-82.

47. Babington argued that grand juries should maximize the trial jury’s freedom of action by returning murder indictments in *all* homicides. *Id.* at 15-16. If the trial jury determined that the proper charge was manslaughter, it could return that verdict on a murder indictment, but it could not return a murder verdict on a manslaughter indictment.

48. *Id.* (emphasis added). He went further later in the tract, writing that a “strong Suspicion, and the Fame of the Country may (in many cases) be Evidence sufficient . . . to find a Bill.” *Id.* at 119.

49. *Id.* at 63.

explained what positive function the grand jury *should* play. The omission would become central to the Whigs' response.

Only a few years after *Advice to Grand Jurors* appeared, the Tory prosecutions of Whigs Stephen Colledge and Anthony Ashley Cooper, the Earl of Shaftesbury, thrust the grand jury into the political spotlight. The Colledge and Shaftesbury cases are inseparable from the political and religious context of the Exclusion Crisis, which pitted Shaftesbury, an anti-Catholic "country" politician and the leader of the nascent Whig Party, against King Charles II and his brother James, the Catholic Duke of York.<sup>50</sup> The major political aim of the early Whigs was legislation excluding James—whom they saw as embodying absolutism—from the line of succession.<sup>51</sup> Their power base was the House of Commons, where they won majorities in three elections held between 1679 and 1681.<sup>52</sup> Charles and James's supporters, who became known as the Tories during this period, fended off exclusionary legislation from their stronghold in the House of Lords.<sup>53</sup> In 1681, the Whigs lost their political clout when Charles dissolved the Oxford Parliament (so named because it met at the Tory stronghold of Oxford) without calling new elections.<sup>54</sup> Not satisfied with merely a political victory, Tories made plans to prosecute several Whigs, including Shaftesbury.<sup>55</sup> But first, they would need to secure grand jury indictments.

Colledge, a minor figure in the Whig party, was the warm-up. The Crown accused him of threatening violence during the Oxford Parliament and asked a London grand jury to return an indictment for treason.<sup>56</sup> Unfortunately for

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50. See J.R. JONES, *THE FIRST WHIGS: THE POLITICS OF THE EXCLUSION CRISIS, 1678-1683*, at 4-8 (1961).

51. *Id.* at 67-68.

52. *Id.* at 6-8. Some historians argue that Jones overstated the political importance of both the Exclusion Crisis and Shaftesbury. See Newton E. Key, 'High Feeding and Smart Drinking': Associating Hedge-Lane Lords in Exclusion Crisis London, in *FEAR, EXCLUSION AND REVOLUTION: ROGER MORRICE AND BRITAIN IN THE 1680S*, at 154, 154-56 (James McElligott ed., 2006) (describing debate and collecting sources). The important points for my purposes are that there was a political crisis and that the Earl of Shaftesbury was a major player in it. At least the main thrust of the debate among historians does not seem to challenge either point. See *id.* at 155-56 ("In the wake of this revisionist deconstruction, the best current analysis of the period arrives at only the diffuse conclusion 'that the crisis and men's responses to it were more complex than was once thought.'" (quoting MARK KNIGHTS, *POLITICS AND OPINION IN CRISIS, 1678-81*, at 368 (1994))); see also KNIGHTS, *supra*, at 5-15.

53. See JONES, *supra* note 50, at 72-73, 140-41.

54. *Id.* at 180. Charles could do so because he had made a secret agreement with France for financial support, rendering revenue bills unnecessary. *Id.* at 176.

55. See *id.* at 182, 189.

56. The eventual charges against Colledge are described in *The Trial of Stephen Colledge, at Oxford for High-Treason, August 17, 1681, 33 Car. II, in 3 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS UPON HIGH-TREASON, AND OTHER CRIMES AND*  
*footnote continued on next page*

the Crown, London was the Whigs' last remaining bastion of influence. A Whig-packed grand jury returned an "ignoramus," what today we would call a "no bill."<sup>57</sup> Colledge's victory proved short-lived. The Crown brought the case to a grand jury in Oxford, which returned a true bill.<sup>58</sup>

The stage was thus set for the prosecution of Shaftesbury himself, whose popularity had ebbed since the dissolution of the Oxford Parliament.<sup>59</sup> Tories saw his prosecution as among the final steps in mopping up the Exclusion Crisis.<sup>60</sup> The Crown alleged that he had committed treason by threatening Charles.<sup>61</sup> Apparently lacking a jurisdictional basis to bring their case outside London, however, the Tories were stuck with a Whig grand jury.<sup>62</sup>

Chief Justice Pemberton, the presiding Tory judge, attempted to counter the grand jury's political affiliation by insisting that the evidentiary bar for an indictment was very low. Although he never cited Babington by name, the influence was clear. "Look ye, Gentlemen," Pemberton implored, "I must tell you, That that which is referr'd to you, is to consider, whether, upon what Evidence you shall have given unto you, there be any Reason or Ground for the King to call these Persons to an Account."<sup>63</sup> He continued: "A probable Cause, or some Ground, that the King hath to call these Persons to answer for it, is enough, Gentlemen, for you to find a Bill, 'tis as much as is by Law requir'd."<sup>64</sup> Pemberton's gambit failed when the grand jury returned another ignoramus.<sup>65</sup>

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MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE END OF THE REIGN OF KING GEORGE I 342 (London 2d ed. 1730) [hereinafter STATE TRIALS].

57. JONES, *supra* note 50, at 188-89; see also Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 IND. L.J. 323, 325 n.20 (2004) ("A refusal to indict results in a 'no bill' or, traditionally, a finding of 'ignoramus' (we ignore it).").

58. JONES, *supra* note 50, at 189.

59. *Id.*

60. *See id.*

61. *See* Proceedings at the Old-Baily, upon the Bill of Indictment for High-Treason Against Anthony Earl of Shaftesbury, November 24, 1681, 33 Car. II, in 3 STATE TRIALS, *supra* note 56, at 414, 418.

62. *See* JONES, *supra* note 50, at 191 (describing the procedure by which Whig officials selected the Shaftesbury grand jury).

63. Proceedings at the Old-Baily, *supra* note 61, at 415-16.

64. *Id.* at 416.

65. The record reflects that when the ignoramus was returned, "the People fell a hollowing and shouting." *Id.* at 437 (italics omitted). The Crown's overreach had the effect of briefly restoring some of Shaftesbury's lost popularity. JONES, *supra* note 50, at 194. By 1682, however, the Tories had consolidated their influence in London. *Id.* at 198-206. Fearing another grand jury proceeding (then, as now, a grand jury ignoramus was no bar to subsequent prosecution), Shaftesbury fled into exile. *See* K.H.D. HALEY, THE FIRST EARL OF SHAFTESBURY 728 (1968) (noting Shaftesbury's departure); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 *footnote continued on next page*

In the aftermath of the Colledge and Shaftesbury cases, books and pamphlets about the evidentiary standard for an indictment proliferated. Many of the contemporary pamphleteers praised the London grand juries. Henry Care, a prominent Whig, included a section on grand juries in his influential book, *English Liberties: Or, The Freeborn Subject's Inheritance*, first published in 1681 or 1682.<sup>66</sup> Grand jurors, just like petit jurors, Care wrote, must “be fully satisfied in their Consciences, that [the defendant] is *Guilty*.”<sup>67</sup> Care also responded to the “probable cause” standard advanced by Pemberton: “People may tell you, That you ought to find a Bill upon any probable Evidence, for 'tis but matter of Course, a Ceremony, a Business of Form, only an Accusation . . .”<sup>68</sup> This cannot be, Care reasoned, or else “to what purpose have we Grand Juries at all?”<sup>69</sup> An anonymous pamphleteer echoed this theme, explaining that the idea that grand juries should return indictments based on the “probability of the thing” rendered them “[o]nly for show.”<sup>70</sup>

The most sophisticated writing on the Whig side—indeed the Whigs’ real answer to Babington—was *The Security of Englishmen's Lives*, written in 1681 by Lord John Somers.<sup>71</sup> Early in the tract, Somers offered what Babington had not—an explanation of the grand jury’s function. “Our ancestors” instituted a grand jury, Somers reasoned, because they “thought it not best to trust” the power of criminal accusation to

any officer of the king’s, or in any judges named by him, nor in any certain number of men during life, lest they should be awed or influenced by great men, corrupted by bribes, flatteries, or love of power, or become negligent, or partial to friends and relations, or pursue their own quarrels or private revenges, or connive at the conspiracies of others, and indict thereupon.<sup>72</sup>

Somers thus saw the grand jury as a vital check against the dangers inherent in delegating prosecutorial power to the King’s officials.

His understanding of the grand jury’s role led Somers to a strict evidentiary criterion for an indictment: a grand juror should vote to find a true bill only if his conscience is satisfied that the defendant is in fact guilty.<sup>73</sup> This

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B.U. L. REV. 1, 10 (2002) (“Shaftesbury himself was forced to flee the country rather than risk being brought before a second, less sympathetic grand jury.”).

66. See HENRY CARE, *ENGLISH LIBERTIES: OR, THE FREE-BORN SUBJECT'S INHERITANCE* (London, George Larkin 1682). On the publication date of Care’s first edition, see SHAPIRO, *supra* note 2, at 285 n.72.

67. CARE, *supra* note 66, at 207.

68. *Id.* at 219 (italics omitted).

69. *Id.* (italics omitted).

70. A GUIDE TO ENGLISH JURIES: SETTING FORTH THEIR ANTIQUITY, POWER, AND DUTY, FROM THE COMMON-LAW, AND STATUTES 53 (London 1682).

71. See JOHN SOMERS, *THE SECURITY OF ENGLISHMEN'S LIVES, OR THE TRUST, POWER, AND DUTY OF THE GRAND JURIES OF ENGLAND* (Tewkesbury, W. Dyde 1798) (1681).

72. *Id.* at 27.

73. See *id.* at 46-47, 64-65.

standard was, to Somers, anathema to the Tory focus on “probabilities.” “Probable, is a logical term,” he explained, “relating to such propositions, as have an appearance, but no certainty of truth; shewing rather what is not, than what is the matter of syllogisms.”<sup>74</sup> Somers allowed that “[t]hese may be allowed in rhetorick,” but not “in logick, whose object is truth.”<sup>75</sup>

The debate between the Whigs and the Tories was conducted in epistemological terms—should an indictment require “certainty” or “probability”? Not far beneath the debate’s surface lurked a fiercely contested political question: Should grand juries constrain prosecutors? The parties’ positions were dictated by the facts on the ground. Tories controlled the prosecutorial function. Whigs did not. Predictably, when Whigs were haled before grand juries on political charges, their allies championed the grand jury as a check against delegated prosecutorial power. And they adopted a demanding charging standard, backed by moral and epistemic arguments. For the Tories, checks on prosecutorial power obstructed the plan to prosecute their political rivals. Inevitably, the Tories gravitated to a permissive charging standard, which they justified by touting the epistemic advantages of petit over grand juries.

My concern is not with the Whigs and Tories per se, but with their impact on American thinking. Americans learned about their debate, and generally about the English law of grand juries, in three main ways: reprinted Whig tracts, legal treatises, and justice of the peace manuals.

First, Americans read Whig writing about the indictment standard. Two of the most significant Whig pamphlets of the debate were reprinted in America.<sup>76</sup> Somers’s *The Security of Englishmen’s Lives* was printed in New York

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74. *Id.* at 89. Recalling the case of two officials convicted of treason for attempting to abolish the grand jury during the sixteenth century, Somers exclaimed that those who “obliquely endeavour[] to render grand juries useless” are no “less criminal, than he that would absolutely abolish them.” *Id.* at 79-80. It is hard to read this as anything other than a criminal accusation against Babington and Pemberton.

75. *Id.* at 89-90. Whig writers predominated in the aftermath of the Colledge and Shaftesbury proceedings, but the Tories were not without retort. An anonymous pamphleteer in *Billa Vera: Or, The Arraignment of Ignoramus* demanded to know: “Was there no Colour, no probable ground, no sufficient matter for an Accusation?” *BILLA VERA*, *supra* note 5, at 26 (emphasis omitted). The pamphlet has been attributed to Laurence Womock. See Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell’s Case*, 111 *YALE L.J.* 1815, 1850 & n.174 (2002). Similarly, Tory Roger North defended the “probable cause” doctrine in his book *Examen*, writing that if the evidence before the grand jury “be lawful and full,” it must return the indictment and leave it to the petit jury to judge the circumstances and the credibility of the witnesses. ROGER NORTH, *EXAMEN: OR, AN ENQUIRY INTO THE CREDIT AND VERACITY OF A PRETENDED COMPLETE HISTORY* 113-14 (London 1740). But on the whole, the Tory side lacked any particularly sophisticated response to Somers. This may explain the third reprinting of Babington in 1692.

76. Imported copies of the Whig and Tory grand jury pamphlets of the 1670s and 1680s may have also made their way into American law libraries. Herbert Johnson’s catalog of imported law books in eighteenth-century American libraries indicates that Henry

*footnote continued on next page*



in 1773,<sup>77</sup> and Henry Care's *English Liberties* was printed in Boston in 1721 and Providence in 1774.<sup>78</sup> On the other hand, none of the Tory pamphlets of the debate seem to have been reprinted in America. Americans apparently had an appetite for Whig writing on grand juries, especially in the run-up to independence.

Treatises were the second major source of American knowledge of English grand juries. Two are particularly important: Matthew Hale's *History of the Pleas of the Crown* and William Blackstone's *Commentaries on the Law of England*. I have already noted Hale's remark ratifying the Tory position, which was written sometime before the Whig-Tory debate.<sup>79</sup> Curiously, when his treatise was published posthumously in 1736, its editor appended a footnote suggesting that the law of indictments had since moved towards the Whig view.<sup>80</sup>

As on so many issues, Blackstone was also influential on American thinking. Here, in full, is his analysis of the grand jury's evidentiary standard:

[T]hey are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with

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Care's *English Liberties* was in the libraries of William Byrd II, Robert Treat Paine, and St. George Tucker. See HERBERT A. JOHNSON, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES, 1700-1799, at 12 (1978). In a 1706 grand jury charge, moreover, Nicholas Trott, the first Chief Justice of South Carolina, cited Babington's *Advice to Grand Jurors*, indicating that Trott at least had knowledge of Babington's argument, if not the book itself. See *infra* note 125 and accompanying text (discussing Trott's charge).

77. 1 MORRIS L. COHEN, BIBLIOGRAPHY OF EARLY AMERICAN LAW 140 (1998).

78. *Id.* at 713-14.

79. 1 HALE, *supra* note 43, at 157 (stating that "in case there be probable evidence," the grand jury "ought to find the bill, because it is but an accusation, and the party is to be put upon his trial afterwards" (emphasis omitted)). Because Hale's treatise was published posthumously, see Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It?: Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 129 (2005), the exact date of his writing is unknown. Shapiro estimates that Hale was writing around 1667. SHAPIRO, *supra* note 2, at 55.

80. In the footnote, Hale's editor wrote:

This same doctrine is laid down by C.J. Pemberton, in the case of the earl of Shaftesbury. *Vide tamen* Sir John Hawles remarks on that case, wherein he unanswerably shews, that a grand-jury ought to have the same persuasion of the truth of the indictment, as a petit jury, or a coroner's inquest.

1 HALE, *supra* note 43, at 157 n.(a) (italics omitted) (citations omitted). The reference is to John Hawles's 1689 commentary on the Shaftesbury proceedings. See JOHN HAWLES, REMARKS UPON THE TRYALS 47-48 (London 1689) (criticizing Pemberton's "probable cause" instruction). By maintaining that Hawles's critique of Pemberton, and by extension, Hale, was "unanswerable," the editor suggests that the law had evolved between Hale's writing and its publication.

remote probabilities: a doctrine, that might be applied to very oppressive purposes.<sup>81</sup>

While Blackstone is not unequivocal,<sup>82</sup> he does take a side in the Whig-Tory contest. The replacement of “sufficient cause” for the preferred Tory formulation of “probable cause” is telling. Still more revealing is his insistence that the grand jury must be “thoroughly persuaded of the truth” of the indictment, a notion incompatible with Tory thinking. But the coup de grâce is a footnote at the end of Blackstone’s discussion citing a Whig critic of Chief Justice Pemberton for the proposition that the “remote probabilities” standard can lead to “oppressive purposes.”<sup>83</sup> This is, in context, a direct attack on Pemberton. While the Whigs would have pushed back against Blackstone’s claim that the indictment is only an “accusation,” rather than a “verdict,” they would, on the whole, have embraced his text. The Tories would have resisted it.

