THE FOURTEENTH AMENDMENT RIGHT TO ACCESS CRIMINAL JUSTICE

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ABSTRACT

American law, typified by Supreme Court decisions like Linda R.S. and Leeke, operates on the assumption that private citizens lack a "judicially cognizable interest" in the criminal prosecution of another and cannot, for instance, challenge the non-prosecution decision of a public prosecutor, however discriminatory. This article shows that the assumption has no substance. Examining nineteenth-century criminal procedure and Congressional enactments after the Civil War, including the Civil Rights Act of 1866 and the Fourteenth Amendment, I argue that Americans long enjoyed a well-defined, personal, civil right to initiate criminal proceedings against wrongdoers.

Through an examination of the era's legal sources, this article demonstrates that crime victims and eyewitnesses long possessed the right to initiate criminal proceedings. I examine treatises, statutes, and, innovatively, malicious prosecution cases, which usually detailed the underlying arrest, to argue that Americans expected their oath, sworn on personal knowledge before a local magistrate, to trigger arrest and a probable cause examination.

During Reconstruction, Southern states weaponized anti-testimony laws to deny freed people this common right to access criminal justice. Even when Southern legislatures passed limited testimony laws under federal pressure, they often burdened the testimony of Black Americans, such as by requiring that their testimony be taken only orally, when most criminal complaints had to be reduced to a written deposition. No article, to my knowledge, has ever discussed these technical burdens on Black testimony during the post-war period.

In response, Congress drafted the Civil Rights Act of 1866—a foundational text for interpreting the Fourteenth Amendment—to secure the right to "give evidence" in "proceedings for the security of person and property." Given the context of the era's criminal procedure, these provisions must be understood as safeguarding Black Americans' access to arrest and examination proceedings against both discriminatory legislation and discriminatory enforcement. Thus, history demands a revision of our understanding about the "cognizable interests" of crime victims and witnesses.

TABLE OF CONTENTS

INTRODUCTION

In American law, victims and witnesses to crime are thought to have no civil right to access the criminal justice system. Arrests are obtained only through the grace and acquiescence of police departments; prosecutions are continued only in the discretion of states' prosecutors. Prosecutorial discretion of this kind is a bedrock of our system, yet it is difficult to say why. This principle—that crime victims and witnesses have no personal rights in the criminal justice system—does draw some support from a series of Supreme Court decisions interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments, but these precedents themselves beg the question; they take up the principle and project it onto history and legal tradition, denying citizens' power to prosecute based on the assumption that they never possessed the right to access criminal justice in the first place. But that assumption about American legal history is unwarranted. Instead, legal and historical sources from the nineteenth century show that American victims and crime witnesses long exercised a definite right to commence criminal prosecutions. This evidence leads to a major revision of our understanding of American jurisprudence: The average citizen's right to participate in criminal prosecution deserves to be restored to the tradition of American civil rights.

How did American law arrive at the conclusion that the average citizen has no civil right to participate in criminal prosecution, if the conclusion has no historical basis? It likely grew from the *a prioris* of decisions about federalism, through which the Court blocked Congress from protecting crime victims. During Reconstruction, the Court first held that Congress could not give the federal courts removal jurisdiction over state-law criminal proceedings, even where state law barred a crime victim from participating as a complainant in criminal proceedings.[1] Later, the Court held that Congress could not seek to enforce criminal laws directly against private, non-state actors, even when the circumstances of a crime suggested that it had been permitted by state neglect, or when the criminals intended to violate the civil rights of the victims.[2] In the mid-twentieth century, the Court held that crime victims could not use civil rights statutes to compel

1. United States v. Blyew, 80 U.S. (13 Wall.) 581 (1872).

2. United States v. Cruikshank, 92 U.S. 542, 548–49 (1876); United States v. Harris, 106 U.S. 629 (1883). *But see* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011), in which Brandwein argues that the cases have been overread and that Congress has the power to regulate the discriminatory conduct of private actors where states fail or neglect to do so. This article is in broad agreement with Professor Brandwein. While I offer here the typical narrative of Reconstruction-era Supreme Court cases, I likewise believe they have been read too expansively.

prosecutors to prosecute, nor compel law enforcers to arrest.[3] In these modern cases, the Court stated the assumption as a holding for the first time, reasoning that a plaintiff-victim lacked "standing" to sue because "in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."[4] The Court has since held that Congress may not create a private cause of action for survivors of gender violence, even upon a strong showing of neglect by state law enforcers in protecting victims of gender-based violence.[5] Finally, the Court held that there was no due-process right to protection by state officers, even where a state held out promises of protection.[6] In these cases over the centuries, what began as an unspoken assumption in dicta about federalism and the powers of Congress ended as a rule of law about individual civil rights.

