Who is the Primary Cognitive Subject in Probable Cause Determinations?

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Abstract

The phrase 'probable cause' is a critical one in the American system of criminal law. The ideas behind it play a critical role when we are stopped by a law enforcement official for an alleged traffic violation or when we are searched prior to boarding an airplane. In this paper, I argue that probable cause is an epistemic, or more properly doxastic, concept. In particular, I attempt to identify that class of individuals who bear the primary responsibility for determining whether a claim of probable cause is sufficient.

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"...no Warrants shall issue, but upon probable cause...."
--the Fourth Amendment

I. Probable Cause

In this paper, I attempt to answer the above question. However, I must first contextualize that question. The Fourth Amendment to the United States Constitution requires that warrants for both searches and seizures be based on probable cause. The Constitution provides no definition of 'probable cause' and no direction as to whether the notion should be applied in other than warrant situations. So far as we know, the first time the phrase appeared in an American legal document was in James Madison's proposal of amendments to the Constitution before the House of Representatives of the First Federal Congress.[1] The only known previous occurrence of the precise phrase was in Sir Matthew Hale's *Historia Placitorum Coronae* where it was used much as we would use the phrase today.[2] William Blackstone used language similar to Hale's and undoubtedly Blackstone's language is dependent on that source.[3] Given this paucity of content for the phrase, the definition of probable cause and other issues surrounding it was left to either the legislative branch or the judicial branch. The legislative branch declined this role and left it to the judicial.

For much of its history, the Supreme Court had little to say about probable cause. This was due in large part because the Court had ruled that the Bill of Rights placed constraints on the federal government but not on state governments.[4] The Court was not presented with a sufficient number of cases on appeal to begin the process of definition. The first major case to discuss Fourth Amendment concerns did not occur until 1886.[5] With the adoption of the Fourteenth Amendment in 1868, the Court was given a tool that could be used to apply the Bill of Rights to state governments. The Court has never ruled that the entire Bill of Rights is applicable to states.[6] Rather, the Court has pursued the course of deciding which provisions of the Bill of Rights are applicable to the states on a case by case basis.[7] Incredible as it may seem, the Fourth Amendment was not applied to the states and their subdivisions until 1961.[8] Prior to this time, the only constraints on state and local governmental searches and seizures were those contained in state constitutions or state bills of rights.

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[1] James Madison, Resolution presented to the House of Representatives, 8 June 1789, in Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Baltimore: Johns Hopkins University Press, 1991), 13.

[2] Matthew Hale, *Historia Placitorum Coronae. The History of the Pleas of the Crown*, ed. Sollom Emlyn with notes and references to later cases by W. A. Stokes and E. Ingersoll, 1st American ed., 2 vols. (Philadelphia: Robert H. Small, 1847), 2:150. This great work of Hale was completed in 1680, but not published until 1736.

[3] William Blackstone, *Commentaries on the Laws of England*, vol. 4, *Of Public Wrongs* (Oxford: Clarendon Press, 1769; reprint , Chicago: University of Chicago Press, 1979), 287.

[4] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[5] Boyd v. United States, 116 U.S. 616 (1886).

[6] The theory that the Fourteenth Amendment makes the entire Bill of Rights applicable to state governments is known in legal circles as the "total incorporation doctrine." The total incorporation approach was essentially rejected in *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The doctrine received its *coup de grace* in *Twining v. New Jersey*, 211 U.S. 78 (1908).

[7] This approach to the relationship between the Bill of Rights *in toto* and the Fourteenth Amendment is called the "selective incorporation doctrine."

[8] Mapp v. Ohio, 367 U.S. 643 (1961). This statement is an oversimplification of a more complex situation. In *Wolf v.Colorado*, 338 U.S. 25 (1949), the Supreme Court held that the Fourth Amendment was applicable to the states. However, the Court also decided that the exclusionary rule should not be imposed upon the states. Thus, *Wolf* did not have nearly the impact on local jurisdictions that *Mapp* was to have.