Third, and most importantly, Americans learned of the Whig-Tory debate in justice of the peace manuals. As Thomas Davies has noted, justice of the peace manuals were “probably the sources regarding criminal procedure that were most accessible to members of the Framers’ generation.”<sup>84</sup> Beginning in 1765, manuals began to appear in the colonies based on Burn’s *The Justice of the Peace, and Parish Officer*, a popular British work.<sup>85</sup> Burn, and his American

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81. 4 WILLIAM BLACKSTONE, COMMENTARIES \*303.

82. See SHAPIRO, *supra* note 2, at 82 (arguing that Blackstone attempted to combine the Whig and Tory views).

83. 4 BLACKSTONE, *supra* note 81, at \*303 & n.8 (citing Remarks on the Earl of Shaftesbury’s Grand Jury, in 4 STATE TRIALS, *supra* note 56, at 183, 183).

84. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 280 (2002).

85. RICHARD BURN, THE JUSTICE OF THE PEACE, AND PARISH OFFICER (London, Henry Lintot 1755). The first American manual based on Burn was *Conductor Generalis*. See Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 9 n.18 (2010). Prior to 1765, three American justice of the peace manuals articulated views consistent with Whig thinking about grand juries. The first American manual, published in 1711, emphasized the similarity between the grand and petit juries: “[N]o Man’s Life . . . shall be touched for any Crime whatsoever, but upon being found Guilty on two several Tryals, for so may that of the Grand and Petty Jury be rightly termed . . . .” CONDUCTOR GENERALIS: OR, A GUIDE FOR JUSTICES OF THE PEACE 156 (New York 1711). The next, in 1722, declared that an indictment, “being in the Nature of a Declaration for the King, ought to be certain, and must not be splied by Implication or Intendment.” CONDUCTOR GENERALIS: OR THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 140 (Philadelphia, Andrew Bradford 1722). In 1750, Benjamin Franklin published a second edition of the 1722 manual. It maintained (in slightly modified form) the language just quoted and added that “Indictments ought to be framed so near the Truth as may be, and the rather, for that they are to be found by the Jury upon their Oaths.” CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 171 (Philadelphia, B. Franklin & D. Hall, 2d ed. 1750) (1722).

followers, provided the following extended description of the Whig-Tory debate:

Lord Hale says, that the grand jury at the assizes or sessions ought only to hear the evidence for the king, and in case there be probable evidence, they ought to find the bill, because it is but an accusation, and the party is to be put on his trial afterwards.

Which doctrine is also laid down by Chief Justice Pemberton, in the case of the Earl of Shaftesbury.

But the learned editor of *Hale's History* observes upon this, that Sir John Hawles in his remarks on the said case, unanswerably shews, that a grand jury ought to have the same persuasion of the truth of the indictment as a petty jury, or a coroner's inquest; for they are sworn to present the truth, and nothing but the truth.

And L. Coke says, that seeing indictments are the foundation of all, and are commonly found in the absence of the party accused, it is necessary there should be substantial proof.<sup>86</sup>

Manuals containing this language were printed widely in America.<sup>87</sup>

Shapiro argues that readers of Burn's manual (and the manuals derived from it) must have been puzzled by how to reconcile the views of Hale and Pemberton, on the one hand, and Hale's editors and Hawles, on the other, with Coke perhaps "seem[ing] to offer a third alternative."<sup>88</sup> This is possible, but the text can also be read as presenting the reader with distinct alternatives. Of course, that still leaves readers with the problem of choosing Option A (Hale and Pemberton) or Option B (Hale's editor, Hawles, and maybe Coke). As we will see, many American judges of the Founding era did see this as a choice, and they overwhelmingly picked Option B.

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86. 2 BURN, *supra* note 85, at 26 (italics omitted) (citations omitted).

87. Specifically, manuals containing the language were printed in Boston in 1773, *see* ABRIDGMENT OF BURN'S JUSTICE OF THE PEACE AND PARISH OFFICER (Boston, Joseph Greenleaf 1773); Williamsburg in 1774, *see* RICHARD STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF PEACE (Williamsburg, Alexander Purdie & John Dixon 1774); New York in 1788 (twice), *see* THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (New York, Hugh Gaine 1788); JAMES PARKER, CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (New York, John Patterson 1788); Philadelphia in both 1788 and 1792, *see* THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (Philadelphia 1792); THE SOUTH-CAROLINA JUSTICE OF PEACE (Philadelphia, R. Aitken & Son 1788); Albany in 1794, *see* THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (Albany, Charles R. & George Webster 1794); Richmond in 1795, *see* WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, IN THE COMMONWEALTH OF VIRGINIA (Richmond, T. Nicolson 1795); and Philadelphia again in 1801, *see* THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE (Philadelphia, Charless 1801). As discussed below, other manuals, not based on Burn, did exist. *See infra* notes 122-23 and accompanying text.

88. SHAPIRO, *supra* note 2, at 86.

## 2. The Founding: general view

Until recently, the readily available historical record included the views of only a handful of Founding-era judges about the evidentiary standard for an indictment. Thanks to the publication of *Gentlemen of the Grand Jury*,<sup>89</sup> the situation has improved markedly.

Grand jury charges in the Founding era had a variety of functions. As Roger Fairfax observes, some judges used them to “lecture captive audiences of prominent local citizens on political issues of the day.”<sup>90</sup> Many judges also oriented the grand jurors to the task before them. They explained the jurisdiction’s substantive criminal law,<sup>91</sup> the process for receiving witness testimony,<sup>92</sup> and the grand jury’s relationship with the prosecuting attorney.<sup>93</sup> In many instances, judges also instructed the jurors on the quantum of evidence they should demand before returning an indictment, an issue that almost never appeared in published legal opinions.<sup>94</sup> Grand jury charges thus open an extraordinary window into the thinking of early American jurists about the evidentiary requirement for a criminal charge.

Founding-era judicial instructions about the quantum of evidence required for an indictment were not uniform, but neither were they closely divided between Whig and Tory views. As this and the next Subparts show, in Founding-era America, among judges who addressed the issue, the Whigs won.

Several judges adopted Blackstone’s “thoroughly persuaded” language. Judge Thomas Waties’s 1789 charge to a South Carolina grand jury is typical of this approach: “[Y]ou ought to be thoroughly persuaded of the truth of an indictment, as far as the evidence goes, before you assent to it; and ought not to send a person to his trial upon probable grounds only, and the mere presumption of criminality.”<sup>95</sup> Other charges told the grand jury to find an

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89. GENTLEMEN OF THE GRAND JURY, *supra* note 7.

90. Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 730 n.155 (2008).

91. See, e.g., Francis Dana’s Charge, 1791, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 400, 400-05 (describing substantive criminal law of Massachusetts).

92. See, e.g., St. George Tucker’s Charge, June, 1793, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1351, 1351 (“[S]hould you wish to have Witnesses brought before you, the Court will order the proper process for that purpose, on your application.”).

93. See, e.g., *id.* (“Indictments will be sent up to you in some Cases by the [Attorney] for the [Commonwealth].”).

94. I am aware of only one: *Respublica v. Shaffer*, 1 U.S. (1 Dall.) 236, 237 (Pa. 1788).

95. Thomas Waties’s Charge, Beaufort, Orangeburgh, & Ninety-Six Districts, 1789, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1243, 1243. Additional Blackstonian charges include Alexander Addison’s Charge, Allegheny, Fayette, Washington, & Westmoreland Counties, September, 1792, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 809, 814; John Houstoun’s Charge, Liberty County, January 31, 1792, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 108, 109; Rufus Putnam’s Charge, Hamilton County, October 7, 1794, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, *footnote continued on next page*

indictment only if it was “satisfied,”<sup>96</sup> “well satisfied,”<sup>97</sup> “fully satisf[ied],”<sup>98</sup> “convince[d],”<sup>99</sup> or “well convinced”<sup>100</sup> of the defendant’s guilt. At least two judges incorporated the Whig idea that grand jurors should present a defendant for trial only if their “consciences” were “satisfied.”<sup>101</sup> Yet other judges instructed grand juries to find an indictment only with “the most unequivocal evidence,”<sup>102</sup> “moral certainty,”<sup>103</sup> evidence “sufficient to convict,”<sup>104</sup> the “most probable grounds,”<sup>105</sup> the “strongest appearance of criminality,”<sup>106</sup> or when it had no “reasonable cause of Doubt.”<sup>107</sup> While these formulations offer a range of certainty levels, they share a common theme: all go beyond, and often far beyond, the bare “probable cause” criterion advanced by the English Tories.

While the charges sometimes simply asserted a particular evidentiary criterion, many judges explained their thinking. Like the Whigs before them, several Founding-era judges expressly criticized criminal charges based on “probabilities.” We have already seen Justice James Wilson’s argument that the probable cause standard could be applied to “promote the vilest and most oppressive purposes.”<sup>108</sup> Other judges echoed this concern. Chief Justice James Kinsey of New Jersey found the probable cause standard inconsistent with the grand juror’s oath:

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at 727, 730; and George Turner’s Charge, Hamilton County, April 8, 1794, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 725, 726.

96. Edward Shippen’s Charge, City of Philadelphia, October 24, 1785, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 770, 773.
97. Francis Dana, Undated Charge Number 4, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 558, 559.
98. Edward Shippen’s Charge, Philadelphia County, August 23, 1794, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 866, 869.
99. William Goforth’s Charge, Hamilton County, February, 1795, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 730, 733.
100. William Stith’s Charge, Greene County, January, 1794, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 129, 129.
101. Thomas Waties’s Charge, *supra* note 95, at 1243; accord Edward Shippen’s Charge, 1791, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 777; Edward Shippen’s Charge, November, 1800, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1068, 1069.
102. John Williams’s Charge, Washington County, 1791, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 686, 687.
103. Wilson’s Charge, *supra* note 27, at 36.
104. Lot Hall’s Charge, Windham County, August, 1797, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1309, 1311.
105. Enoch Edwards’s Charge, Philadelphia County, March 7, 1791, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 780, 783.
106. *Id.*
107. Nathaniel Peaslee Sargent’s Charge, Middlesex County, November, 1780 (and Earlier), in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 347, 348.
108. Wilson’s Charge, *supra* note 27, at 35-36.

[T]ho' I have often heard it laid down as a rule, that probability is a sufficient ground for you to indict a citizen, . . . [I] have always viewed it as a principle against which reason revolts. . . . Indeed if the oath of a Grand-Juryman be considered and compared with that of the Petit-jury, and if it also be considered that those writers who absurdly advance this doctrine tell you that probability is by no means sufficient for a Petit-jury to convict, and that it ought to weigh but little, I confess I cannot suggest to myself any solid ground for the distinction made between a Petit and a Grand-jury . . .<sup>109</sup>

South Carolina's Judge Waties agreed: "When indeed you recollect that you are sworn 'to present nothing but the truth,' you will without doubt require something more than probability to support every charge . . ."<sup>110</sup>

The notion that the grand jury's inquiry should be as strict or stricter than the petit jury's recurred frequently. "[W]hy should a less evidence indict a man," Judge William Cooper of New York asked, "than the petit-jury have for their verdict?"<sup>111</sup> "[G]reater exactness and diligence," he continued, "is required of the grand-jury."<sup>112</sup> For Judge Edward Shippen of Pennsylvania, the concurrence of grand and petit jury protects liberty:

So tender is the Law, and so indulgent to every Person charged with a criminal Offence, that before any Bill of Indictment can be returned a true Bill, there must be at least twelve of the Grand Jury who must concur in finding the Charge again him satisfactorily proved; and after that, before he can be finally convicted, the whole Petit Jury must agree in the same Judgment; So that twenty four at least of his fellow Citizens must be satisfied of his guilt, before the Law can punish him.<sup>113</sup>

In a similar vein, Justice Samuel Chase wrote that "every Grand Jury, before they find an indictment, should expect the same proof, and as satisfactory evidenc[e] of the guilt of the accused as the Petit Jury would require to Justify their verdict against him."<sup>114</sup>

Other judges connected a strict evidentiary requirement to the fact that grand jurors heard only the government's evidence. Justice Francis Dana of Massachusetts, for instance, noted in an undated charge that because the grand

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109. James Kinsey's Charge, Hunterdon County, April 6, 1790, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 597, 599.

110. Thomas Waties's Charge, *supra* note 95, at 1243.

111. William Cooper's Charge, Otsego County, 1791, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 685, 686.

112. *Id.*

113. Edward Shippen's Charge, *supra* note 96, at 773; *see also* Thomas Carnes's Charge, Burke County, September, 1798, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 206, 207. Justice Blair of the Supreme Court took the same view. John Blair's Charge to the Grand Jury of the Circuit Court for the District of Delaware, October 27, 1794, in 2 DOCUMENTARY HISTORY, *supra* note 8, at 485, 485.

114. Samuel Chase's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, April 12, 1800, in 3 DOCUMENTARY HISTORY, *supra* note 8, at 408, 409 (alteration in original) (emphasis omitted).

jury would proceed in secret and hear only the government's witnesses, "you are to proceed with due caution and to be well satisfied that the evidence laid before you . . . is sufficient to do away the first presumption of Innocence, before you establish the accusation."<sup>115</sup> Likewise, Pennsylvania's Judge Shippen explained in 1793 that:

As you hear the Evidence on one Side only, that Evidence should be full and convincing; it is not enough that there are probable Grounds of the Guilt of the party but the proof must be either positive, or strongly presumptive, before you put the party to the Hazard Pain or Expence of a public Trial.<sup>116</sup>

Yet another argument grounded a strict evidentiary criterion in the presumption of innocence. Judge Alexander Addison of Pennsylvania wrote that when the evidence against a suspect is "light or rash," the "common presumption of innocence is a sufficient counterpoise, and you may safely disregard an accusation so lightly supported."<sup>117</sup> Massachusetts's Justice Dana concurred: "In all your enquiries Gentlemen take this maxim with you, That the Law presumes every Man innocent untill his guilt is made apparent."<sup>118</sup>

### 3. The Founding: outliers

From the surviving grand jury charges, we know that at least six Founding-era American judges charged grand jurors to return an indictment on probable cause alone.<sup>119</sup> Four of them—William Henry Drayton, Henry Pendleton, John Faucheraud Grimke, and Elihu Hall Bay—were from South

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115. Francis Dana, *supra* note 97, at 559.

116. Edward Shippen's Charge, Bucks County, October, 1793, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 848, 849; see also James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Georgia, October 17, 1791, in 2 DOCUMENTARY HISTORY, *supra* note 8, at 216, 223 ("[A]s the evidence to a Grand Jury is usually, and perhaps ought always, to be on the side of the prosecution only . . . unless there is a high probability from the evidence before the Grand Jury, there is little prospect of a final conviction by the petit jury, who may have more favorable evidence for the person accused, but can be seldom expected to have stronger against him . . .").

117. Alexander Addison's Charge, *supra* note 95, at 814. Later in the charge, Addison adds: "For a grand jury ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes, and not rest satisfied merely with remote probabilities." *Id.*

118. Francis Dana, Undated Charge Number 3, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 557, 557 (emphasis omitted).

119. I have excluded from this study a 1779 grand jury charge by Judge Anthony Stokes, who came to Georgia from England shortly before the Revolutionary War erupted. In a postwar memoir, Stokes makes clear that he was a British judge doing temporary duty in America, not an American. ANTHONY STOKES, A NARRATIVE OF THE OFFICIAL CONDUCT OF ANTHONY STOKES 109 (London 1784). Indeed, during the war he was captured by American military forces, *id.* at 28-29, released, *id.* at 34-35, went to Great Britain, *id.* at 45, and then returned during a British countercharge, *id.* at 49-51. His views on the proper criminal charging standard might be probative of contemporary thinking in London, a topic beyond my scope, but he was not a member of the Founding generation of American judges.