But since the earlier cases in this series addressed issues of federalism rather than the rights of crime victims, when the modern Court finally announced the broad "no standing" rule of *Linda R.S.* and *Leeke* in the 1970s, there was nothing to base it on. The statement from *Linda R.S.* that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another," in (we are told) "American jurisprudence," is unsupported at best, and unabashedly circular when viewed critically.[7] *Linda R.S.* and *Leeke* are wrong, baseless, and due for reconsideration.[8]

While these cases depend on broad, confident intonations about American legal history, that confidence leads them (and us) astray. There is in truth little historical research to draw on in this area. What we have is tinged by the glow of legend and storytelling. One historian tells us that criminal law enforcement in the nineteenth century drew no distinction between "riot and disorder on the one hand and law enforcement on the other," and left a wide opening for "[v]igilantes and lynch mobs."[9] Other historians have found, by contrast, that nineteenth century criminal law aspired to order and control, and, indeed, often achieved levels of both that are overbearing to modern sensibilities.[10]

This mixed history yields at least one clear conclusion: there was a tradition of victims filing and prosecuting cases without heavy

3. Linda R.S. v. Richard D., 410 U.S. 614 (1973); Leeke v. Timmerman, 454 U.S. 83 (1981).
4. *Linda R.S.*, 410 U.S. at 619.
5. United States v. Morrison, 529 U.S. 598 (2000).
6. Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).
7. *Linda R.S.*, 410 U.S. at 619.
8. I have previously critiqued these cases. *See* John Crain, *The Constitutional Tort of Shielding Criminal Wrongdoers in Violation of the Equal Protection of the Laws*, 86 ALB. L. REV. 599 (2023).
9. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 214 (2001).
10. *See* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE (2009).

intermediation by government officials.[11] Upon the oath of a victim or complaining witness, nineteenth century officials commenced hearings, took statements, and transmitted evidence to the grand jury, as a matter of definite and ministerial process activated by the victim or complaining witness.[12] While this system had its drawbacks, and while it could break down and miscarry in ways that appear colorful or shocking to a modern observer, it also did not make the mistake of cutting victims out of criminal procedure. It saw the crime victim or witness as participants in criminal procedure, with definite rights to activate and access criminal justice proceedings. While we may look back in horror on the vigilantes and lynch mobs of the era, a time traveler from the nineteenth century would scorn our system for its reliance on the grace of executive officials.

This article recounts the evidence—at least preliminarily, since so much more could be said—that Congress legislated the Fourteenth Amendment to address lapses in criminal law enforcement in the post-Civil War South. Congress legislated against a backdrop not solely or even primarily of "vigilantes and lynch mobs," but of well-known, orderly procedures of arrest and commitment.[13] The law of the period viewed the initial arrest of criminal offenders as the fulfillment of an official duty, contrary to the modern theory of police discretion.[14] Citizens could swear an oath before a local official—variably called a "magistrate" or "justice of the peace"—that a crime had occurred.[15] If they swore that oath on personal knowledge, magistrates were generally expected and required to issue an arrest warrant.[16] When Congress legislated civil rights in the aftermath of the Civil War, they referenced these universal, duty-bound arrest procedures. The best evidence of Congress's intent to secure access to criminal justice comes from the Civil Rights Act of 1866 (1866 CRA), Congress's first attempt after the Civil War to protect the rights of Black Americans. In the 1866 CRA, Congress used language that would have signaled to contemporaries that the law secured access to criminal justice and, specifically, to arrest proceedings.

In Part I, I explain why the 1866 CRA should be viewed as evidence for the intent of the framers of the Fourteenth Amendment, under the holding of 2010's *McDonald v. City of Chicago*. In Part II, I turn to one of the rights enumerated by the 1866 CRA, the right to "give evidence." Coupled with a

11. *See infra*, Part III.
12. *See id*.
13. *See infra*, Part III.A.
14. *See id*.
15. *See infra*, Part III.B.
16. *See id*.

later clause in the 1866 CRA, ensuring equal access to "proceedings for the security of person and property," the "give evidence" clause would have overturned Southern laws that barred slaves and free Black Americans from testifying against White people in criminal cases. One well-understood effect of those laws was to prevent slaves and free Black Americans from opening criminal proceedings against White people. Therefore, in overturning those discriminatory testimony laws, the 1866 CRA intended to ensure that Black Americans would be able to commence criminal proceedings, regardless of the race of the accused.

Having established the hypothesis, I flesh it out in two ways. First, in Part III, I analyze the criminal justice institutions of the nineteenth century. I show that magistrates and justices of the peace generally had no choice but to issue a warrant of arrest upon receiving an oath by a (White) complainant with personal knowledge. This rule informs the "give evidence" clause and puts it in its context: anyone with the right to testify, i.e. to "give evidence," had the right to the issuance of an arrest warrant. Second, in Part IV.A, I look at the years 1865–66, immediately after the Civil War, to show that racist anti-testimony laws were viewed by Congress, the military, and even conservatives like Andrew Johnson as an impediment to securing the protection of Black Americans in the South. In Part IV.B, I examine their actions to show that the 1866 CRA targeted both formal law and discrimination in-fact to ensure that Black Americans could obtain the arrest and prosecution of criminal assailants.