In 1963, the Court ruled "…that the constitutionality of state searches would be judged under precisely the same standards applied to federal searches under the Fourth Amendment."[9] Since then, a plethora of cases involving Fourth Amendment issues, in general, and probable cause issues, in particular, have gone on appeal to the Supreme Court. *Brinegar v. United States* was one of the earlier cases in which there was an explicit discussion of probable cause by the Court. This case has subsequently been one of the most frequently cited in other related Supreme Court cases as well as in legal texts. *Brinegar* quotes with approval the definition of probable cause given in *Carroll v. United States.*

> …Probable cause exists where 'the facts and the circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.[10]

Although there have been slight differences in phrasing, this definition has remained the core definition of probable cause throughout the legal literature.[11] As noted at the beginning of this paper, for a warrant to be valid, it must be based on probable cause. But not all searches and seizures are conducted with warrants. The Court has interpreted the Fourth Amendment to prohibit only unreasonable searches and seizures.[12] Thus, there may be reasonable warrantless searches and seizures. However, the Court also held that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment…."[13] Thus, the measure of the reasonableness of any particular search and seizure starts with the probable cause standard.

Even so, some searches and seizures may still be reasonable even if they do not measure up to the probable cause standard. Inspections of highly regulated businesses may meet Fourth Amendment standards even if they are conducted without warrants and are not based on probable cause.[14] For example, government officials may inspect bars, restaurants, pharmacies, and so on without warrants or probable cause but still be within Fourth Amendment standards. Furthermore, a police officer may, given the appropriate circumstances, stop and frisk a suspected person without a warrant or probable cause.[15] Another example of searches that the Court has ruled do not require either a warrant or probable cause are searches of passengers at airports prior to boarding and searches of those crossing international boarders. An example of the sort of reasoning the Court used in exempting such searches from Fourth Amendment requirements may be found in *United States v. Edwards*.

> When the risk is the jeopardy to hundreds of lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing highjacking or like damage and with reasonable scope and the passenger has been given advanced notice of his liability to such a search so that he can avoid it by choosing not to travel by air.[16]

Despite the fact that certain searches and seizures require neither a warrant nor probable cause, it still remains the case that most searches and seizures aimed at criminal activities must be based on probable cause whether conducted pursuant to a warrant or not. Thus, before a police officer may stop a motorist for speeding or arrest a person for public intoxication, she must have probable cause to do so. Probable cause in its most tangible and public form is a series of natural language statements. In the case of a governmental official seeking a warrant, these statements are usually written on a piece of paper which is to be presented to a magistrate for her examination. This document is an affidavit. In the event that a governmental agent has acted without a warrant, the statements are presented in oral form before a judge. These statements are elicited from the agent by direct examination of a prosecuting attorney and those statements are subject to cross examination by a defense attorney. The person either seeking a warrant or taking warrantless action has the responsibility to gather as much relevant information as she can under the particular circumstances and truthfully present that information to a magistrate or judge. In either case, the information is presented under oath. The decision concerning the sufficiency of probable cause is not within the purview of a jury because probable cause has been ruled a matter of law and not of fact. In the United States, the jury is the determiner of fact whereas the judge is the determiner of law. Probable cause decisions made by either magistrates or judges are subject to review by appellate courts because, once again, they are matters of law and not of fact. In order for statements of probable cause to constitute probable cause for an arrest, those statements must support the drawing of two conclusions:

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[9] Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure*, Hornbook Series, Student ed. (St. Paul, Minn.: West Publishing Co., 1985), 55, f. 1 referring to *Ker v. California*, 374 U.S. 23 (1963).

[10] Brinegar v. United Sates, 338 U.S. 160 (1949), 175-76, quoting Carroll v. United States, 267 U.S. 132 (1925), 162.

[11] John Wesley Hall, Jr., *Search and Seizure*, 2nd ed. (Deerfield, Ill.: Clark Boardman Callaghan, 1991) 1:82.

[12] *Vide*, for example, United States v. Chadwick, 433 U.S. 1 (1977), 9.

[13] Hill v. California, 401 U.S. 797 (1971), 804. This doctrine was reiterated by the Court in *Maryland v. Garrison*, 480 U.S. 79 (1987), 87.

[14] Colonnade Catering Corporation v. United States, 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972).

[15] Terry v. Ohio, 392 U.S. 1 (1968).

[16] United States v. Edwards, 498 F. 2d 496, 500 (CA2 1974). Also see, for example, *Carroll v. United States*, 267 U.S. 132 (1925). The *Carroll* case was cited to uphold the ruling more recently in *United States v. Flores-Montano*, 541 U.S. 149 (2004).