Carolina, while the other two—Thomas McKean and Richard Peters—presided in Pennsylvania.

a. South Carolina

Between 1774 and 1784, three South Carolina judges charged grand juries in conformity with the Tory probable cause standard.<sup>120</sup> None of the charges contained a detailed explanation of the standard's logic. The most elaborate justification was from Judge Grimke, who explained the probable cause standard as a kind of inverted Blackstone ratio:

[I]t is not to be understood that you are to make so minute an investigation into such matters, as are the proper subjects of your enquiry, as to establish the fact itself. You are to find the bill, tho' founded only upon probable grounds of suspicion, that the accused is guilty. . . . And in conformity to that wise maxim which declares that it is better that ten guilty men should elude the justice of the Courts of Law, than that one innocent person should suffer unmeritedly; it is likewise preferable, that ten guiltless persons should undergo the inconveniency of an examination before you, than that one offender should triumph in his crimes with impunity.<sup>121</sup>

South Carolina is exceptional for two reasons. First, prior to 1788, South Carolina did not have a justice of the peace manual based on *Burn's Country Justice*.<sup>122</sup> Its manual, William Simpson's *The Practical Justice of the Peace and Parish-Officer, of His Majesty's Province of South-Carolina*, first published in 1761, lacked the standard text describing the positions of Hale, Pemberton, Hale's editor, Hawles, and Coke on the indictment standard.<sup>123</sup> Indeed, it did not offer any guidance at all about the evidentiary requirement for an indictment.

Where, then, did the South Carolina judges derive the probable cause standard? The likely explanation—and the second reason South Carolina is exceptional—is that they found it in an early eighteenth-century grand jury charge by Nicholas Trott, South Carolina's first Chief Justice. Trott, who

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120. See William Henry Drayton's Charge, Camden, Cheraws, & Georgetown Districts, November 5, 15, & 26, 1774, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1179, 1181 (“[F]ind all such Bills of Indictment, as the examination of Witnesses in support of them, may induce you to think there is a probability that the fact charged is true . . . .”); John Faucheraud Grimke's Charge, Cheraws, Camden, & Georgetown Districts, November 15 & 26, 1783, & April 5, 1784, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1220, 1225 (“You are going to find the bill, tho' founded only upon probable grounds of suspicion, that the accused is guilty . . . .”); Henry Pendleton's Charge, Ninety-Six & Beaufort Districts, November, 1776, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1205, 1208 (“[Y]ou have nothing to do; but to find whether there is or is not probable Cause of Prosecution . . . .”).

121. John Faucheraud Grimke's Charge, *supra* note 120, at 1225; see also 4 BLACKSTONE, *supra* note 81, at \*352.

122. See *supra* notes 85-87 and accompanying text.

123. See WILLIAM SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE AND PARISH-OFFICER, OF HIS MAJESTY'S PROVINCE OF SOUTH-CAROLINA (Charlestown, Robert Wells 1761).



received his legal training in England in the 1690s before travelling to South Carolina,<sup>124</sup> apparently knew the then-recent Whig-Tory debate well. In a 1706 charge, he cited Babington's *Advice to Grand Jurors* for the proposition that:

You are not to try ye Prisoner but to consider whither or no there is just cause of Accusation, or that probable proof of ye fact laid in the Charge, as that the Person ought to be put upon his Tryal for the same; For then there is an other Jury which properly are said to try ye Prisoner, and are to pass between him & ye Queen upon his Life or Death.<sup>125</sup>

It seems likely that Trott's charge was the source material for Judges Drayton, Pendleton, and Grimke.<sup>126</sup>

In 1788 a new justice of the peace manual appeared, *The South-Carolina Justice of the Peace*.<sup>127</sup> A preface complained that Simpson's manual, which it effectively replaced, contained only the "rudiments" of materials magistrates needed to perform their duties.<sup>128</sup> The new manual included Burn's familiar account of the Whig-Tory debate.<sup>129</sup> The next year, Judge Thomas Waties charged a South Carolina grand jury in accord with the Whig view, telling the jury (as quoted above), that it "ought not to send a person to his trial upon probable grounds only, and the mere presumption of criminality."<sup>130</sup> While South Carolina appears to have been moving toward the more common American view of the charging standard, two years later, another South Carolina judge, Elihu Hall Bay, told a grand jury that it was to determine "whether there are probable grounds for prosecuting the offenders complained of."<sup>131</sup> Thus, even after its new justice of the peace manual and Waties's impassioned critique of the probable cause standard, South Carolina may have remained an outlier.

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124. L. Lynn Hogue, *The Sources of Trott's Grand Jury Charges*, in *SOUTH CAROLINA LEGAL HISTORY* 23, 25-26 (Herbert A. Johnson ed., 1980).

125. Nicholas Trott's Charge, Province of South Carolina, March 20, 1706, in 2 *GENTLEMEN OF THE GRAND JURY*, *supra* note 7, at 1123, 1124 & n.h (emphasis omitted). This is the only citation to Babington I have found in any early American source.

126. Trott's 1706 charge was published within a manuscript entitled *Eight Charges Delivered at So Many Several General Sessions & Gaol Deliveries: Held at Charles Town for the Province of South Carolina. In the Years 1703, 1704, 1705, 1706, 1707. Together with a General Charge to the Grand Juries for the Said Province*. See Nicholas Trott's Charge, *supra* note 125, at 1123 n.1. I have not determined how widely the manuscript circulated.

127. See *THE SOUTH-CAROLINA JUSTICE OF THE PEACE*, *supra* note 87.

128. *Id.* at v.

129. *Id.* at 270.

130. Thomas Waties's Charge, *supra* note 95, at 1243.

131. Elihu Hall Bay's Charge, Camden District, April, 1791, in 2 *GENTLEMEN OF THE GRAND JURY*, *supra* note 7, at 1258, 1259.

b. Pennsylvania

Compare two grand jury charges by Pennsylvania Chief Justice Thomas McKean. The first is from 1778: “We now beg leave to dismiss you, with this recommendation, in all doubtful cases to incline rather to acquittal than crimination; for it is safer to err in acquitting than in punishing, on the side of mercy than on the side of justice.”<sup>132</sup> A decade later, McKean told another grand jury:

[T]he bills, or presentments, found by a grand Jury, amount to nothing more than an official accusation, in order to put the party accused upon his trial . . . . It is the duty of the Grand-Jury to enquire into the nature and probable grounds of the charge; but it is the exclusive province of the Petty Jury, to hear and determine . . . whether the Defendant is, or is not, guilty . . . .<sup>133</sup>

The two charges can perhaps be reconciled, but the change in tone is striking. The 1778 version of McKean is almost Whiggish, but by 1788 he is a fierce Tory. Why the shift?

McKean’s private thoughts on the matter are lost to time, but the answer may lie in a bitter dispute he had with a Philadelphia grand jury in late 1782 and early 1783. It began when McKean levied hefty criminal fines against two retired army officers convicted of assault.<sup>134</sup> The fines, and a nasty comment McKean made to one of the defendants, drew the ire of Philadelphia printer Eleazer Oswald, who published columns critical of McKean in his paper.<sup>135</sup> Incensed by Oswald’s impetuosity, McKean had him arrested and presented to the grand jury for seditious libel.<sup>136</sup> After the grand jury twice refused to indict, McKean summoned it for (in the words of a grand juror) a “reprimand.”<sup>137</sup> McKean ordered the grand jury to reconsider, but it stuck to its position.<sup>138</sup>

The incident inspired a flurry of newspaper columns and essays on both grand juries and the law of seditious libel.<sup>139</sup> The grand jury itself penned a

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132. Thomas McKean’s Charge, York County, April 21, 1778, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 762, 767.

133. Thomas McKean’s Address to the Grand Jury of Philadelphia, February 13, 1788, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1098, 1099.

134. See G.S. ROWE, THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 182-84 (1978); Dwight L. Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83*, 45 JOURNALISM Q. 235, 237 (1968).

135. ROWE, *supra* note 134, at 184; Teeter, *supra* note 134, at 237. For an example, see A Friend to the Army, Letter to the Editor, INDEP. GAZETTEER (Phila.), Oct. 15, 1782, at 2.

136. Teeter, *supra* note 134, at 237-38.

137. *Extracts from the Diary of Jacob Hiltzheimer, of Philadelphia, 1768-1798*, 16 PA. MAG. HIST. & BIOGRAPHY 160, 163 (1892) (entries of Jan. 1 & 3, 1783).

138. *Id.* (entry of Jan. 4, 1783).

139. My focus is on the grand jury issues raised in the public reaction. For a discussion focused on the free speech issues arising in the 1783 writings, see Teeter, *supra* note 134, at 239.

“Memorial and Remonstrance” objecting to McKean’s treatment, which was printed in several Philadelphia papers.<sup>140</sup> McKean responded in a newspaper column under the pseudonym “Jurisperitus,” in which he directly addressed the evidentiary standard for an indictment.<sup>141</sup> Invoking Blackstone—while conspicuously failing to disclose Blackstone’s “thoroughly persuaded” language—McKean argued that it “has been the law for ages” that a grand jury inquires only into the sufficiency of an accusation.<sup>142</sup> He acknowledged that “some writers” held a different opinion, but urged that “their *opinion* has never been adjudged or received for *law*.”<sup>143</sup> McKean’s colleague on the Pennsylvania Supreme Court, Justice George Bryan, backed McKean in two columns under the pseudonym “Adrian.”<sup>144</sup> Like the English Tories, he emphasized the greater importance of the trial over the grand jury.<sup>145</sup> Bryan’s columns in turn drew a response from John Witherspoon, the President of the College of New Jersey (now Princeton).<sup>146</sup> Witherspoon noted McKean’s obvious conflict of interest in the Oswald matter as a reason why the grand jury might have legitimately declined to indict. The grand jurors, he reasoned, may have been wary of a precedent-setting trial “when an exasperated man, of impetuous passions, was to preside in the determination of his own cause.”<sup>147</sup>

The most detailed treatment of the evidentiary questions arising out of the incident appears in two essays by Francis Hopkinson, McKean’s brother-in-law and longtime nemesis.<sup>148</sup> Hopkinson, a Philadelphia lawyer and later a federal

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140. Memorial and Remonstrance of the Philadelphia Grand Jury, January 6, 1783, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1095, 1095-98. For a list of the newspapers that printed the Memorial and Remonstrance, see *id.* at 1098 n.1.

141. Jurisperitus, Letter to the Editor, *For the Pennsylvania Gazette*, PA. GAZETTE, Jan. 29, 1783, at 1; see also ROWE, *supra* note 134, at 188 & n.18 (identifying McKean as Jurisperitus).

142. Jurisperitus, *supra* note 141.

143. *Id.*

144. Adrian, Letter to the Editor, FREEMAN’S J. (Phila.), Jan. 29, 1783, at 2 [hereinafter Adrian II]; Adrian, Letter to the Editor, FREEMAN’S J. (Phila.), Jan. 15, 1783, at 2; see also Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 189 (1984) (identifying George Bryan as Adrian).

145. Adrian II, *supra* note 144.

146. See Aristides, *To Adrian*, PA. GAZETTE, Jan. 22, 1783, at 3; see also Teeter, *supra* note 134, at 242 (identifying Princeton’s President Witherspoon as Aristides).

147. Aristides, *supra* note 146. For additional reaction to McKean’s conduct of the grand jury, see ROWE, *supra* note 134, at 187 & n.17, listing other sources who responded in the local press.

148. One of the People, Letter to the Editor, PA. PACKET, Jan. 25, 1783, at 1, *reprinted in* 1 THE MISCELLANEOUS ESSAYS AND OCCASIONAL WRITINGS OF FRANCIS HOPKINSON, ESQ. 194 (Philadelphia, T. Dobson 1792) [hereinafter HOPKINSON ESSAYS]; Francis Hopkinson, *To the People*, in 1 HOPKINSON ESSAYS, *supra*, at 219. On McKean’s relationship with Hopkinson, see ROWE, *supra* note 134, at 49, 188, 235.

judge,<sup>149</sup> adopted the persona of an ordinary citizen to critique McKean and Bryan. Hopkinson took aim at Bryan's lament over the grand jury's conduct: "Was there not, (says [Bryan],) the usual probable evidence for an open enquiry by a petit jury? If there was, why stifle the cause in the chamber of the grand inquest?"<sup>150</sup> Hopkinson was shocked. "*Probable evidence, and stifle a cause,*" he exclaimed, was "horrid language!"<sup>151</sup> "[A]re men's lives, reputations, and fortunes to be hung upon the tenterhooks of logical probabilities," he asked, "and is the fair acquittal of a fellow-citizen from a heinous charge to be called a stifled cause?"<sup>152</sup>

McKean is a genuine outlier to the American trend of requiring more than probable cause to support an indictment. For three reasons, this cuts only weakly against my claim that the Whig/Wilson view predominated among Founding-era judges who considered the issue. First (and most speculatively), McKean's change in tone between 1778 and 1788 suggests that his dispute with the Oswald grand jury may have driven his position. Second, the strong reaction against McKean's conduct in the Oswald grand jury proceedings—by the grand jury itself, Witherspoon, Hopkinson, and others—indicates that McKean's thinking was out of the mainstream. Third, and most importantly, McKean's views on the grand jury were not very influential among his contemporaries. McKean seems to have convinced Judge Richard Peters, a federal judge in Pennsylvania, who charged a grand jury in 1792 to return an indictment on probable cause using logic plainly derived from McKean.<sup>153</sup> But even in Pennsylvania, at least three judges (Addison, Edwards, and Shippen) gave contrary grand jury charges *after* 1788.<sup>154</sup>

#### 4. Understanding the Founders

A crucial question remains: *Why* did many American jurists gravitate towards the Whigs' view and reject the probable cause standard? The political logic of the Exclusion Crisis, after all, no longer held. Unlike John Somers and

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149. See *Biographical Directory of Federal Judges: Hopkinson, Francis*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1093&cid=999&ctype=na&instate=na> (last visited Mar. 3, 2016).

150. One of the People, *supra* note 148, at 202.

151. *Id.*

152. *Id.* Much of Hopkinson's analysis was drawn from SOMERS, *supra* note 71, which he quotes at great length. *Id.* at 203-16. To preserve his fictional identity, Hopkinson claimed that the treatise was in "an old folio book" that his grandfather had brought from England, and of which his father "had made no other use of . . . but to strap his razor on the leathern cover." *Id.* at 198.

153. See Richard Peters's Charge, District of Pennsylvania, February 14, 1792, in 2 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 1412, 1413-14.

154. See Alexander Addison's Charge, *supra* note 95; Enoch Edwards's Charge, *supra* note 105; Edward Shippen's Charge, *supra* note 98; Edward Shippen's Charge, *supra* note 101.

Henry Care, the American judges did not insist on a strict charging standard in order to protect their allies from political prosecutions.<sup>155</sup> We must look elsewhere for explanation. In two ways, the strict charging standard many Founding-era judges favored was a good fit with the criminal justice and political conditions of their time.

First, it makes sense that the Founding generation, with its deep-seated anxiety about concentrations of power, would share the Whigs' emphasis on constraining the prosecutorial function.<sup>156</sup> To the Founders, the "great problem to be solved" in "design[ing] governance institutions" was the "excessive concentration of political power."<sup>157</sup> At least some Founding-era judges understood the unrestrained power to initiate criminal prosecution as an example of excessively concentrated political power. Thus Justice Wilson, in his 1790 grand jury charge, argued that:

The executive power, of prosecuting crimes and offences, might be dangerous and destructive, if exercised *solely* by Judges *occasionally* appointed, or appointed *during pleasure*, for that purpose. To prevent this, two precautions are used. . . . [One] is, that a double barrier—a presentment, as well as a trial by jury—is placed between the liberty and security of the citizen, and the power and exertions of administration.<sup>158</sup>

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155. In theory, it is possible that the seditious libel prosecutions of the 1790s could have impacted the thinking of judges at the very end of what I am calling the Founding period. See Charles A. Heckman, *A Jeffersonian Lawyer and Judge in Federalist Connecticut: The Career of Pierpont Edwards*, 28 CONN. L. REV. 669, 670 (1996) ("Federal prosecutions for seditious libel had been a matter of great contention during the 1790s, culminating in the furor over the Sedition Act of 1798."). Yet it seems unlikely that judges nominated by a Federalist President would have advocated a strict charging standard to guard against seditious libel prosecutions by Federalist prosecutors.