I. WHY THE CIVIL RIGHTS ACT OF 1866?

Because this Article will draw primarily on the 1866 CRA, both on its substance and on its enforcement provisions, it needs a brief introduction.

As well as directly protecting certain civil rights against race discrimination, the 1866 CRA serves as an interpretive key to the Fourteenth Amendment, owing to the circumstances surrounding its passage. When passed, it ignited a constitutional debate in Congress.[17] Though Congress had used its Thirteenth Amendment enforcement powers to pass the 1866 CRA, many believed that the Amendment's ban on slavery did not imply a power in Congress to secure civil rights to the freed people.[18] Congress therefore repassed the 1866 CRA under the Fourteenth Amendment as part of the Enforcement Act of 1870, and, owing to those circumstances, as the

17. GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY 73–74 (2013); WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 88, 90 (2016).

18. ARAIZA, *supra* note 17, at 88, 90.

Supreme Court has explained, "it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866."[19]

In the 2010 case *McDonald v. City of Chicago*, for instance, the 1866 CRA served as linchpin to the Court's holding that the Fourteenth Amendment incorporates the Second Amendment right to bear arms. For context, the 1866 CRA, after declaring birthright citizenship, first enumerated (and still, as codified, enumerates) civil rights belonging to those under the "jurisdiction" of the United States: "to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property."[20] It then provided for a catchall right to the "full and equal benefit of all laws and proceedings for the security of person and property."[21] With its language protecting the right to "sue, be parties, and give evidence," coupled with its catchall clause, the 1866 CRA meant to ensure full equality of legal process, including, as its proponent in the House, Lyman Trumbull, put it "the right to enforce rights in the courts."[22]

The Supreme Court decision in *McDonald* exemplifies the breadth of the "proceedings" catchall and furnishes some further tools for interpreting the 1866 CRA (and, therefore, the Fourteenth Amendment). In the broad phrase "laws . . . for the security of person and property," the *McDonald* Court situated the right to own firearms for self-defense.[23] To aid its interpretation of the 1866 CRA, the Court incorporated the intent of the contemporaneous Freedmen's Bureau Bill, which protected the right to bear arms.[24] The Court also looked to events surrounding the passage of these laws, such as the experience of freed people living under oppressive Southern governments and "Union Army commanders t[aking] steps to secure the right of all citizens to keep and bear arms."[25]

All of these interpretive tools—the 1866 CRA's text regarding "laws and proceedings for the security of person and property," the context of accompanying legislation, the political goals of the Reconstruction Congress, and the actions of officials enforcing the 1866 CRA—are relevant to understanding the Fourteenth Amendment's treatment of criminal justice procedures, too. Specifically, the 1866 CRA secures the right to "give

19. McDonald v. City of Chicago, 561 U.S. 742, 775 (2010).
20. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a)).
21. *Id*.
22. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).
23. *McDonald*, 561 U.S. at 774–75.
24. *Id*. at 773.
25. *Id*. at 773.

evidence." "Give evidence" means, essentially, "to testify under oath."[26] Crucially, however, while "give evidence" has always signified "to testify under oath," it also previously conveyed more of its literal sense "to furnish evidence."[27] This broad right to "give evidence" or "furnish evidence" must be read, like the other rights enumerated in the 1866 CRA, in conjunction with the catchall phrasing at the end of Section 1, securing the "full and equal benefit of all laws and proceedings for the security of person and property."[28] These two clauses of the 1866 CRA work in tandem, the first clause guaranteeing the right to testify and otherwise "give evidence" under oath in the "proceedings for the security of person and property" described in the second clause.[29]

II. THE RIGHT TO GIVE EVIDENCE

A close examination of the "give evidence" and "proceedings" clauses of the 1866 CRA will ground the hypothesis that these clauses had a certain and established meaning for victims and witnesses testifying in criminal proceedings. That hypothesis may then be corroborated by the statutes, cases, and treatises of the era.

The "give evidence" clause targeted contemporary laws that discriminated against Black witnesses. Under Black Codes before and after the Civil War, slaves were either totally denied oath-making capacity,[30] or permitted only to testify against other slaves or free Black Americans.[31] This meant they could not usually prosecute criminal cases as complaining victims. Abolitionists of the period, for instance, bitterly criticized the way the pre-war Black Codes barred slaves in criminal proceedings from bearing

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26. Give Evidence, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/give%20evidence [perma.cc/WL25-EA9S] ("to talk and answer questions about something especially in a court of law while formally promising that what one is saying is true **:** testify."); Testify, BLACK'S LAW DICTIONARY (11th ed. 2019) ("to give as a witness").

27. Richard A. Nagareda, *Compulsion "To Be A Witness" and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1603–23 (1999).

28. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

29. Exactly how they worked in conjunction is the topic of this article and is explored more fully below.

30. *See, e.g.*, Ga. Code § 3772 (Clark, Cobb & Irwin 1861); Tex. Code Crim. Proc. art. 644 (Willie 1857).