(1) that a crime has been or is being committed and (2) that a particular person has committed or is committing it. In order for statements to constitute probable cause for a search, they must also support the drawing of two conclusions: (1) that the particularly specified items sought in the search are in some relevant way connected to some criminal activity and (2) that those items will be found in a particularly specified location.[17] Based on this very brief sketch of probable cause, it should be clear that the statements have a clearly epistemic dimension. I take 'epistemic' here in a broad sense to include not only knowledge in the strict sense, but beliefs as well. Thus, this is as much a doxastic inquiry as an epistemological one. One of the problems this inquiry faces is identifying the primary cognitive subject in probable cause determinations. This issue is explored in the next section.

II. Who is the Primary Cognitive Subject?

The standard works on criminal procedure or search and seizure oftentimes do not sufficiently emphasize the role of the magistrate as the drawer of conclusions in probable cause hearings. From the philosophical standpoint, an important epistemological problem emerges here. If probable cause is justified belief as is implied in the language contained in *Carroll v. United States*, then in order to analyze the nature of that justification it is necessary to identify the primary cognitive subject. In the usual epistemological discussions, it is assumed that one is speaking from the standpoint of the primary cognitive subject. In the texts of legal decisions and legal scholarship, one is often hard put to determine if it is the police officers, the magistrates, the trial judges, or the appellate judges who are the primary cognitive subjects. If the primary cognitive subject can be identified with respect to probable cause, then many of the problems related to probable cause become much easier to analyze and to understand.

There is no question that in most cases the police have already drawn their own conclusions. Otherwise, they normally would not apply for a warrant or take the action they did. As is often the case, the magistrate draws the same or sufficiently similar conclusions to uphold a ruling on the sufficiency of the probable cause. This situation may lead to some confusion as to who has the responsibility to draw conclusions from the facts stated. If the police officer has drawn his own conclusions and acts on those conclusions in a situation in which he is permitted to act without a warrant, then that officer must defend those conclusions under cross examination. It is the responsibility of the prosecution under direct and redirect examination to show to the satisfaction of the judge hearing the case that the officer had sufficient information on which to base his conclusions and that the probable cause upon which the officer was acting is sufficient. In such a situation, it is the trial judge who makes the probable cause determination. The police officer's determination is merely preliminary and subject to final review by the courts. Of course, the preferred method of making a probable cause determination is prior review by a magistrate. Here, the magistrate has an opportunity to review the statements of the affiant and even question the affiant for further information and clarification. Such information may then be added to the affidavit. Under either of the two methods, it is a "neutral and detached" magistrate who makes the determination.

The Supreme Court has emphasized this fact repeatedly. Thus in *Johnson v. United States*, the Court asserts

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[18]

Justice William O. Douglas states the matter even more bluntly in one of his many dissents.

> We deal with the constitutional right of privacy that can be invaded only on a showing of "probable cause" as provided by the Fourth Amendment. That is a strict standard; what the police say does not necessarily carry the day; "probable cause" is in the keeping of the magistrate. Yet anything he says does not necessarily go either. He too is bound by the Constitution. His discretion is reviewable.[19]

While most judges would agree with Justice Douglas that "…'probable' cause is in the keeping of the magistrate...," matters are quite different with probable cause as a strict standard. The Court in *Illinois v. Gates* reemphasizes the Court's traditional stand with regard to the role of the magistrate as the determiner of probable cause. "The task of the issuing magistrate is simply to make a practical, commonsense decision whether...there is a fair probability that contraband or evidence of a crime will be found in a particular place."[20] The *Gates* Court also agrees with Justice Douglas that a magistrate's probable cause determination is reviewable by appellate courts. "In order to ensure that...an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued."[21]

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[17] Jerold H. Israel and Wayne R. LaFave, *Criminal Procedure: Constitutional Limitations*, Nutshell Series, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1980), 113.
[18] Johnson v. United States, 333 U.S. 10 (1948), 13-14.
[19] United States v. Ventresca, 380 U.S. 102 (1965), 117.
[20] Illinois v. Gates, 462 U.S. 213, 238.
[21] Ibid., 239.