156. To some degree, the Founding-era judges may have relied on the authority of the Whigs themselves. The general influence of the Whig movement on American thinking has been well documented. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34-36 (1967); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 77-180 (1985); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 14-17 (1969). Yet it seems unlikely that American judges adopted the Whig position based simply on an argument from authority. If they had, one would expect to see copious references to the principal Whig writers—Somers, Hale, and Hawles—in their charges.

157. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316 (2006) (quoting THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961)). Levinson and Pildes wrote of the Framers of the Constitution, but anxiety about concentrated power extended throughout the Founding era. See WOOD, *supra* note 156, at 150-61 (describing American Revolutionary thinking about separation of powers); James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 KAN. L. REV. 1377, 1382 (2004) ("Much in the Constitution of the United States (and in state constitutions) confirms a commitment to individual liberty and a fear of centralized and concentrated power.").

158. Wilson's Charge, *supra* note 27, at 35 (footnote omitted).

Chief Justice Kinsey of New Jersey made a similar point in rejecting a probable cause standard:

The truth is, as I believe, this doctrine [of probable cause] has been broached in times not remarkable for true notions of liberty; Times in which the courts were filled with judges holding their offices at the will and pleasure of the crown, which they too often followed with a shameful partiality, as well as an unrelenting severity against which innocence seldom afforded any security, or by which guilt too often escaped with impunity.<sup>159</sup>

The Founding-era judges' embrace of a strict charging standard may be explained, in part, by their demand for constraints on the delegation of prosecutorial power.

Second, although Founding-era judges did not say so explicitly, their insistence that grand jurors be certain of a suspect's guilt may also reflect the trial system then in place. I have noted that a strict charging standard will be attractive when an adjudicative system does not otherwise provide adequate certainty that the people it punishes are guilty.<sup>160</sup> As Lawrence Friedman explains, at the beginning of the nineteenth century, trials "rarely lasted a day, and most were probably much shorter."<sup>161</sup> It would hardly be surprising if judges (privately) questioned the reliability of such trials. They were too politic to do so openly, but allusions in grand jury charges to the "risk" of public trial suggest that part of the impetus for a strict charging standard may have been weakness elsewhere in the adjudicative process.<sup>162</sup>

#### B. Probable Cause Triumphant: The Nineteenth and Twentieth Centuries

Leaving the eighteenth century, the Whig/Wilson view of the criminal charging standard seems settled. Yet by the middle of the twentieth century, it had all but disappeared, replaced by the "probable cause" standard so dreaded by Justice Wilson and many of his contemporaries. This Subpart traces the post-Founding history of the criminal charging standard into the twentieth century. Because the basic story has been told before,<sup>163</sup> my aim is less to describe what happened than to suggest an explanation as to why.

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159. James Kinsey's Charge, Hunterdon County, April 6, 1790, in 1 GENTLEMEN OF THE GRAND JURY, *supra* note 7, at 597, 599.

160. *See supra* Part I.

161. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 245 (1993).

162. *See* Enoch Edwards's Charge, *supra* note 105, at 783; Edward Shippen's Charge, November, 1800, *supra* note 101, at 1069. Another possibility bears mention here: Founding-era judges may have trusted grand juries because grand jurors were selected from the upper ranks of society. *See* Washburn, *supra* note 16, at 2377 ("Early American grand juries . . . consisted of educated and propertied white males and they no doubt represented similarly situated citizens quite well.").

163. *See* SHAPIRO, *supra* note 2, at 86-113; Kuckes, *supra* note 10, at 142-47.

The Whig/Wilson charging standard stood for about the first three-quarters of the nineteenth century.<sup>164</sup> If anything, it grew more entrenched. Treatise writers joined judges in rejecting probable cause as a charging standard.<sup>165</sup> Judges, meanwhile, made the Founders' approach more sophisticated by formulating what Barbara Shapiro labels the "prima facie" standard, pursuant to which a grand jury should indict only if the government's evidence would, unless contradicted or explained by the defendant, warrant a conviction.<sup>166</sup> Chief Justice Lamuel Shaw of Massachusetts gave an early "prima facie" charge in 1832.<sup>167</sup> The evidence before the grand jury, he explained, "must be of such a nature, that if it stood alone, uncontradicted and uncontrolled by any defensive matter, it would be sufficient to justify a conviction on trial."<sup>168</sup> Similar descriptions of the prima facie standard can be found in nineteenth-century legal opinions,<sup>169</sup> grand jury charges,<sup>170</sup> and a manual for grand jurors in New York.<sup>171</sup>

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164. See SHAPIRO, *supra* note 2, at 93-96.

165. See 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW; COMPRISING THE PRACTICE, PLEADINGS, AND EVIDENCE \*318 (Philadelphia, Edward Earle 1819); 1 A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE, PLEADING AND EVIDENCE, IN INDICTABLE CASES 98-1 n.4 (New York, Banks, Gould & Co., 6th ed. 1853) ("Formerly, indeed, it was laid down that the grand jury ought to find the bill if probable evidence can be adduced to support it . . . . But great authorities have taken a more merciful view of the subject . . ."). *But see* FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE §§ 361-62, at 249-52 (Philadelphia, Kay & Brother, 8th ed. 1880) (describing the grand jury's standard as a "question [that] was in former times much considered" and explaining the positions of Hale, Wilson, McKean, and others).

166. SHAPIRO, *supra* note 2, at 93-95.

167. *Chief Justice Shaw's Charge to the Grand Jury*, AM. JURIST & L. MAG., July & Oct. 1832, at 216, 219.

168. *Id.*

169. See *United States v. Mackenzie*, 30 F. Cas. 1160, 1160-61 (S.D.N.Y. 1843) (No. 18,313) ("The same reason should restrain the jury from finding an indictment, unless satisfied that the facts they present will subject the accused to a legal arraignment and punishment."); *Bostick v. Rutherford*, 11 N.C. (4 Hawks) 83, 86-87 (1825) ("So, of an ignoramus of the bill. It is not evidence as to probable cause. For probable cause will not warrant the finding of a bill; it requires *prima facie* evidence of guilt, which is more."). This is not to say that probable cause for grand juries disappeared entirely. See *United States v. Smith*, 27 F. Cas. 1186, 1187 (C.C.D.N.Y. 1806) (No. 16,321a) ("The object of the grand jury is only to judge whether there is probable cause for putting a party to answer a charge[,] and therefore it should not be bound down to the same strictness of investigation as the tribunal which is ultimately to decide upon the charge.").

170. In 1836, Chief Justice Roger Taney told a federal grand jury in Maryland that because "every one is deemed to be innocent, until the contrary appears by sufficient legal proof," it should return an indictment only when "the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused." *Charge to Grand Jury*, 30 F. Cas. 998, 999 (Taney, Circuit Justice, C.C.D. Md. 1836) (No. 18,257); see also *Charge to Grand Jury*, 30 F. Cas. 976, 976 (C.C.D. Conn. 1867) (No. 18,246) ("In order to find a true bill against any person, the proof should be such as, in your judgment, would warrant a petit jury in pronouncing the accused guilty."); Extract from *Charges to Grand Jurors: From One of City Judge Russel*, July Term 1857, *footnote continued on next page*

Shapiro sees the *prima facie* standard as a new and distinct approach to charging, which brought together for the first time an “institutional element”—the fact that the grand jury heard only the government’s evidence—with an “epistemological element”—the idea that the grand jury should be convinced of the defendant’s guilt.<sup>172</sup> Shapiro’s view makes sense given her sources.<sup>173</sup> But it is apparent from the grand jury charges discussed in Part II.A above that the *prima facie* standard is continuous with, and even foreshadowed by, the approach taken by many Founding-era judges. As we have seen, Founding-era judges justified a strict charging standard in part on the grounds that the grand jury saw only one side of a case.<sup>174</sup>

The high-water mark for the Whig/Wilson charging standard came in 1872, when Justice Stephen Johnson Field told a federal grand jury in California that although “[f]ormerly, it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable,” a “different and a more just and merciful rule now prevails.”<sup>175</sup> As such, Field instructed:

To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty—in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury.<sup>176</sup>

Field’s charge became the definitive statement of the *prima facie* standard.<sup>177</sup>

Even by 1872, however, the charging standard had begun to shift in the direction of probable cause. The change came most quickly to information

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in A. OAKLEY HALL, *BRIEF FOR GRAND JURORS IN THE COUNTY OF NEW YORK* 15, 17 (2d ed. 1864) (“The test . . . is this: whether the case for the prosecution is so made out as that, if sitting as the trying, instead of the indicting body, without any explanation or defence of any kind from the accused, or anything further appearing, they would feel justified in rendering a conviction against him.”).

171. See A. Oakley Hall, *Suggestions and Aids for Grand Jurors*, in HALL, *supra* note 170, at 25 (“Some jurors suppose that probable cause or suspicion of guilt is enough to put a man on trial, and that a petit jury is really to decide. The words, however, of Blackstone are ‘THOROUGHLY persuaded of the truth of an indictment.’”).

172. SHAPIRO, *supra* note 2, at 94.

173. Shapiro’s principal sources for Founding-era views include Wilson’s charge and published materials relating to Pennsylvania Chief Justice McKean. *Id.* at 88-92.

174. See *supra* notes 115-18 and accompanying text (noting charges of Francis Dana, Edward Shippen, and James Iredell).

175. Charge to Grand Jury, 30 F. Cas. 992, 993-94 (Field, Circuit Justice, C.C.D. Cal. 1872) (No. 18,255).

176. *Id.* at 994.

177. See GEORGE J. EDWARDS, JR., *THE GRAND JURY: CONSIDERED FROM AN HISTORICAL, POLITICAL AND LEGAL STANDPOINT, AND THE LAW AND PRACTICE RELATING THERETO* 105 (1906) (“In the Federal courts the rule there prevailing is thus stated by Mr. Justice Field . . . . The same rule is recognized in New York, Massachusetts and Virginia, and has been adopted in California by statute.” (footnotes omitted)).



charging. Thus far, I have considered only one mechanism for bringing a criminal charge: the grand jury indictment. Starting with Michigan in 1859, states began experimenting with charging by prosecutor's information.<sup>178</sup> Nineteenth-century reformers criticized the cost and inefficiency of grand jury proceedings, as well as their secrecy.<sup>179</sup> Information charging enabled prosecutors to commence criminal cases without securing an indictment from a grand jury.<sup>180</sup> Procedures varied from jurisdiction to jurisdiction, but as a general rule, when a prosecution was commenced by information, a magistrate reviewed the sufficiency of the government's allegations at a preliminary hearing.<sup>181</sup> In information states, magistrates thus took over the grand jury's screening function.<sup>182</sup>

Before information charging began, preliminary hearings existed to test the lawfulness of arrests.<sup>183</sup> When jurisdictions added the review of informations to the preliminary hearing's agenda, they had to choose a standard. They could use the probable cause standard applicable to arrest, or they could use the *prima facie* standard, which, at least in the earliest days of information charging, still dominated the grand jury context. They overwhelmingly chose probable cause.<sup>184</sup> In Michigan, for example, an 1862

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178. SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 1:5 (West 2015).

179. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.6(d) (4th ed. West 2015) ("The dominant arguments advanced in favor of prosecution by information dwelled on the costs and character of grand jury review."); see also RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 68-71 (1963) (describing legislative contests over abolition); David J. Bodenhamer, *Criminal Justice and Democratic Theory in Antebellum America: The Grand Jury Debate in Indiana*, 5 J. EARLY REPUBLIC 481, 488-89 (1985) (noting "three major avenues of attack for anti-jury delegates" in Indiana: "the grand jury was an antiquated institution in a progressive age; the secrecy and *ex parte* proceedings of the body were contrary to republican principles; and pre-indictment public examinations would be more efficient in prosecuting crime than continuation of the present system").

180. See LAFAVE ET AL., *supra* note 179, § 1.6(d) ("Building upon the expanded authority of the prosecutor, a movement was initiated in the latter half of the nineteenth century to allow the initiation of prosecution in felony cases by information rather than indictment.").

181. *Id.* ("Where prosecution by information was allowed, it ordinarily had to be supported by a magistrate's finding of probable cause at a preliminary hearing."); see also SHAPIRO, *supra* note 2, at 101.

182. See FRIEDMAN, *supra* note 161, at 242. In 1884, the Supreme Court upheld the constitutionality of information charging by states. *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that the Grand Jury Clause of the Fifth Amendment is not incorporated against the states).

183. See SHAPIRO, *supra* note 2, at 104-05.

184. *Id.* at 101 ("Although the evidentiary standard of the judicialized preliminary hearing varied slightly from jurisdiction to jurisdiction, that institution on the whole adopted a standard of 'probable cause,' a concept derived from arrest and search and seizure standards."); see also LAFAVE ET AL., *supra* note 179, § 14.3(a) (explaining that the "dominant formulation" of the standard required for an information is probable cause).

court ruling held that judges would review informations under the probable cause standard set forth in a statute providing for review of arrests.<sup>185</sup> Likewise, when the United States Supreme Court approved California's information charging system in *Hurtado v. California*, it noted that California law provided for "examination and commitment by a magistrate, certifying to the probable guilt of the defendant."<sup>186</sup>

Shapiro argues that in the context of information charging, probable cause emerged as the governing standard "without anyone giving it serious thought simply because it [was] the standard in place for preliminary hearings."<sup>187</sup> Consistent with Shapiro's explanation, I am aware of no contemporaneous debate about what charging standard should apply to informations. This includes the state legislative fights over bills to authorize information charging.<sup>188</sup> The proponents of these bills had *many* complaints about grand juries and grand jurors—a Michigan legislative committee report, for instance, contended that "[t]he grand jury is irresponsible as well as absolute in the exercise of its powers."<sup>189</sup> Yet the strict charging standard does not seem to have been among the complaints.<sup>190</sup> The absence of legislative, judicial, or scholarly attention to the charging standard during the adoption of information charging is remarkable. To many Founding-era judges, the charging standard was critically important. But by the middle and latter parts

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185. *Washburn v. People*, 10 Mich. 372, 384-86 (1862). The 1859 Michigan legislation that authorized information charging was silent about what standard a judicial officer should use at the preliminary hearing. *See* An Act to Provide for the Trial of Offences Upon Information, ch. 138, § 8, 1859 Mich. Pub. Acts 391, 393. The Michigan Supreme Court later explained that the preliminary examination was designed in part "to accomplish the purpose of a presentment by the grand jury under the law as it existed before, in protecting a party against being subject to the indignity of a public trial for an offense before probable cause had been established against him by evidence under oath." *People v. Annis*, 13 Mich. 511, 515 (1865).

186. *Hurtado*, 110 U.S. at 538.

187. SHAPIRO, *supra* note 2, at 105.

188. *See* sources cited *supra* note 179.

189. *See, e.g.*, REPORT OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES ON RECOMMENDING THE PASSAGE OF THE BILL TO PROVIDE FOR THE TRIAL OF OFFENCES UPON INFORMATION, MICH. H.R. DOC. NO. 4, Biennial Sess., at 20 (1859).

190. Indeed, a Michigan legislative committee seems to have endorsed the *prima facie* standard, calling it the "better doctrine" and explaining that it is "doubtless some security against the too frequent finding of indictments, if the jury will regard it." *Id.* at 27. The committee did complain that the higher standard "greatly aggravates the injury resulting to the accused from indictment upon a false and malicious accusation, by rendering it more weighty." *Id.* Arguably this is a criticism about the charging standard, but the committee's concern seems to be more about the institutional setting for the *prima facie* finding than the standard itself. *See id.* ("So far from being a mere accusation, it is an expression of the *deliberate conviction* of at least twelve of his fellow citizens *that he is guilty*, and that he ought to be put on his trial before the petit jury, to the end that he may be punished.").

of the nineteenth century, criminal justice reformers changed it, seemingly without noticing.