31. *See, e.g.*, An Act to Protect Freedmen in Their Rights of Person and Property in this State, 98 (Alabama); 1865-66 Ala. Acts 200 (Act No. 98). CONG. GLOBE, 39th Cong., 1st Sess. 588 (1866) (Speech of Ignatius Donnelly, discussing the post-war code of Mississippi).

witness against White aggressors.[32] Northern treatise-writers also frequently lamented that laws blocking the testimony of Black Americans against Whites effectively nullified the nominal criminal laws protecting Black Americans in southern jurisdictions.[33] Contemporary legislative debates, including those surrounding both the 1866 CRA and the Fourteenth Amendment, also reveal the nexus between the right to testify and complainants' access to criminal justice.[34]

These laws of course kept Black witnesses from taking the witness stand against White defendants.[35] But they also radically precluded all law enforcement proceedings on behalf of Black people against White people, barring slaves and free Black Americans from making even an initial

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32. Deborah A. Rosen, *Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric*, 58 AM. J. LEGAL HIST. 126, 136–37 (2018); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 510–11 (1985). These laws were especially solicitous of the rights of slave-masters. Two leading cases on the right of the master are *State v. Mann*, 13 N.C. 263, 268 (1829) and *Commonwealth v. Turner*, 26 Va. 678 (1827). *Mann*, for instance, drew the ire of Harriet Beecher Stowe in a passage of Uncle Tom's Cabin. Sally Greene, Eric L. Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. REV. 669 (2009).

33. WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 178 *et passim* (Am. & Foreign Anti-Slavery Soc'y 1853) (From the United Kingdom: "At present, the wilful, malicious, and deliberate murder of a slave, by whomsoever perpetrated, is declared to be punishable with death, in every State…The exclusion of all testimony of colored persons, bond or free, is a feature sufficient, of itself, to render these laws nugatory."); *see also* GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA, WITH SOME ALTERATIONS AND CONSIDERABLE ADDITIONS 107 (1856) ("A white man may, with impunity, if no other white be present, torture, maim, and even murder his slave, in the midst of any number of negroes and mulattoes.").

34. The topic was not central to debates around the passage of either the 1866 CRA or the Fourteenth Amendment. Nonetheless, legislators during both debates understood the nexus between the right to testify and the capacity to prosecute crimes. *See* Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966). Congress also passed a law to bar discrimination against Black witnesses in federal Court in 1862, and those debates make the connection even clearer. *See* CONG. GLOBE, 38th Cong., 1st Sess. 3260–61 (1864). For instance, Senator Sumner, who introduced the law as an amendment, argued,

> If colored persons cannot testify against white persons, what protection can they have against outrage? The white person may perpetrate any brutality upon colored persons with impunity. There is nothing in the dreary catalogue of crime, from a simple assault to murder itself, which may not be committed with impunity by a white person if no other white person be present.

Id. at 3260.

35. *See, e.g.,* Bowlin v. Com., 65 Ky. 5, 26 (1867), a Kentucky case holding the 1866 CRA unconstitutional, with the result that a conviction based on the trial testimony of Black person had to be reversed and remanded.

criminal complaint.[36] For example, Frederick Douglass recounts trying to complain to a committing magistrate about being assaulted, only to be turned away for lacking the capacity under Maryland law to swear a criminal complaint against White men.[37] In overturning these discriminatory evidence laws, the 1866 CRA opened all criminal justice institutions—not just trial courts—to the freed people.[38] This is an important nuance. Arrests and investigations can be provided to victims as a matter of right; final verdicts at trial cannot. But prompt arrests and thorough investigations impact final verdicts and are their own deterrents.

Congress could not, of course, change popular prejudice, according to which Black people, slave or free, were incapable of understanding the import of an oath. These prejudices took deep root in conceptions of conscience.[39] One legal scholar, for instance, advised magistrates in 1828 to reject the oath of a person who did not believe in "a God, and a future state of reward and punishment."[40] A person who lacked such beliefs could not

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36. Blyew v. United States, 80 U.S. (13 Wall.) 581, 598 (1872) ("Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender.") (Bradley, J., dissenting). (I return to *Blyew* below.) There would have been a great variety of actual practices; the laws often created carve-outs and exceptions that could result in slaves and free Black Americans being able to prosecute some crimes, usually with the corroboration of White witnesses. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619–1860, chs. 9–10 (1996) discusses some of these. This article will not, for the most part, address these nuances. The crucial point here is that this was a second-class right. See MORRIS and LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE (2009) for a lengthy discussion of these nuances. Edwards, especially, has endeavored to tell the story of the participation of Black Americans in the Southern legal system, especially free Black Americans. One of her main points was that a slave or free Black with enough standing amongst the Whites of a given community likely could seek redress. For even more on this topic, though mostly from the perspective of civil law, MARTHA S. JONES, BIRTHRIGHT CITIZENSHIP: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018).