The implication of this statement is that if the courts do not "...conscientiously review the sufficiency of affidavits..." *de novo*, then it will fall to the appellate courts to provide just such a review. John Hall emphasizes that recent Supreme Court decisions have intended to place more responsibility on magistrates issuing warrants.

> Under *Leon*, however, the magistrate is now the central figure in the search warrant process. Once the warrant issues, the burden to suppress is heavy. As a practical matter, the defendant will have to show a substantial lack of probable cause on the totality of the circumstances, that a *Franks* challenge is appropriate, or that the magistrate lacked neutrality.[22]

Furthermore in *Leon*, the Court ruled that it would not "...bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." A *Franks* challenge is a claim that must be made by the defendant that a specific portion of an affidavit for a warrant is false. This claim must be supported by reasons and affidavits or sworn or otherwise reliable statements of witnesses. If the challenge is accepted by the court, then a *Franks* hearing is held. In this hearing, the defendant has the burden of proving by a preponderance of the evidence that the statements so challenged are false and their inclusion in the affidavit is perjury or a reckless disregard for the truth.[23]

This is certainly the position the Court takes in *Gates*.

> ...[W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." "...A grudging or negative attitude by reviewing courts towards warrants,"...is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant....[24]

Where the *Gates* Court disagrees with Justice Douglas' judgment is whether or not probable cause is a strict standard. Clearly, the majority in *Gates* does not consider probable cause as strict a standard as does Justice Douglas. The Court in *Gates* makes this clear in its criticism of *Spinelli*.

> The rigorous inquiry into the *Spinelli* prongs and the complex superstructure of evidentiary and analytical rules that some have seen implicit in our *Spinelli* decision, cannot be reconciled with the fact that many warrants are--quite properly,...—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings.[25]

The Court is not inconsistent here in noting that warrants may issue on the basis of the commonsense judgments of laymen. The Court points out that "...search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who do not remain abreast of each judicial refinement of the nature of 'probable cause.'"[26] This is one of the reasons that *de novo* judicial review of the sufficiency of affidavits must be conscientious. The most important conclusion to draw from the foregoing is that it is the magistrate reviewing the affidavit for a warrant or the trial judge ruling on the probable cause testimonial evidence of witnesses who is the primary cognitive or doxastic subject with respect to probable cause. Neither law enforcement officers nor appellate judges play that role. If this fact is kept firmly in mind, many of the apparent difficulties and inconsistencies concerning probable cause can be solved or resolved. It should be obvious that probable cause is a normative legal concept. Furthermore, it should also be clear that probable cause has a normative epistemological or doxastic dimension as well. Since the Supreme Court has ruled that the Fourth Amendment also provides a right of privacy and that probable cause plays a direct rôle in protecting that right, then probable cause also has normative implications in the social, political, and moral spheres. These are topics that I will explore in subsequent papers.

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[22] John Wesley Hall, Jr., *Search and Seizure*, 2nd ed. (Deerfield, Ill.: Clark Boardman Callaghan, 1991), 1:77. Briefly, *United States v. Leon*, 468 U.S. 897 (1984) introduced the "good faith" exception to the exclusionary rule. The exclusionary rule prohibits the introduction in a criminal trial of evidence obtained in violation of a defendant's constitutional rights. The exclusionary was first applied to federal law enforcement officials in a Fourth Amendment context in *Weeks v. United States*, 232 U.S. 383 (1914); it was later extended to local law enforcement officials in *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Mapp*, the Court asserted,

> Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'

Also in *Leon*, the Court also ruled that the exclusionary rule is not constitutionally based but, rather, a judicially created remedy to constitutional abuses.

[23] *Franks v. Delaware*, 438 U.S. 154 (1978). *Vide*, Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure*, Hornbook Series, student ed. (St. Paul, Minn.: West Publishing Co., 1985), 130-32 for a clear, brief discussion of *Franks*. I have relied heavily on that discussion for my description here.

[24] Illinois v. Gates, 462 U.S. 213, 236. The Court cites *Spinelli v. United States*, 393 U.S. 410 (1969), 419 and *United States v. Ventresca*, 380 U.S. 102, 108, 109.

[25] Illinois v. Gates, 462 U.S. 213, 235-36. Citation omitted.

[26] Ibid., 235.