While many states shifted to information charging, the grand jury system remained in place in the federal courts and other states. Here the changeover to probable cause was slow and messy. In the late nineteenth century and the first half of the twentieth century, a mounting number of opinions,<sup>191</sup> grand jury charges,<sup>192</sup> academic commentaries,<sup>193</sup> and grand jury handbooks<sup>194</sup> announced that a grand jury needed only probable cause to return an indictment. By 1932, an article in the *Yale Law Journal* could maintain that probable cause was the “catch phrase” for the grand jury’s standard.<sup>195</sup> Even the

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191. See, e.g., *Shushan v. United States*, 117 F.2d 110, 113 (5th Cir. 1941) (“In the grand jury room guilt does not have to be shown beyond a reasonable doubt, but only as probable.”), *overruled in part by* *United States v. Cruz*, 478 F.2d 408 (5th Cir. 1973); *Atwell v. United States*, 162 F. 97, 100 (4th Cir. 1908) (describing the grand jury’s “sole province” as “to make a preliminary and ex parte investigation, to ascertain if probable cause for presentment be found”); *United States v. Potash*, 332 F. Supp. 730, 734 (S.D.N.Y. 1971) (“But the grand jury was only required to be satisfied that probable cause existed to believe the defendants committed the crime charged.”); *United States v. Smyth*, 104 F. Supp. 283, 299-300 (N.D. Cal. 1952) (“If a grand jury consider competent and incompetent evidence, they can still indict if the competent evidence is sufficient to convince them there is probable cause for them to believe, if it were unexplained, that a crime has been committed.”); *In re Cravens*, 40 F.2d 931, 932 (W.D. Mo. 1929) (“A showing of probable cause before a grand jury antecedent to indictment must include competent evidence tending to prove every essential element of the crime charged.”); *United States v. Olmstead*, 7 F.2d 756, 759 (W.D. Wash. 1925) (“Grand jury proceedings are not final, and the proof need only establish a reasonable ground to believe that the defendant is guilty.”).

192. See *Charge to Grand Jury*, 16 F.R.D. 93, 94 (S.D. Cal. 1954) (“Your duty, in all cases, is to determine whether there is probable cause to believe that an accused person is guilty of the offense charged.”); *Charge to the Grand Jury*, 1 F.R.D. 144, 148 (D. Kan. 1939) (“It is not your duty to try the merits of each case, but you are merely to inquire whether there is sufficient ground to believe that a crime has been committed and whether there is probable cause to put the accused upon his trial for the commission of such crime.”).

193. George H. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 177 (1932) (“The grand jury stage is, after all, no more than preliminary. The catch phrase embodying its standard is but *probable cause*.”); Franklin G. Fessenden, *Improvement in Criminal Pleading*, 10 HARV. L. REV. 98, 110-11 (1896) (“The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until the criminal evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends.” (quoting *Commonwealth v. Holley*, 69 Mass. (3 Gray) 458, 459 (1855))).

194. See SECTION OF JUDICIAL ADMIN., AM. BAR ASS’N, FEDERAL GRAND JURY HANDBOOK 11 (1958) (“[Y]our investigation must be devoted solely to ascertaining if there is probable cause to believe that a Federal crime has been committed . . . .” (emphasis omitted)). Compare FED. GRAND JURY ASS’N FOR THE S. DIST. OF N.Y., HANDBOOK FOR FEDERAL GRAND JURORS 16 (2d ed. 1939) (quoting Justice Field’s prima facie charge), with FED. GRAND JURY ASS’N FOR THE S. DIST. OF N.Y., HANDBOOK FOR FEDERAL GRAND JURORS (3d ed. 1953) (omitting discussion of Justice Field’s charge).

195. Dession, *supra* note 193, at 177.

Supreme Court mentioned (in dicta) that the grand jury's job is to evaluate probable cause.<sup>196</sup> But the *prima facie* standard hung on, finding support in treatises and grand jury charges as late as the middle of the twentieth century.<sup>197</sup>

Curiously, discussions about the grand jury standard during this period contain very little direct engagement between the competing options. Writers who favored the *prima facie* standard rarely explained why probable cause was undesirable. For the most part, they did not even acknowledge probable cause's *existence*. Nor did probable cause's adherents engage with the logic of the *prima facie* standard. The charging standard had apparently fallen off the radar.

In 1978, the Judicial Conference of the United States approved a model grand jury charge containing the probable cause standard.<sup>198</sup> The conference's Committee on the Operation of the Jury System issued a report on the model charge, yet did not pause to note that the probable cause standard was contestable.<sup>199</sup> The model charge finally settled the issue in the federal courts. When, in the early twenty-first century, federal defendants mounted a series of challenges to the model grand jury charge, even they took the basic probable cause standard as a given.<sup>200</sup> The states, moreover, followed the federal lead: the vast majority of states that still routinely require grand jury indictments have adopted probable cause as the charging standard.<sup>201</sup> Even when state statutes or

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196. See *Branzburg v. Hayes*, 408 U.S. 665, 686-87 (1972) ("The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."); *Ex parte United States*, 287 U.S. 241, 249 (1932) ("The question whether there was probable cause for putting the accused on trial was for the grand jury to determine . . ."); *Beavers v. Henkel*, 194 U.S. 73, 84 (1904) ("The thought is that no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty.").

197. See THEODORE W. HOUSEL & GUY O. WALSER, *DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES* § 213, at 284 (2d ed. 1946) (arguing for a "beyond a reasonable doubt" grand jury standard); John Raymond Fletcher, *Charge to a Grand Jury*, 18 F.R.D. 211, 215 (1955) ("The evidence before [the grand jury] is usually only the government's case and if this will not, although uncontradicted, prove defendant guilty he should not be indicted at all."); Irving R. Kaufman, *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331, 335 (1955) ("[I]f upon the credible evidence which you have heard, absent an explanation by the defendant, you would be willing to convict, you should indict.").

198. See *supra* notes 33-35 and accompanying text.

199. See JURY COMMITTEE REPORT, *supra* note 34, at 3 (noting that the model charge "includes instructions on the nature of the grand jury" and "the necessity of probable cause for indictment").

200. See *United States v. Navarro-Vargas*, 408 F.3d 1184, 1187-88 (9th Cir. 2005) (en banc) (identifying grounds for challenge to grand jury charge).

201. Many states with information charging occasionally use grand juries. See LAFAYE ET AL., *supra* note 179, § 15.1(g). My concern here is only with states that routinely require indictments. I am aware of two states that still use a charging standard stricter

*footnote continued on next page*

constitutions contain language seeming to require the prima facie standard, state courts have insisted that probable cause suffices for an indictment.<sup>202</sup>

By the middle of the twentieth century, judges, scholars, and even litigants had evidently lost interest in an issue that their predecessors in the eighteenth and early nineteenth centuries cared about deeply. What had happened to enable this disregard for—and even neglect of—the charging standard? Given the silence of contemporaries, we are necessarily in the realm of supposition. One source of explanation lies in broader social and political dynamics

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than probable cause. Most significantly, in New York, “[t]he grand jury ‘must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged.’” *People v. Vanalst*, 959 N.Y.S.2d 356, 357 (App. Div. 2013) (quoting *People v. Wyant*, 951 N.Y.S.2d 294, 294 (App. Div. 2012)). Under this standard, “legally sufficient evidence” means “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof.” *Id.* (quoting N.Y. CRIM. PROC. LAW § 70.10(1) (McKinney 2013)). In New Jersey, grand jurors are instructed: “You are not to return an indictment unless the State has presented evidence which together with the reasonable inferences you draw from that evidence, leads you to conclude that (1) a crime has been committed and (2) the accused has committed it.” Memorandum from Philip S. Carchman, Judge, N.J. Appellate Division, to Assignment Judges, Directive #12-06: Standard Grand Jury Charge—For Statewide Use 2 (July 20, 2006), [http://www.judiciary.state.nj.us/directive/2006/dir\\_12\\_06.pdf](http://www.judiciary.state.nj.us/directive/2006/dir_12_06.pdf).

202. At least three state courts have confronted defense challenges to the probable cause standard. *See Sheldon v. State*, 796 P.2d 831, 836 (Alaska Ct. App. 1990); *Cummiskey v. Superior Court*, 839 P.2d 1059, 1064 (Cal. 1993) (en banc); *State v. Lawler*, 267 N.W. 65, 67-69 (Wis. 1936). In *Cummiskey*, the court considered a California statute providing that a grand jury should return an indictment only if the evidence “would warrant a conviction by a trial jury.” 839 P.2d at 1063 (quoting CAL. PENAL CODE § 939.8 (West 1992)). The court concluded that “under the statutory scheme, it is the grand jury’s function to determine whether probable cause exists to accuse a defendant of a particular crime.” *Id.* at 1064. The logic is hard to find, but the primary rationale seems to have been that the court had previously assumed a probable cause standard and did not wish to upset that assumption. *See id.* at 1064-65. As a spirited partial dissent noted, “[t]he majority conclude[d] . . . that the Legislature did not mean what it said.” *Id.* at 1074 (Kennard, J., concurring and dissenting). Alaska’s Court of Appeals made a similar move in *Sheldon*. It ruled that the statutory standard for an indictment—evidence that “would warrant a conviction of the defendant,” 796 P.2d at 836 (quoting ALASKA R. CRIM. P. 6(q))—meant only that the grand jury “should return an indictment when convinced of the probability of the defendant’s guilt.” *Id.* The basis for this imaginative interpretation was a concern that the grand jury process not turn into a “mini trial.” *Id.* By comparison, the Wisconsin Supreme Court’s decision in *Lawler* appears fastidious. The court gave three reasons for rejecting the defendant’s request for a prima facie standard. First, the court feared that under the prima facie standard, “the investigation of a grand jury will amount practically to a trial.” 267 N.W. at 70. Second, without citation, the court asserted that “[n]o such degree of proof was required at the common law to warrant the return of an indictment by a grand jury.” *Id.* (One might reasonably ask: Whose common law, Pemberton’s or Wilson’s?) Third, to distinguish Blackstone’s view that an indictment should not rest on “remote probabilities,” the court noted that Wisconsin’s definition of probable cause is fairly demanding. *Id.* at 70-71 (quoting *Beavers v. Henkel*, 194 U.S. 73, 84 (1904)).

affecting the criminal justice system. As probable cause emerged in the late nineteenth and early twentieth centuries, immigration from southern and eastern Europe increased,<sup>203</sup> African Americans migrated from the South to northern cities,<sup>204</sup> and an expanding media sensationalized crime.<sup>205</sup> I certainly cannot rule out the possibility that these and other forces impacted how criminal justice policymakers perceived the charging standard. Yet it seems strange that the broader social and political dynamics would yield a pro-government reform in this aspect of criminal procedure while, at the same time, other facets of criminal procedure were transforming in seemingly pro-defendant ways, as we will see shortly.<sup>206</sup>

We can also seek an explanation in changes within the criminal justice system itself. The emerging criminal justice system differed from that of the early nineteenth century in two crucial respects: (i) the formal litigation process, especially the trial, had grown complicated and seemingly defendant-friendly, and (ii) the institution of plea bargaining had begun its ascent.<sup>207</sup> The

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203. Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882, 908 n.64 (1997) (“In the 1880s a new tide of immigrants from Eastern and Southern Europe, namely Italians, Slavs, Poles, Russians, Hungarians, Greeks, and Jews, broke the Nordic circle of Western and Northern Europeans, triggering antforeign sentiments centering on cultural prejudice and intolerance.”); *see also* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 15 (2011).

204. Dash T. Douglas, *A House Divided: The Social and Economic Underdevelopment of America's Inner Cities*, 10 U. FLA. J.L. & PUB. POL'Y 369, 371 (1999) (“From 1910 to 1930, approximately 1.25 million African Americans migrated from the South to northern cities in search of work.”); *see also* STUNTZ, *supra* note 203, at 16.

205. HISTORY OF THE MASS MEDIA IN THE UNITED STATES 629 (Margaret A. Blanchard ed., 1998) (“The New Journalism and the sensational yellow journalism of the 1880s and 1890s, practiced especially by the newspapers of Joseph Pulitzer and William Randolph Hearst, further set the journalistic stage for the tabloids, relying on violence and human interest stories to help boost circulation into the hundreds of thousands.”). Media sensationalism of crime can be traced earlier, to the “penny press” of the 1830s. *Id.*; *see also* Craig Haney, *Media Criminology and the Death Penalty*, 58 DEPAUL L. REV. 689, 723 n.173 (2009) (“Criticism of the media's role in promoting and distorting crime-related issues dates to at least the nineteenth century.”).

206. *See infra* notes 209-16 and accompanying text.

207. Another change internal to the criminal justice system may also be relevant: the increasing professionalization of police and prosecutors. The first modern municipal police departments emerged in the United States in the nineteenth century, replacing a haphazard earlier system of night watchmen and constables. FRIEDMAN, *supra* note 161, at 67-68 (“One of the major social inventions of the first half of the nineteenth century was the creation of police forces: full-time, night-and-day agencies whose job was to prevent crime, to keep the peace, and to capture criminals.”); *see also* Donald A. Dripps, *The Fourteenth Amendment, the Bill of Rights, and the (First) Criminal Procedure Revolution*, 18 J. CONTEMP. LEGAL ISSUES 469, 475 (2009) (“By 1866 a uniformed police force, counsel for the defendant, and the penitentiary were common features of American systems outside the South.”); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 274 (1979) (dating the development of the “modern police department[]” to the 1840s and 1850s in large cities and the 1870s in mid-sized ones). In

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first is naturally related to a relaxed charging standard. I will defer discussion of plea bargaining to Part III.

As noted above, criminal trials in the late eighteenth and early nineteenth century generally took less than a day.<sup>208</sup> “Trials probably got longer and more complex” over the course of the nineteenth century, though local variations persisted.<sup>209</sup> Enhanced access to counsel is partially responsible, as Nancy King

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the late eighteenth and early nineteenth centuries, moreover, prosecutors were still part-timers who spent much of their practice on noncriminal matters. *See* FRIEDMAN, *supra* note 161, at 67 (“In the beginning . . . there were no actors in the system who spent all their working lives in criminal justice.”). By the late nineteenth century, prosecutorial offices in urban centers were staffed by full-time criminal justice professionals. *See* Haller, *supra*, at 274 (“By the 1840s and 1850s in the larger cities and by the 1870s in midsized cities, . . . full-time prosecutorial staffs developed and often handled charging decisions, at least in serious cases.”). *But see* MIKE MCCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY* 10 (2005) (arguing that that early nineteenth-century criminal justice actors were not more amateurish than their successors).

To be sure, this was not the case everywhere. *See* FISHER, *supra* note 12, at 42 (“Like most public prosecutors in nineteenth-century America, they worked part-time, drew (at best) part-time salaries, and therefore held more than one job.”). In the federal system, prosecutors became full-time only in the middle of the twentieth century. *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 446 (2009). Even in the modern era, many rural prosecutors work part-time. *See id.* at 419, 421. According to some historical accounts, moreover, it is only in the late nineteenth century that public prosecutors fully supplanted the earlier system of private prosecutors. *Id.* at 422 n.32 (“Although virtually all commentators share the view that private prosecution was the dominant mode in the colonial era, Joan Jacoby, in her influential book on the development of the American prosecutor, challenges the conventional wisdom.” (citing JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY*, at xvi-xvii (1980))); *see also* ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 119-20 (1989) (documenting the end of private prosecutions in Philadelphia during the nineteenth century). Yet it is hard to know in what direction the professionalization of police and prosecutors cuts with respect to the charging standard. On one hand, judges from the late nineteenth century forward may have felt less compelled to constrain professionalized police and prosecutors than they had their (relatively) amateurish predecessors. On the other hand, the concentration of authority in the hands of powerful prosecutors may have cut in favor of stricter screening at the charging stage.