37. WILLIAM S. MCFEELY, FREDERICK DOUGLASS 61–63 (1991) (quoting FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM). For instance, one treatise writer, H.S. McCall, explaining his disagreement with placing disabilities on a former felon's right to swear out a warrant, asked rhetorically "Must he [the former felon], therefore, suffer all injuries, and have no way to help himself?" H.S. MCCALL, NEW YORK CIVIL AND CRIMINAL JUSTICE: A COMPLETE TREATISE ON THE CIVIL, CRIMINAL, AND SPECIAL POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK (3d ed. 1865).

38. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 568–69 (1991); *see also* Christopher R. Green*, The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 68 (2008) (explaining the right to testify as part of the "protection of the laws."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410–13 (1992) (explaining that the 1866 CRA targeted the Black Codes, including their discriminatory evidence rules). Of course, this is also one of the main conclusions this article is seeking to prove, and if the reader is skeptical, they should continue reading.

39. Thomas Morris observed this of slave oaths. THOMAS MORRIS, SOUTHERN SLAVERY AND THE LAW 1619–1860, ch. 10 (1996).

40. DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 66 (2d ed. 1828).

be trusted to keep an oath, he advised.[41] In 1861, a Northern scholar might still consider, if only to reject as unconstitutional, British precedents holding invalid the oaths of persons with "religious scruples or infidelity, which renders them incapable of taking an oath."[42] But even in this period, many jurisdictions continued to allow a cross-examination of the witness's religious convictions to probe credibility.[43] Like a person lacking religious convictions, Black people were said to have "no idea of the sanctity of an oath."[44] As one scholar observed, many Whites thought that "the hope of gain" or "fear of punishment" would induce slaves to give false testimony.[45] These ideas were so engrained, both North and South, that former slaves writing narratives of their experiences would carefully justify their acts of deception while enslaved, even when they had been deceiving slavers or White aggressors in ways that appear obviously just to a modern reader.[46] These writers understood that a White reading public would closely interrogate their capacity to speak the truth.

The 1866 CRA targeted bias in criminal law enforcement and secured the right to access criminal justice by giving the freed people an oath as good as a White person's. But what would this mean practically? Of course, the right to testify would allow a victim to bear witness in a courtroom, but a closer look at the period's criminal procedure will show that it meant something more. The average American had a fundamental expectation about what law enforcers would do upon the oath of a complaining witness: examine the complainant, issue an arrest warrant (if appropriate), take the accused into custody, and hold a probable cause hearing. These were the

41. *Id.*

42. JOHN STILWELL JENKINS, NEW YORK CIVIL AND CRIMINAL JUSTICE: A COMPLETE TREATISE ON THE CIVIL, CRIMINAL, AND SPECIAL POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK 515 (2d ed. 1861).

43. *See, e.g.,* Ga. Code § 3772 (Clark, Cobb & Irwin 1861). Modern evidentiary rules such as Federal Rule of Evidence 610 were meant to end the practice of cross-examining a witness on the religious beliefs underpinning their oaths.

44. So reported a professedly "liberal" planter to Carl Schurz in 1865. CARL SCHURZ, REPORT ON THE CONDITION OF THE SOUTH 188 (1865) [hereinafter *Schurz Report*].

45. GEORGE MCDOWELL STROUD, SKETCH OF THE SLAVE LAWS 48 (1856).

46. See the accounts compiled in WILLIAM L. ANDREWS & HENRY LOUIS GATES, JR., THE CIVITAS ANTHOLOGY OF AFRICAN AMERICAN SLAVE NARRATIVES (1998). *Id.* at 223, *Narrative of William W. Brown, an American Slave* ("This incident shows how it is that slavery makes its victims lying and mean; for which vices it afterwards reproaches them, and uses them as arguments to prove that they deserve no better fate."); *id.* at 303, *Narrative of the Life and Adventures of Henry Bibb, an American Slave* ("In fact, the only weapon of self defense that I could use successfully was that of deception. It is useless for a poor helpless slave, to resist a white man in a slaveholding State."); *id.* at 554, *Incidents in the Life of a Slave Girl, Harriet A. Jacobs* ("Who can blame slaves for being cunning? They are constantly compelled to resort to it. It is the only weapon of the weak and oppressed against the strength of their tyrants."). The idea itself comes from the Introduction by editor William L. Andrews.

proceedings denied to Frederick Douglass when he sought to report his assault. Had Douglass been regarded as a citizen with a good oath his complaint would have entailed an arrest and probable cause hearing. This Article turns to these procedures, to demonstrate that they were considered as-of-right to complainants and victims with a good oath.

III. THE CONTEXT OF NINETEENTH-CENTURY CRIMINAL PROCEDURE

There were generally two methods for commencing a criminal prosecution in the nineteenth century. First was appearance before a grand jury. The second was appearance before a magistrate, who would arrest, examine, and commit the accused for further proceedings, including before a grand jury (depending on the crime and jurisdiction). After an overview and analysis of these procedures, the power of the victim-complainant's "oath" will be considered again in context.

In this era, the doors of the grand jury were open to all citizens, not just states' attorneys.[47] It was a common and accepted practice for complainants to report crimes directly to these bodies.[48] Yet it was the magistrate, known interchangeably as a "justice of the peace," who was "the great committing force of the country" according to one popular criminal procedure treatise of the era.[49] If anything, the convenience and accessibility of the magistrate made them a far more important presence in most communities than the grand jury. In the course of the nineteenth century, "the grand jury went into eclipse" in many jurisdictions.[50] This is attested by the 1884 Supreme Court decision in *Hurtado v. California*, where the Court declined to overrule a California statute permitting prosecution of felonies without a grand jury indictment, leaving it to the local magistrate to find probable cause in most cases.[51] All jurisdictions also permitted a "surety to keep the peace" whereby a person threatened by violence could have a Justice arrest the

47. Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 308–52 (1994).

48. *See, e.g.*, Hains v. Elwell, 3 N.J.L. 843 (1811) ("The plaintiff complaineth of the defendant for this, to wit, that the plaintiff did, in September, or court term, 1810, make a malicious complaint to the grand jury, without having any just cause, to the great damage of the plaintiff."). In Kendrick v. Cypert, 29 Tenn. 291 (1849), the complainant went to the grand jury and presented his evidence, even against the advice of the state's attorney, a situation difficult to imagine in modern practice.

49. JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE; OR, PLEADING EVIDENCE AND PRACTICE IN CRIMINAL CASES § 239 (2d ed. 1872).

50. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 242 (1993).

51. Hurtado v. California, 110 U.S. 516 (1884).

source of the threat and force them to post a bond, a practical procedure which bolstered the Justice's position as a protector of the community.[52]

Historian Edward L. Ayers describes the basic procedure that would be followed in a nineteenth-century criminal case in the following way:

> The usual procedure within this system was for a victim of violence or theft to initiate a case by swearing out a complaint before a neighborhood justice of the peace, who in turn would issue a warrant for the arrest of the accused party. The county sheriff then brought the accused before the magistrate for a preliminary hearing, after which the magistrate would either dismiss the case or, if he found sufficient cause, bind the accused over to the Superior Court for a hearing by the grand jury. . . . After the grand jury had indicted a defendant, a petit jury would determine his guilt or innocence.[53]

This was a process initiated by the victim, encompassing arrest, examination, grand jury, and— ultimately—petit jury. (For clarity, this article will refer to the entire process as the "commitment" process and will refer to the presiding magistrate as the "committing magistrate" or "justice of the peace.") This procedure had roots in English common law.[54] Blackstone's Commentaries describe it.[55] Professor Laurent Sacharoff has noted it in the Founding Era.[56] It also appears in criminal procedure treatises of the nineteenth century, notably the influential treatise by Joel Prentiss Bishop.[57]

But there is a better source for confirming contemporary practice. Courts deciding the law in malicious prosecution suits often described the

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52. Many statutory and judicial examples could be cited here, but Arnold v. State, 92 Ind. 187, 192 (1883), is instructive for acknowledging the long provenance of a "surety to keep the peace" and holding it exempt from the constitutional protections afforded criminal defendants, such as the right to jury trial. James Kent listed the "preventive arm of the magistrate" as one of three rights of "personal security," along with the "terrors of the penal code" and protection against "tyrannical" government action. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 15 (13th ed. 1884).

53. EDWARD L. AYERS, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY SOUTH 109 (1984).

54. I generally use "English law" or "English common law," because the phrase "common law" has become meaningless. It sometimes refers to a tradition of civil or human rights as developed in English courts, sometimes to the practice of allowing judges to make substantive law, or to the general principles underlying the Anglo-American legal tradition. All I mean by "common law" or "English common law" is the inheritance of English law—that is, the law used in English law and equity courts as opposed to other religious, mercantile, manorial, or customary jurisdictions.

55. 4 WILLIAM BLACKSTONE, COMMENTARIES XXI–XXII.

56. Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 622–32 (2022).

57. BISHOP, *supra* note 49, §§ 225–238; *see also* DAVIS, *supra* note 40, chs. I–VI; HENRY HITCHCOCK, THE ALABAMA JUSTICE OF THE PEACE 204–05 (1822).

circumstances of the plaintiff's arrest and initial examination, since these circumstances bore on the questions of malice and absence of probable cause (the elements of a prima facie case of malicious prosecution). These descriptions open a window into the commitment process, corroborating that the universal practice was for a magistrate to issue an arrest warrant upon the oath of a complaining victim; call the accused and other witnesses to a hearing; and then decide whether to discharge the accused (ending the prosecution) or commit the accused for further proceedings before a higher court, which could include a grand jury indictment or motion practice.[58] This procedure, in sum, was ancient and universal.