208. *See supra* text accompanying note 161.

209. FRIEDMAN, *supra* note 161, at 245. Friedman notes that in the 1880s, the average trial in Alameda County, California was 1.5 days, but that in Leon County, Florida, a court could handle six trials per day. *Id.*; *see also* Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 348 (1982) (noting that “refinements” in trial procedure “have made the trial more costly, more time-consuming, and perhaps more unpredictable”); Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2710 (1996). Trial length grew dramatically by the middle of the twentieth century, especially in the aftermath of the “due process revolution” of the 1960s. *See* Alschuler, *supra* note 12, at 38 (reporting that the average length of a felony jury trial in Los Angeles jumped “from 3.5 days in 1964 to 7.2 days in 1968”). As Benjamin Barton observes, “[i]n a series of famous 1960s cases, the Warren Court launched a due process revolution in criminal procedure, guaranteeing a series of

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explains: “Expanded provision of counsel for the defense during the nineteenth centuries meant longer voir dires, more objections, more arguments about evidentiary and procedural matters, and, of course, more orations to the jury . . . .”<sup>210</sup> Evidentiary reforms were also significant.<sup>211</sup> In the nineteenth century, restrictions on defendant testimony were lifted,<sup>212</sup> while hearsay rules were liberalized early in the twentieth century.<sup>213</sup> Later in the twentieth century, expert testimony became routine.<sup>214</sup> Beyond the trial itself, the modern criminal appeal emerged in the nineteenth century,<sup>215</sup> and with it, as Langbein notes, “motions designed to provoke and preserve issues for appeal.”<sup>216</sup>

“In theory,” Friedman observes, these reforms were “supposed to be entirely for the defendant’s benefit.”<sup>217</sup> Contemporaries saw it that way, which is not to say that they liked it. Some during the Progressive era complained that the reforms had turned the criminal process into sport.<sup>218</sup> A writer in 1912 bemoaned that, “[i]n their efforts to protect the innocent from any possible injustice[,] the law-makers have engrafted upon the old common law modifications as to its administration that have robbed it mostly of its deterrent influence.”<sup>219</sup>

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new rights to criminal defendants.” Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1234 (2010).

210. King, *supra* note 209, at 2710.

211. See John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 10-11 (1978).

212. Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1, 20 (1989) (“Defendants were granted the right to testify in the latter part of the nineteenth century when jurisdictions decided that it was wrong to prevent innocent defendants from trying to counter the prosecution’s evidence.”).

213. King, *supra* note 209, at 2711.

214. *Id.*

215. FRIEDMAN, *supra* note 161, at 256.

216. Langbein, *supra* note 211, at 11.

217. FRIEDMAN, *supra* note 161, at 248 n.\*. Friedman was referencing the evidentiary reforms, *id.* at 248, but it seems clear that expanded access to counsel and criminal appeal rights fit his description just as well. For a view contrary to Friedman’s, see Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 739 (1976), arguing that many of the evidentiary reforms of the nineteenth and twentieth centuries “had the impact of creating new obstacles to the presentation of the defense case.”

218. See LAFAVE ET AL., *supra* note 179, § 1.6(e) (“Some Progressives also complained that the criminal trial process was being influenced by a sporting theory of justice that emphasized the competitive contest rather than a search for the truth. This led them to argue for elimination of defense ‘advantages’ which seemed to them to do no more than make a game of the trial.” (footnote omitted)).

219. ALBERT H. CURRIER, *THE PRESENT DAY PROBLEM OF CRIME* 23 (1912).



Regardless of whether Progressives were right that reforms had gone too far, one thing was clear: the litigation process was guarding against the conviction of the innocent—or appearing to—like never before. This is precisely the condition under which we should expect decisionmakers to deemphasize the charging standard. Charging standards, especially strict ones, buy certainty that those who are punished are guilty.<sup>220</sup> Judges (and legislators, to the extent that they took responsibility for charging standards) in the late nineteenth and early twentieth century had every reason to think that defendants who were punished—despite access to counsel, evidentiary reforms, and appeals—were, in fact, guilty.<sup>221</sup> While their silence precludes any strong causal claim, it's not surprising that judges and legislators would fail to stress, and even neglect, the charging standard. The criminal justice system had provided other means for achieving certainty, or at least it seemed to.

### III. Probable Cause and Plea Bargaining

The last Part left off with the probable cause charging standard firmly ensconced in a criminal justice system with an expansive (and expensive) criminal trial. But there was—as those familiar with American criminal justice in operation will recognize—a problem. Even as probable cause rose, criminal trials in the United States tumbled.<sup>222</sup> Plea bargaining emerged in the United States in the immediate aftermath of the Civil War, but it was not until the 1920s that anyone recognized that it had become pervasive, and not until the 1960s and 1970s that it came under intense scrutiny. By then, plea bargains, not trials, were the dominant adjudicative method of American criminal justice. As Robert Scott and William Stuntz memorably put it, plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>223</sup> The logic underlying the probable cause standard—that grand juries and magistrates need not be certain of a suspect's guilt because trial juries would be—had been undercut.

This Part explores the intersection of probable cause and plea bargaining. In Part III.A, I draw on the extensive literature on plea bargaining to briefly summarize the institution's rise and its consequences for criminal justice. That literature has amply described plea bargaining's vices and virtues. Less

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220. See *supra* Part I.

221. Moorfield Storey, a former president of the American Bar Association and the first president of the NAACP, said in 1913 that “[i]t may have been necessary in the days of Scroggs and Jeffries [the late seventeenth century] to protect the innocent, but to-day the innocent are in no appreciable danger.” Moorfield Storey, *Some Practical Suggestions as to the Reform of Criminal Procedure*, Address at the Fifth Yearly Meeting of the American Institute of Criminal Law and Criminology (Sept. 3, 1913), in 4 J. AM. INST. CRIM. L. & CRIMINOLOGY 495, 501 (1913).

222. See *infra* notes 225-36 and accompanying text.

223. Scott & Stuntz, *supra* note 21, at 1912.

understood is that the probable cause standard exacerbates two of plea bargaining's vices—its “innocence problem” and its lack of constraints on prosecutors. Part III.B calls attention to these critical but underexplored interactions between plea bargaining and probable cause.

Plea bargaining diminished the two “goods” in which charging standards traffic—certainty of guilt and constraint on prosecutors. It would have been reasonable to expect these changes to lead to a recalibration of the charging standard. Part III.C offers three explanations for why the probable cause standard survived in the age of plea bargaining. One possibility is that decisionmakers' demand for certainty of guilt and/or prosecutorial constraint diminished. Another is that decisionmakers believed that guilty pleas provided adequate certainty of defendants' guilt. The final possibility is that, because of the manner in which the criminal justice system adopted plea bargaining, decisionmakers never reexamined its fit with probable cause.

#### A. The Virtues and Vices of Plea Bargaining

Although legal historians have not converged on a theory of why plea bargaining emerged in the United States, they largely agree about when it did.<sup>224</sup> Rare prior to the Civil War, plea bargaining began its ascent during the second half of the nineteenth century.<sup>225</sup> Scholars have found documentary evidence of systematic plea bargaining during the late nineteenth century in Middlesex County, Massachusetts,<sup>226</sup> New York City,<sup>227</sup> and Alameda County,

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224. There are many explanatory theories of plea bargaining. The leading contenders (several of which are interrelated) are: (i) the length and complexity of criminal trials, see Alschuler, *supra* note 12, at 6; Langbein, *supra* note 211, at 11; (ii) docket pressure, see FISHER, *supra* note 12, at 8; (iii) professionalization of police, prosecutors, and the judiciary, see Malcolm M. Feeley, *Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining*, 31 *ISR. L. REV.* 183, 207 (1997); see also LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, at 180 (1981); (iv) political economy, see MCCONVILLE & MIRSKY, *supra* note 207, at 202; and (v) social control by elites, see MARY E. VOGEL, *COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY*, at viii (2007). For a review of this literature, see Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 *ANN. REV. L. & SOC. SCI.* 131 (2005).

225. See Alschuler, *supra* note 12, at 18-19; see also Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 *LAW & SOC'Y REV.* 247, 248 (1979) (finding earliest evidence of plea bargaining in 1860s); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 *LAW & SOC'Y REV.* 273, 273 (1979) (“Albert Alschuler and Lawrence Friedman . . . agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.”). There are hints of plea bargaining earlier in Anglo-American history, but not in any systematic form. See Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 *AM. J. CRIM. L.* 505, 509 (1999).

226. George Fisher, *Plea Bargaining's Triumph*, 109 *YALE L.J.* 857, 868-76 (2000).

227. MCCONVILLE & MIRSKY, *supra* note 207, at 288 & fig.12.1.

California.<sup>228</sup> While prosecutors and defense attorneys in these and other jurisdictions undoubtedly understood the practice at some level, it flew under the public radar until the 1920s, when a number of states conducted extensive surveys of their criminal justice systems.<sup>229</sup> As George Fisher explains, the authors of the state surveys and a pair of contemporary scholars “quite literally discovered that plea bargaining had overrun the nation’s courts.”<sup>230</sup>

By the middle of the 1920s, guilty pleas, rather than guilty verdicts at trial, accounted for 70% or more of convictions in more than twenty major American cities.<sup>231</sup> These high rates, as Alschuler notes, “left little room for dramatic increases.”<sup>232</sup> But rise they did. Alschuler reports that the Federal Bureau of Census recorded a 77% guilty plea rate (nationally) in 1936, 80% in 1938, and 86% in 1940.<sup>233</sup> Federal guilty plea rates dipped somewhat during the middle decades of the twentieth century, but the overall trajectory of guilty pleas has been upward.<sup>234</sup> Today, 94% of felony convictions in state court are the result of guilty pleas;<sup>235</sup> in federal court, the rate is closer to 97%.<sup>236</sup>

Scholarly attention to plea bargaining has been unrelenting since the 1960s.<sup>237</sup> Much of the debate has focused on plea bargaining’s legitimacy, with

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228. FRIEDMAN & PERCIVAL, *supra* note 224, at 174 & tbl.5.12.

229. See FISHER, *supra* note 12, at 6-7, 6 n.13 (collecting state surveys).

230. *Id.* at 6; see also Alschuler, *supra* note 12, at 26 (“The dominance of the guilty plea [in the 1920s] apparently came as a remarkable surprise to contemporary observers.”). The early plea bargaining scholars were Justin Miller and Raymond Moley. See Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928).

231. Moley, *supra* note 230, at 105. Moley identified twenty-one cities with guilty rates of 70% or higher. Of these, ten were between 70% and 79%, six were between 80% and 89%, and five were 90% or higher. *Id.* The highest guilty plea rate was 95% in Syracuse and St. Paul. Moley’s table included a few outlier jurisdictions with lower guilty plea rates. The lowest was San Francisco, at only 33%. Moley was suspicious of this figure. *Id.* at 105 n.24 (“The record of San Francisco shown in this table is so strikingly out of line with the tendency in other cities that it deserves more complete investigation than we have been able to make.”).

232. Alschuler, *supra* note 12, at 33.

233. *Id.*

234. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91 fig.1 (2005).

235. Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 854 (2014).

236. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 6 n.33 (2013).

237. See Lawrence M. Friedman, *Front Page: Notes on the Nature and Significance of Headline Trials*, 55 ST. LOUIS U. L.J. 1243, 1244 n.2 (2011) (“There is a large literature on plea bargaining.”); Wright & Miller, *supra* note 24, at 36 (“A huge literature exists on plea bargaining, much of it produced over the past thirty years.”).

critics calling for it to be abolished.<sup>238</sup> Yet for better or worse, abolition is politically a nonstarter.<sup>239</sup> Recent scholarship has therefore dropped the all-or-nothing quality of the earlier work,<sup>240</sup> and even a leading abolitionist has announced that “[t]he time for a crusade to prohibit plea bargaining has passed.”<sup>241</sup>

Like virtually all institutions, plea bargaining has both vices and virtues. There are two basic social virtues. First, it is a cheap way of disposing of criminal cases.<sup>242</sup> If plea bargaining disappeared and trials resurfaced as the ordinary mechanism of criminal adjudication, one of two things would happen. Either far fewer defendants—including guilty defendants—would be brought to justice, or else criminal justice expenditures would rise significantly.<sup>243</sup> Second, plea bargaining enables prosecutors and defendants to reduce uncertainty by spreading risk.<sup>244</sup> This is the central insight of the “contractual” or “shadow of trial” theory of plea bargaining.<sup>245</sup>

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238. Zacharias, *supra* note 15, at 1122-23 (“The academic literature has consisted largely of attempts to provide a theoretical justification for plea bargaining and, conversely, of calls for the system’s abolition.” (footnote omitted)). For examples of calls for abolition, see Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); and Schulhofer, *supra* note 14.

239. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 162 (1978) (“[T]o speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy.”).

240. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469 (2004) (“At this point, some authors might simply call for the abolition of plea bargaining, but I take the continued existence of plea bargaining as a given.”); Zacharias, *supra* note 15, at 1123 (“This Article accepts plea bargaining as a given.”).

241. Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 706 (2013).

242. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) (“Yet plea bargaining is desirable, not just defensible, if the system attempts to maximize deterrence from a given commitment of resources. It serves the price-establishing function at low cost.”); see also DONALD J. NEWMAN, AM. BAR FOUND., CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 4 (Frank J. Remington ed., 1966) (“Compared to the typically long, costly, and complex trial, the guilty plea is a model of efficiency, assuring conviction of defendants at small cost to all involved.”); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2309 (2006) (“Plea bargains are not only cheaper than trials, they are much cheaper.”); Wright & Miller, *supra* note 24, at 38 (“Most discussions of plea bargaining begin with the observation that plea bargaining makes the prosecutor more administratively efficient.”).

243. See Wright & Miller, *supra* note 24, at 38. The size of the additional expenditure would vary depending on what type of trial the post-plea-bargaining system adopted. See Schulhofer, *supra* note 14, at 2003-04.

244. Scott & Stuntz, *supra* note 21, at 1936-40.

245. See Bibas, *supra* note 240, at 2464 (“The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes.”).

Plea bargaining's defenders also emphasize that plea bargains are in the private interest of both prosecutors and defendants.<sup>246</sup> They enable prosecutors to preserve pristine win-loss ratios, a valuable consideration in light of the political ambition of many prosecutors.<sup>247</sup> For defendants, plea bargaining means avoiding harsh posttrial sentences.<sup>248</sup> In low-level cases involving detained defendants, the allure of plea bargaining to defendants is especially strong, as it often means winning release for time served.<sup>249</sup>

Plea bargaining also has vices. Many critics have focused on obstacles preventing litigants from making the rational plea deals that the contractual model assumes.<sup>250</sup> Stephanos Bibas identifies a large number of such impediments, including cognitive biases, inadequate funding of indigent defense, prosecutors' obsession over win-loss records, "lumpy" sentencing guidelines, pretrial detention, and more.<sup>251</sup>

Another critique of plea bargaining emphasizes its coercive logic.<sup>252</sup> The essential mechanism underlying plea bargaining is the trial penalty, i.e., the "differential between the posttrial sentence and the post-plea sentence."<sup>253</sup> When the trial penalty is sufficiently large, it offers an independent reason for a defendant to rationally plead guilty, regardless of his guilt or innocence, the strength of the government's case, or the availability of a legal defense.<sup>254</sup> Plea bargaining can be described as coercive when the trial penalty is inflated to induce rational guilty pleas.<sup>255</sup> Critics of plea bargaining argue that this is exactly what has happened to the trial penalty in the United States. Although

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246. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) ("Defendants can use or exchange their rights, whichever makes them better off. So plea bargaining helps defendants.").

247. Bibas, *supra* note 240, at 2472 ("Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch.").

248. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1141-42 (2008).

249. See *id.* at 1143 ("[P]rosecutors make frequent offers of pleas to noncriminal violations and time-served dispositions."); see also Bibas, *supra* note 240, at 2491-93.

250. See, e.g., Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 165 (2007) ("I take a broader tack to suggest why the rational actor paradigm in plea bargaining may not capture the reality of the negotiation between prosecutor and defense counsel, and why lawyers may not be likely to lessen the effects of cognitive bias and heuristics."); Schulhofer, *supra* note 14, at 1987-91 (describing conflicts of interest that pervade plea bargaining).

251. Bibas, *supra* note 240, at 2468-69.

252. See Langbein, *supra* note 211, at 13 ("Plea bargaining, like torture, is coercive."). See generally Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527 (1979) (examining conditions under which plea bargaining is voluntary or coercive).

253. Wright, *supra* note 234, at 93.

254. *Id.*; see also sources cited *infra* note 259.

255. See Alschuler, *supra* note 241, at 686; Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 91-94 (2005).

the harshest posttrial sentencing laws are directly implicated only in the tiny percentage of cases that go to trial, their presence is felt in the myriad cases bargained in their shadow.<sup>256</sup> For plea bargaining's critics, the key point—the thing that makes plea bargaining coercive instead of just severe—is that the harshness of posttrial sentences cannot be justified on any grounds other than that they induce rational guilty pleas.<sup>257</sup> As Bibas notes, an expected posttrial sentence “is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”<sup>258</sup>

The most searing criticisms of plea bargaining focus not on whether plea deals are in the private interest of litigants—they typically are—but on their externalities. Two such critiques are critical here because they implicate certainty of guilt and constraint on prosecution.

The first is plea bargaining's well-known “innocence problem.”<sup>259</sup> As noted, the coercive logic of plea bargaining works on innocent and guilty defendants alike.<sup>260</sup> Even plea bargaining's defenders recognize that it is not an effective mechanism for sorting the innocent from the guilty.<sup>261</sup> While it is

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256. See Stuntz, *supra* note 13, at 2550-53, 2556-57; see also *infra* notes 266-67 and accompanying text.

257. See Alschuler, *supra* note 241, at 686.

258. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011); see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (“[T]hose who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.”).

259. See, e.g., Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) (“Plea bargaining has an innocence problem.”); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Value*, 2012 UTAH L. REV. 51, 57 (noting the “significant innocence problem that plea bargaining has today”); Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 148 (2011) (“The objections that have been leveled against plea bargaining are numerous and diverse, but most stem from a common problem: plea bargaining reduces the ability of the criminal justice system to avoid convicting the innocent.” (footnote omitted)); Wright & Miller, *supra* note 24, at 94 (“One urgent problem discussed in the literature on plea bargains (and we believe it is a substantial problem in fact) is the innocent defendant.”). *But see* Bowers, *supra* note 248, at 1119 (arguing that the “conventional view” of plea bargaining's innocence problem “is largely wrong”).

260. Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77-78 (2010) (“[O]ur existing legal system places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations.” (footnote omitted)); see also Bowers, *supra* note 248, at 1122-23.

261. Scott & Stuntz, *supra* note 21, at 1947 (“[S]eparating the innocent from the guilty—the central task of the system—takes place primarily at two stages: precharging and trial. Those innocent defendants who are not screened out at the first stage may be forced to wait for the last; plea bargaining, the intermediate stage, will afford them little relief.”). The reason, according to Scott and Stuntz, is that innocent defendants often have no

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impossible to know the severity of the problem, it is all but certain that innocent people do plead guilty to crimes, including serious ones.<sup>262</sup> This may be rational from the defendant's perspective, but it imposes a social cost not internalized by either litigant. As Stephen Schulhofer explains, "the decision of an innocent defendant to plead guilty in return for a low sentence inflicts costs on society, even if the defendant prefers this result, because it undermines the accuracy of the guilt-determining process and public confidence in the meaning of criminal conviction."<sup>263</sup>

The second externality-centered critique concerns plea bargaining's effect on the distribution of power among criminal justice actors. Plea bargaining concentrates power in the hands of prosecutors, at the expense of judges and juries.<sup>264</sup> William Stuntz, who transformed over the course of his career from one of plea bargaining's most sophisticated defenders to a critic, demonstrated this powerfully.<sup>265</sup> Stuntz showed that given broad substantive law, severe posttrial sentences, and prosecutorial freedom to decide what cases to pursue, plea bargains are driven entirely by the prosecutor's desired sentence.<sup>266</sup> Neither the law nor the strength of the government's evidence has any marginal effect on the price of a plea.<sup>267</sup> John Langbein makes a similar point,

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mechanism to credibly signal their innocence. *Id.* at 1946 ("In the absence of reliable signals that they can afford to take seriously, prosecutors have no viable option other than to ignore claims of innocence."). *But see* Covey, *supra* note 259, at 76 ("Under standard assumptions, private information about guilt and innocence is irrelevant to plea bargaining outcomes. Under other payoff and rule structures, however, private information can be made relevant through what economists refer to as 'signaling.'").

262. See Dervan & Edkins, *supra* note 236, at 20; see also Bowers, *supra* note 248, at 1124 ("There is no longer any serious question that innocent people are charged with and convicted of crimes."); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/?pagination=false&printpage=true>. Of the 337 individuals conclusively exonerated through the Innocence Project, 33 pled guilty. *DNA Exonerations Nationwide*, INNOCENCE PROJECT (last updated Feb. 19, 2016, 12:34 PM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

263. Schulhofer, *supra* note 14, at 1996; see also NEWMAN, *supra* note 242, at 3 ("Conviction of a crime is a serious matter, especially for the person convicted, but also for the entire social order which defines and supports the conviction process.").

264. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 920-21 (2006) ("One effect of plea bargaining was to reduce juries' roles and to hide cases from public scrutiny."); Wright & Miller, *supra* note 24, at 39-40 ("The clearest effect of plea bargains on trial judges is to marginalize them.").

265. Compare Scott & Stuntz, *supra* note 21 (making the most sophisticated contractual case for plea bargaining in the literature), with Stuntz, *supra* note 13, at 2549 n.4 ("Even so, I think we [Scott and Stuntz] overemphasized the role trials play—and hence the role law plays—in plea bargains.").

266. Stuntz, *supra* note 13, at 2550 ("For [some] crimes, plea bargains take place in the shadow of prosecutors' preferences, voters' preferences, budget constraints, and other forces—but not in the shadow of the law.").

267. See *id.*

observing that “[a]s a practical matter, plea bargaining concentrates both the power to adjudicate and the power to sentence in the hands of the prosecutor.”<sup>268</sup> Plea bargaining liberates prosecutors from the constraints of judges and juries. No individual defendant worries about the effect his plea will have on the distribution of criminal justice power—nor should he<sup>269</sup>—but it is a consequence nonetheless.

## B. The Interaction of Probable Cause and Plea Bargaining

Plea bargaining’s innocence problem and its effect on the allocation of criminal justice authority have been carefully explored in the literature. Much less attention has been paid to the *interaction* of plea bargaining and the probable cause charging standard. Yet it has profound implications. The combination exacerbates plea bargaining’s vices.

### 1. “Zero opinion” mechanism

When two decisionmakers independently form the same opinion, there is good reason to be confident in the judgment.<sup>270</sup> This is the logic underlying the practice of obtaining second opinions from doctors, lawyers, and others.<sup>271</sup> We can easily imagine a criminal justice system structured as a second-opinion mechanism. A grand jury or magistrate would give the first opinion, and the trial jury the second. When both agree that the defendant is guilty, society would be confident that the person it punishes actually is guilty. Such a structure would operationalize the Blackstone principle that society should err on the side of acquitting the guilty rather than convicting the innocent.<sup>272</sup>

Because plea bargaining circumvents trial juries, it takes one of the decisionmakers out of the equation.<sup>273</sup> This has the obvious effect of increasing the other’s importance. As Peter Arenella observes, “[i]n a system where the prosecutor’s decision to file charges is usually followed by a negotiated guilty

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268. John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 124 (1992); see also Roza Pati, *The ICC and the Case of Sudan’s Omar al Bashir: Is Plea-Bargaining a Valid Option?*, 15 U.C. DAVIS J. INT’L L. & POL’Y 265, 323 (2009) (“Those who oppose the powerful plea-bargaining system in the United States find the power of justice concentrated in the office of the prosecutor.”).

269. Cf. Bowers, *supra* note 248, at 1163 (“[T]he innocent defendant seems a strange agent of social reform. By obliging her to forego a plea, she is forced to internalize all costs and risks for diffuse and somewhat abstract public benefit.”).

270. See Vermeule, *supra* note 22, at 1456 (“[A] second opinion may provide extra legitimacy to the decision or increase the decision maker’s confidence that it is correct—at least so long as the second opinion coincides with the first.” (emphasis omitted)).

271. *Id.* at 1435.

272. 4 BLACKSTONE, *supra* note 81, at \*352.

273. See *supra* note 264 and accompanying text.



plea, we can no longer pretend that the pretrial process does not adjudicate the defendant's guilt."<sup>274</sup> By itself—i.e., before we focus on probable cause—plea bargaining is a “one opinion” mechanism.<sup>275</sup>

Now consider how probable cause affects this dynamic. Courts and commentators have long debated the level of proof that probable cause entails.<sup>276</sup> As a matter of federal law, however, the Supreme Court's 2014 decision in *Kaley v. United States* makes clear that probable cause to indict requires *less* than a preponderance of the evidence. Stressing that probable cause is “not a high bar,” the Court expressly equated probable cause to indict with probable cause to arrest.<sup>277</sup> Probable cause to arrest, in turn, “does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands.”<sup>278</sup> While some states use a stricter formulation of probable cause, many others accord with federal law.<sup>279</sup> When a 1981 survey of judges asked respondents to reduce “probable cause” to a specific probability, moreover, the average was 45.78%.<sup>280</sup>

In the federal courts and many states, then, grand juries and magistrates may legitimately find probable cause even if they do not believe that guilt is more likely than not. This means that the probable cause standard requires no opinion that the defendant is guilty. Plea bargaining by itself makes the

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274. Arenella, *supra* note 2, at 468-69.

275. By “one opinion” mechanism, I refer to the number of opinions independent of the prosecutor. A prosecutor who has investigated a case is not a neutral judge of a suspect's guilt. As Rachel Barkow observes, “[t]he prosecutor who has already invested himself or herself in a case might reach a biased and erroneous conclusion.” Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 896 (2009). To be sure, there is good reason to think that grand juries in practice are not themselves independent of prosecutors. *See supra* note 16. To the extent this is accurate, grand jury systems are already “zero opinion” mechanisms before the analysis even gets to the probable cause standard.

276. *See, e.g.*, Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 972 (2003) (“We need to step back from the trees and assess the forest: Just how probable is probable cause?”); William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 693 (2011) (“Law professors love to debate even such a basic issue as how ‘probable’ probable cause needs to be.”). The various formulations offered by courts are typically vague and unhelpful to these debates. *See, e.g.*, *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014) (“Probable cause . . . requires only the ‘kind of “fair probability” on which “reasonable and prudent [people,] not legal technicians, act.”’” (second alteration in original) (quoting *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013))).

277. *Kaley*, 134 S. Ct. at 1103 (referencing *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975), to define probable cause to indict).

278. *Gerstein*, 420 U.S. at 121 (emphasis added).

279. *See* LAFAVE ET AL., *supra* note 179, § 14.3(a) (describing the meaning of “probable cause” for purposes of preliminary hearings).

280. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 801 n.61 (2013) (citing C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1324-25, 1327 (1982)).

criminal justice system a “one opinion” mechanism because no trial jury ever adjudicates the defendant’s guilt. Adding probable cause to the mix arguably makes it a “zero opinion” mechanism. Just as there is good reason for confidence in two opinion system design, there is cause for uncertainty with a zero opinion procedure.

## 2. Prosecutorial incentives

The interaction of probable cause and plea bargaining also affects prosecutorial control of the criminal justice system.

A sophisticated defense of plea-dominated criminal justice acknowledges that little sorting of guilty and innocent takes place in formal judicial proceedings, but posits the prosecutor as a “quasi-judge” or “quasi-administrator” whose screening of cases is the adjudicative system.<sup>281</sup> As Gerard Lynch observes, “for most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.”<sup>282</sup> Thus understood, prosecutors are less litigators than ordinary government bureaucrats, and the plea-dominated criminal justice system rests, in part, on an implicit trust in prosecutors to distinguish between innocent and guilty.

Once the bureaucratic logic of plea bargaining has been identified, the tools of administrative law and political science become useful in analyzing it. As political scientists and administrative law scholars understand, there are three basic modes of bureaucratic operation: working, shirking, and sabotage.<sup>283</sup> Bureaucrats are “working” when they faithfully serve their principals’ policies, “shirking” when they “fail[] to work,” and engaging in “sabotage” when they substitute their own preferences for their principals’.<sup>284</sup> Agents able to “shirk” or “sabotage” are plainly less constrained than their “working” colleagues.

The danger inherent in an “administrative system” of criminal justice is that prosecutors will shirk or sabotage instead of work. To the extent Lynch and others have correctly identified the plea bargaining system as administrative in nature, they have also identified the possibility for fissures

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281. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2149 (1998); see also Wright & Miller, *supra* note 24, at 111-13 (arguing for the efficacy of internal controls on prosecutorial screening). I say “plea-dominated criminal justice” here rather than “plea bargaining” because Lynch expresses discomfort with the “bargaining” aspect of plea bargaining. Lynch, *supra*, at 2129-30.

282. Lynch, *supra* note 281, at 2120.

283. JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 21 (1997).

284. Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 488-89 (2012); see also BREHM & GATES, *supra* note 283, at 21 (“Bureaucrats can choose from a variety of policy output decisions, which we label ‘working,’ ‘shirking,’ and ‘sabotage.’”).

between prosecutors and their principals. The trouble is that the probable cause standard exacerbates that risk by enabling prosecutorial shirking.

Because she must establish only probable cause to initiate a charge, and because probable cause is typically defined as less than a preponderance of the evidence,<sup>285</sup> a prosecutor need not investigate a matter sufficiently to convince herself of a defendant's guilt before obtaining a formal charge, and thus, usually, a conviction. As a practical matter, this means that the prosecutor is free to defer to the investigating law enforcement agency rather than make an independent judgment. That is shirking. The logic of the administrative system of criminal justice is that the prosecutor will make a reasoned determination of the defendant's guilt.<sup>286</sup> While many prosecutors discharge this duty vigilantly, prosecutors occasionally acknowledge bringing charges about which they are "agnostic."<sup>287</sup> Stanley Fisher goes so far as to call it the "prevailing view" in practice that prosecutors may "proceed absent personal belief in the defendant's guilt."<sup>288</sup> Prosecutors may justify this in multiple ways. One is on the grounds that the ultimate decision of guilt or innocence—as to particular issues or the case as a whole—is for the jury, not them.<sup>289</sup> In his classic study of the prosecutorial role in plea bargaining, Albert Alschuler reported that some prosecutors he interviewed "insist[ed] that it is not part of their job to make an independent judgment on questions of intention or questions of justification."<sup>290</sup> Even when prosecutors are personally convinced that the defendant is guilty of one offense, moreover, they may tack on additional charges as to which they are agnostic.<sup>291</sup> The purpose, Alafair Burke observes, may be to "gain leverage over the defendant in plea negotiations."<sup>292</sup>

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285. See *supra* notes 277-80 and accompanying text.

286. Lynch, *supra* note 281, at 2129; see also Wright & Miller, *supra* note 24, at 109 (arguing that as prosecutors attach more care to screening, they should put in place barriers to bargaining).

287. Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 79 (2010).

288. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 230 n.144 (1988).

289. Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 534 (1999).

290. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 64 n.42 (1968).

291. Burke, *supra* note 287, at 86-87.

292. *Id.* at 87. Many prosecutors do believe that they should prosecute defendants only when they are personally convinced of guilt. See Alschuler, *supra* note 290, at 64 n.42 ("In the reflective atmosphere of a conversational interview, most prosecutors declare that a prosecutor should not proceed unless he is satisfied of the defendant's guilt."); see also Burke, *supra* note 287, at 85 ("I can attest that when I was a prosecutor, I was told, and 'never questioned,' that my colleagues and I should pursue a case only when personally convinced of the defendant's guilt." (quoting Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 309 (2001))); Gershman, *supra*, at 309 ("Years ago, when I became a prosecutor, I was trained to believe that you never put a defendant to

*footnote continued on next page*

The prospect of prosecutorial shirking does not exist *because* of the probable cause standard. The standard nonetheless exacerbates the risk. By enabling prosecutors to file charges about which they are agnostic, it further diminishes constraints on the delegation of prosecutorial authority.