With the outline of this procedure in mind, the next sections turn to judicial and scholarly discussions about the powers and duties of committing magistrates at different stages of the commitment procedure. These discussions show that committing magistrates had only a cabined discretion to reject the evidence of a victim-witness during the processes of arrest and examination. They lacked the discretion to reject complaints or decline prosecutions for policy reasons. Their lack of discretion stands in contrast to the modern law enforcer, who generally may decline to prosecute for any reason or no reason at all. To the extent the magistrate had non-discretionary duties upon the complaint of a crime victim, this implies—I will argue—that the victim had a right to access criminal justice.

A. The Magistrate's "Ministerial" Role

To begin, contemporary authorities called the commitment process "ministerial"; that is, non-discretionary and non-judicial. The arresting magistrate was seen as duty-bound to arrest upon complaint.[59]

The distinction between ministerial/non-discretionary and judicial/discretionary arose in numerous legal contexts and could determine,

58. *See, e.g.,* Baird v. Householder, 32 Pa. 168 (1858) (plaintiff arrested on warrant, examined, committed, and discharged by superior court for legal insufficiency of the complaint); Center v. Spring, 2 Iowa 393, 394(1856) (plaintiff arrested, examined, and discharged); Shock v. M'Chesney, 1808 WL 1464, at *1 (Pa. 1808) (plaintiff arrested, examined, and committed, but grand jury declined to indict); Stancliff v. Palmeter, 18 Ind. 321, 321–22 (1862) (plaintiff arrested, brought before U.S. commissioner, examined, and discharged); Long v. Rogers, 17 Ala. 540, 544 (1850) (plaintiff arrested, brought before magistrate, examined, discharged); Johnson v. Shove, 72 Mass. 498, 498 (1856) (plaintiff bound over by justice of the peace, but no indictment returned by grand jury); Johnson v. Chambers, 32 N.C. 287 (1849) (plaintiff arrested and discharged after examination); Goggans v. Monroe, 31 Ga. 331, 332 (1860) (plaintiff arrested and committed, but no true bill found by grand jury); Bliss v. Wyman, 7 Cal. 257, 261 (1857) (plaintiff arrested, examined and committed); Burlingame v. Burlingame, 1828 WL 1902 (N.Y. Sup. Ct. 1828) (plaintiff arrested, examination held, and defendant discharged after an hours-long session); Griffin v. Chubb, 7 Tex. 603, 604 (1852) (plaintiff arrested, committed, indicted, and tried before jury).

59. This idea is further developed in Part III.B, *infra*.

for instance, when an official would be held liable for an official act.[60] Regarding magistrates, the law was that a ministerial, non-discretionary act was subject to challenge in a civil suit by the party aggrieved, while a judicial, discretionary act was immune to civil suit.[61] Where a justice was sued for some mistake in commencing a criminal case, the issue was whether commencing a criminal case was ministerial (exposing the justice to liability) or judicial (rendering the justice immune).[62]

In English law, authorities agreed that a justice of the peace in arresting, examining, and committing criminals acted ministerially and could be held liable by the party aggrieved.[63] Bishop, writing in 1872, remained confident that a justice of the peace acted ministerially in the commitment process.[64] Yet he withheld a full endorsement of this principle, likely because it had become unclear by the time he wrote if the old rule held. Some courts adhered to the old rule of English law that the justice of the peace played a purely ministerial role in arrest and examination.[65] Or, they at least held that certain parts of the process of arrest, examination, and commitment were ministerial.[66] According to those judges, justices of the peace could be held liable for defects in the commitment process. Nonetheless, by 1872, the case law appeared to be trending towards extending "judicial" immunity over the

60. One such doctrine is famously expressed in South v. Maryland, 59 U.S. (18 How.) 396 (1855).

61. This, for now, can only stand as a generalization. There were situations where ministerial acts were held immune, and where judicial acts were held actionable. *See, e.g.,* McCarthy v. De Armit, 99 Pa. 63, 71–72 (1881) (discussing the difference and embracing many of the ambiguities in the doctrine); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* 74 STAN. L. REV. ONLINE 115 (2022) (also discussing these ambiguities).

62. *McCarthy*, 99 Pa. at 71–72.

63. *See, e.g.,* 3 RICHARD BURN, THE JUSTICE OF THE PEACE AND PARISH OFFICER 32 (17th ed. 1793); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS ch. 13, § 20 (John Curwood ed., 1824).

64. BISHOP, *supra* note 49, § 237.

65. *See*, *e.g.,* Flack v. Harrington, 1 Ill. 213, 214 (1826) (issuing warrant not supported by oath of a complaining victim subjected justice of the peace to civil liability); State v. Sneed, 84 N.C. 816, 825–26 (1881) (defendant justice of the peace could be held criminally liable to state for corruptly issuing a warrant of arrest, because such issuance was a ministerial duty); Lining v. Bentham, 2 S.C.L. 1, 4 (S.C. Const. App. 1796) (counsel argued the English common law ministerial-judicial distinction; the court agreed that the action at issue was judicial). But note that both *Flack* and *Sneed* involved arrest warrants, for which the strongest case of a purely "ministerial" duty can be made.