### C. Understanding Probable Cause's Survival

At some point, plea bargaining's effects on social certainty of guilt and constraint on prosecution became obvious to participants in and commentators on American criminal justice.<sup>293</sup> It is hard to pinpoint exactly when this happened, but we can place lower and upper bounds. It was probably not before the 1920s, when plea bargaining was "discovered."<sup>294</sup> Before the 1920s, and in some measure until scholarly attention intensified in the 1960s and 1970s, plea bargaining was essentially invisible.<sup>295</sup> As Lawrence Friedman observes, plea bargaining in the twentieth century was "[p]ervasive, yes, but for most of the century, fairly invisible, and certainly not the stuff of controversy; its rapid rise was hardly noticed by the general public, or even by high courts

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trial unless you were personally convinced of his guilt."); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178 (1965) ("The great majority, if not all, of the [assistant prosecutors] felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt."). *But see* Alschuler, *supra* note 290, at 64 n.42 ("It may be doubted, moreover, that the prosecutors' declaration[s] always reflect their actual practices. In the day-to-day game of prosecuting, it seems relatively easy to avoid serious reflection upon the ultimate question of guilt or innocence."). Prosecutors who take a more expansive approach to charging violate no ethical rule. Burke, *supra* note 287, at 83-84. Arguably, so long as probable cause exists, a prosecutor can even charge a defendant that she personally believes is *innocent* without fear of professional sanction. If the prosecutor subjectively believes that the defendant is innocent of the charge, the problem is arguably one of sabotage, not shirking.

293. To be clear, the consequences of plea bargaining discussed in Part III.A above became obvious at some point. This is not necessarily true about the *interaction* between plea bargaining and probable cause discussed in Part III.B. As noted there, the interaction has been underexplored in the plea bargaining literature.
294. *See supra* note 230 and accompanying text. The 1920s round of plea bargaining analysis, moreover, was fairly limited. *See supra* notes 226-30 and accompanying text.
295. A 1967 presidential task force noted that plea bargaining "operate[d] in an informal, invisible manner." PRESIDENT'S COMM'N ON LAW ENFT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURT 9 (1967); *see also* Walter E. Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 504 (1971) ("[P]lea bargaining's prime vice has heretofore been in its invisibility and lack of candor . . ."); Moley, *supra* note 230, at 126 ("Worst of all, [plea bargaining] carries little public responsibility. It leaves little upon the record. . . . The very difficulty with which the facts concerning this practice have been unearthed show how easy it has been for prosecutors to indulge in this sort of compromise without exciting public interest."); James Vorenberg, *The Presidential Crime Commission*, in *Proceedings of the Thirtieth Annual Judicial Conference*, 44 F.R.D. 57, 81 (1967) ("The plea of guilty and the whole issue of the dishonesty of the plea-bargaining process in many courts is another area of invisibility, where there is very little law either in court decisions or in legislation . . . [.]").

and legal scholars.”<sup>296</sup> Under these circumstances, it would not be surprising if even those directly involved in criminal litigation failed to appreciate plea bargaining’s systemic effects. If they did, they kept quiet about them.<sup>297</sup>

By the 1970s and 1980s, on the other hand, nobody paying attention could have failed to notice plea bargaining’s transformation of the criminal justice system. By sometime in the mid- to late twentieth century, profound changes had become apparent. The formalized trial system had given way to plea bargaining. The new system, whatever its virtues, counted among its vices both uncertainty about the actual guilt of individuals punished and unconstrained delegations of prosecutorial authority. *Ceteris paribus*, these are precisely the conditions that would suggest a return to a “strict” charging standard.<sup>298</sup> Yet the old standard remained in place. That demands explanation.

In this Subpart, I offer three explanations for probable cause’s retention: changes in the “demand” for certainty and prosecutorial constraint, apparent changes in the “supply” of certainty, and path dependence.

### 1. Demand

The framework in Part I suggests that a strict standard becomes more likely when criminal justice decisionmakers highly value certainty of guilt and constraints on the delegation of prosecutorial power. Probable cause may have been retained in the age of plea bargaining simply because those empowered to change it did not highly value those goods. This state of affairs is consistent with the “tough-on-crime movement” that began in the 1960s.<sup>299</sup> A vast literature considers the causes and consequences of the “punitive turn” in American criminal justice.<sup>300</sup> For present purposes, the crucial point is that decisionmakers during this period enthusiastically embraced Herbert Packer’s “Crime Control Model” of criminal justice, in which the “repression of criminal conduct is by far the most important function to be performed by the criminal process.”<sup>301</sup> It is altogether possible that the emphasis that decisionmakers put on the “repression of criminal conduct” left comparatively little room for certainty or prosecutorial constraint.

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296. FRIEDMAN, *supra* note 161, at 392.

297. In his history of plea bargaining, Alschuler notes a handful of commentary from the 1920s and 1930s foreshadowing the subsequent focus on plea bargaining’s systemic consequences, but observes that “[m]ost of the [early] criticism came from the hawks of the criminal process rather than the doves.” Alschuler, *supra* note 12, at 29-32.

298. *See supra* Part I.

299. *See* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 288 (2012).

300. STUNTZ, *supra* note 203, at 252-55. Many of the leading analyses are collected in Brown, *supra* note 299, at 288 n.6.

301. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 158 (1968).

## 2. Supply

Another explanation for probable cause's retention is based on the apparent certainty of guilty pleas. In a typical guilty plea, the defendant solemnly admits in open court that he is guilty of the crime charged,<sup>302</sup> and a judge finds a "factual basis for the plea."<sup>303</sup> What more certainty could one want? This is precisely the logic that the Supreme Court invoked when it endorsed the constitutionality of plea bargaining in a series of cases in the 1970s.<sup>304</sup> As the Court observed in *Menna v. New York*, "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case."<sup>305</sup> In Part I, I suggested that a strict charging standard becomes less likely when certainty of guilt is otherwise achieved by the adjudicative system. It may be that probable cause survived in the era of plea bargaining because those empowered to change it believed (rightly or wrongly) that guilty pleas provide adequate certainty of guilt.

## 3. Path dependence

A third explanation is that criminal justice decisionmakers never reexamined the fit between probable cause and plea bargaining. Given plea bargaining's history and its still-ambivalent treatment in formal law, this too is possible.

As noted, nobody (other than perhaps those directly involved in criminal litigation) noticed plea bargaining for the first several decades of its rise, much less its systemic consequences.<sup>306</sup> By the time that plea bargaining's constitutionality was squarely presented to the Supreme Court in *Brady v.*

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302. *Alford* pleas, in which the defendant pleads guilty without confessing guilt, are an uncomfortable exception. See *North Carolina v. Alford*, 400 U.S. 25, 38 (1970); Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1412 (2003) ("Alford pleas are awful. There could hardly be a clearer violation of due process than sending someone to prison who has neither been found guilty nor admitted his guilt. If anything short of torture can shock your conscience, Alford pleas should.").

303. LAFAVE ET AL., *supra* note 179, § 21.4(f) (reciting from Federal Rule of Criminal Procedure 11(b)(3) and noting the "comparable provision[s]" of many states). *But see* Richard L. Lippke, *Plea Bargaining in the Shadow of the Constitution*, 51 DUQ. L. REV. 709, 720 (2013) ("And though judges are supposed to verify in plea colloquies that a 'factual basis' exists for any pleas entered, it does not appear that they do so with any rigor.").

304. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."); *Brady v. United States*, 397 U.S. 742, 748 (1970) ("That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized.").

305. 423 U.S. 61, 62 n.2 (1975) (per curiam).

306. See *supra* note 230 and accompanying text.

*United States*<sup>307</sup> and *Bordenkircher v. Hayes*,<sup>308</sup> the outcome appeared inevitable.<sup>309</sup> Indeed, there is a sense of *fait accompli* in the Court's rulings.<sup>310</sup> Left to reconcile the principle that confessions may not be "coerced" with the underlying logic of plea bargaining, the Court adopted a legal fiction that prosecutorial threats of severe posttrial sentences are not coercive.<sup>311</sup> But even the Court seemed less than fully convinced, its ambivalence revealed by a caveat at the end of *Brady*: "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves."<sup>312</sup>

Even today, the Supreme Court's criminal law jurisprudence often posits the trial as the basic adjudicative mechanism of criminal justice.<sup>313</sup> This reflects the still-ambivalent relationship between plea bargaining and formal law.<sup>314</sup>

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307. 397 U.S. 742.

308. 434 U.S. 357.

309. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037 (1984) ("In most criminal cases, plea bargaining is necessary and inevitable—at any rate, that is the view of nearly all knowledgeable scholars and practitioners and much of the public at large.").

310. See *Bordenkircher*, 434 U.S. at 361-62 ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977))); *Brady*, 397 U.S. at 751 ("The issue we deal with is *inherent* in the criminal law and its administration . . . ." (emphasis added)).

311. In *Brady*, the threatened posttrial sentence was death. 397 U.S. at 743. In *Bordenkircher*, it was a life sentence, as opposed to the five years offered in the plea. 434 U.S. at 358-59. Citing *Brady* and *Bordenkircher*, Josh Bowers notes that the Supreme Court "has held expressly that the kind of mental coercion implicit to a charge—even to a capital charge or mandatory charge of life without parole—does not qualify as mental coercion." Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1147 (2013).

312. 397 U.S. at 758. Lucian Dervan interestingly posits this language as a "safety-valve." Dervan, *supra* note 259, at 87-88.

313. There are exceptions, of course. In two recent cases, the Court has given legal consequence to the defense counsel's role in plea bargaining. See *Missouri v. Frye*, 132 S. Ct. 1399, 1410-11 (2012) (holding that attorney's performance was deficient when attorney failed to communicate plea offer to defendant); *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (allowing ineffective assistance claim when faulty legal advice led defendant to reject plea offer); see also *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that attorney's performance was deficient when attorney gave incorrect advice about immigration consequences of plea bargain). Albert Alschuler, however, argues that *Lafler* and *Frye* are not the "landmarks" that they might appear. Alschuler, *supra* note 241, at 678-81.

314. See, e.g., Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 630 (2005) ("Current law and practice surrounding plea bargaining reflect ambivalence about this problem."); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 460 (2013) ("Although plea bargains are the lifeblood of the American criminal justice system, courts have been ambivalent toward them.").

The probable cause standard itself offers an example. Writing for the Court in 2014, Justice Kagan asserted that a grand jury's probable cause finding "determines *only* whether adequate grounds exist to proceed to trial and reach" the question "whether a defendant is guilty beyond peradventure."<sup>315</sup> This is, of course, not entirely correct. As we have seen, in the modern criminal justice system, the most important characteristic of a probable cause finding—whether by a grand jury or a magistrate—is to commence or advance plea bargaining, not to invite the defendant to a trial.

There was no moment in time when criminal justice policymakers "decided" to adopt plea bargaining as the dominant mechanism of criminal adjudication. American criminal justice backed into plea bargaining slowly and clumsily. In light of plea bargaining's history and its ambivalent treatment in formal law, it is entirely plausible that criminal justice policymakers *never* examined the fit between plea bargaining and probable cause. If so, probable cause persisted—and persists today—not because it achieved the "right" amounts of certainty and constraint, but because it was in the right place at the right time.

### Conclusion

The goals of this Article are largely analytical. I conclude by making the normative implications of the analysis more explicit.

One potential implication of the historical evidence assembled in Part II is a legal argument about the "original meaning" of the Grand Jury Clause. One might, for instance, argue that federal judges may not, consistent with the Fifth Amendment, instruct grand jurors to indict based on mere "probable cause." The Supreme Court has proven willing to upset settled criminal justice practices based on historical evidence.<sup>316</sup> I leave it to those writing on originalism to develop such an argument in this context. Three limitations, however, seem significant. First, because the Grand Jury Clause is not incorporated against the states, the argument would apply only to the federal criminal justice system.<sup>317</sup> Second, while the probable cause standard is not ancient, it is, in 2016, settled and supported by precedent.<sup>318</sup> A strong variant of originalism—akin to what William Baude calls "exclusive originalism"—would

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315. *Kaley v. United States*, 134 S. Ct. 1090, 1104 (2014) (emphasis added).

316. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 50 (2004) (noting that because the text of the Sixth Amendment's Confrontation Clause did not resolve the question presented, they had to "therefore turn to the historical background of the Clause to understand its meaning," and concluding that the history of examination practices "supports two inferences about the meaning of the Sixth Amendment").

317. *See Hurtado v. California*, 110 U.S. 516, 520, 538 (1884) (holding that the Grand Jury Clause of the Fifth Amendment is not incorporated against the states).

318. *See supra* notes 277-78 and accompanying text.



thus be required to displace it.<sup>319</sup> Third, the history likely cannot support an argument that the Fifth Amendment *requires* judges to instruct grand juries using a prima facie or certainty charge.<sup>320</sup> It is much more plausible (assuming an originalist methodology) that the Grand Jury Clause precludes charges based on bare probable cause.

My priority is the criminal justice system of today, which is to say, the criminal justice system of plea bargains. In Part III.C, I canvassed three plausible explanations of why probable cause survived when the rise of plea bargaining might have suggested returning to a stricter standard. My analysis does not allow me to identify one of the three (or a combination of them) as the “real” reason for probable cause’s stickiness. The critical normative point is this: *none* is appealing. Certainty and checks on prosecutorial delegation are vital elements of a criminal justice system—if we have lost sight of them, that is to our detriment. Whatever their appearance, moreover, guilty pleas do not assure us of a defendant’s guilt,<sup>321</sup> and we should not have a charging standard premised on the belief that they do. Finally, there is little good to say about the accidental retention of a charging standard designed for an adjudicative regime we do not use.

The contemporary probable cause standard is problematic at best. In this moment of criminal justice reform, it should be on the table, and probably on the chopping block. This could mean changing the standard that judges use when they instruct grand jurors and that magistrates apply at preliminary hearings.<sup>322</sup> But innovative institutional mechanisms, calibrated for the contemporary world of plea bargaining, should also be considered.<sup>323</sup>

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319. Cf. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015) (defining “exclusive originalism”).

320. While a “certainty” standard was more popular in the Founding era than “probable cause,” *see supra* Part II.A, most Founding-era grand jury charges did not take a position on the probable cause versus certainty debate.

321. *See supra* notes 259–63 accompanying text.

322. *See, e.g.,* Arenella, *supra* note 2, at 559 (proposing a heightened grand jury standard).

323. While this is not the place to explore institutional options in depth, I note a promising one: an exclusionary rule providing that, absent special circumstances, at trial the government may only offer evidence that it presented to the grand jury or screening magistrate. Naturally, there would be caveats. For instance, the government should be allowed to present evidence responsive to the defendant’s evidence, or of events occurring after the indictment or information. The general rule, however, would incentivize prosecutors to investigate and screen cases before returning indictments and informations. This would provide both greater certainty of guilt and a meaningful constraint on prosecutorial authority. And because the government often does not know before it obtains an indictment or information whether a defendant will accept a guilty plea, its logic would apply to many cases and not just the few that go to trial. Of course, the exclusionary rule would have costs, and further analysis is required to determine whether the benefits would outweigh the costs. Even if they did, the exclusionary rule would not cure all the pathologies of plea-fueled criminal justice. But it might push against them. Cf. Alschuler, *supra* note 241, at 707 (arguing that scholars

*footnote continued on next page*

Ultimately, the overriding normative implication of this Article is that we should not take probable cause for granted. As the historical analysis demonstrates, probable cause is neither necessary nor timeless. Criminal charging standards represent a choice. It is time—indeed, past time—to revisit ours.

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should “abandon the search for ways to make the criminal justice system fair and principled” and focus instead on “mak[ing] it less awful”).