66. *See, e.g.,* Blythe v. Tompkins, 1856 WL 6596 (N.Y. Sup. Ct. 1856) (decision whether evidence sufficed to issue warrant was judicial; decisions made in drafting the warrant were ministerial, since statute dictated what the warrant had to contain).

commitment process.[67] Likely aware of the state of case law, yet wishing to honor the old rule, Bishop hedged.

> It should, in the first place, be observed, that, in the exercise of this jurisdiction [to bind over the accused], the magistrate is deemed to act, not judicially, but ministerially; at least, he does not put forth "judicial power," within the meaning of the constitution of the United States.[68]

Bishop then cited two constitutional cases: *Prigg v. Pennsylvania*[69] and *Ex parte Gist*.[70] These two citations are instructive for their imprecision, suggesting that Bishop was reaching for a desired result using imperfect dicta. In citing *Prigg* and *Gist*, he appeared to inject a practical understanding of how the law worked into cases that did not quite support his position. A close look at his use of these two cases reveals what that practical understanding was.

Prigg held that the slaver-friendly federal Fugitive Slave Act of 1793 (the "Act") preempted Pennsylvania laws dealing with the same subject.[71] The Act, as written, permitted a slaver to seize and take his "fugitive" before either a federal judge or a state magistrate.[72] The judge or magistrate was then supposed to decide whether the so-called "fugitive" had the legal status of a slave, and accordingly issue or decline to issue a certificate of removal.[73] The Act prescribed no punishments to the slaver who declined to obtain such a certificate, while the Pennsylvania law punished as kidnapping any removal accomplished without a certificate.[74] Arguably, the Pennsylvania law forced slavers to respect the federal procedure. Nonetheless, the Court, in an opinion written by Justice Joseph Story, held

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67. *See, e.g., McCarthy*, 99 Pa. at 71–72 (calling the decision to act on a "complaint" judicial, but calling the decision to arrest upon the magistrate's own investigation, at issue in this case, ministerial); Bailey v. Wiggins, 6 Del. 299, 305–06 (Del. Sup. Ct. 1856) (whether probable cause existed after an oath taken was a judicial decision); Mangold v. Thorpe, 33 N.J.L. 134, 137–38 (Sup. Ct. 1868) (same). At a minimum, the old rule had weakened.

68. BISHOP, *supra* note 49, § 237. This section is part of a longer passage, §§ 235–39, in which Bishop addressed whether a magistrate acted as an inferior or superior court when exercising the power to examine and commit. The significance of the issue was that ambiguities would be resolved in favor of the jurisdiction of a superior court, but against an inferior court.

69. 41 U.S. (16 Pet.) 539 (1842).

70. 26 Ala. 156 (1855).

71. 41 U.S. at 625–26.

72. 1 Stat. 302, § 3.

73. *Id*.

74. *Prigg*, 41 U.S. at 550.

that Pennsylvania's kidnapping provision was preempted by federal law, which prescribed no such punishment for a certificateless removal.[75]

The Pennsylvania law also furnished the slaver some help that he had not enjoyed under the Act: any state magistrate could issue an arrest warrant to a constable to apprehend the "fugitive."[76] If the Act preempted state law in all cases, could Pennsylvania allow its magistrates even to issue these arrest warrants for "fugitives"? That, after all, was not a procedure prescribed by the Act, and arguably it too should have been preempted, no matter how helpful it was in the scheme of federal law enforcement.[77] Unlike with Pennsylvania's law punishing certificateless removals as kidnapping, the Court did not hold that Pennsylvania's warrant-and-arrest procedure was preempted by federal law, even though, like the kidnapping law, it purported to add extra provisions in aid of the Act.[78] Instead, the Court "entertain[ed] no doubt whatsoever, that the states, in virtue of their general police power, possess[] full jurisdiction to arrest and restrain runaway slaves."[79] The concurrence of Justice Wayne put an even finer point on Story's vague formulation:

> I deny all right in the states to legislate upon this subject; unless it be to aid, by mere ministerial acts, the protection of an owner's right to a fugitive slave; the prevention of all interference with it by the officers of a state, or its citizens, or an authority to its magistrates to execute the law of congress; and such legislation over fugitives as may be strictly of a police character.[80]

Story's main holding, coupled with Wayne's concurrence, suggests that the commitment process was a "mere ministerial act" as Bishop believed, unmixed with "judicial power." The implication was that there was nothing for federal law to preempt in Pennsylvania's permission to state magistrates to issue arrest warrants for "fugitives." The states were free to fulfill or not to fulfill these law enforcement functions without conflicting with federal power.

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75. *Id*. at 625–26.

76. This comes from the explanation of the Pennsylvania Attorney General. *Id*. at 599–600. For the quote of the law itself, see *id*. at 554–55.

77. Justice Story's opinion underplays this issue. Justice Wayne's concurrence, as further explained below, puts a finer point on it, *see id.* at 644 (Wayne, J., concurring), as does Justice Daniels's concurrence. *Id.* at 656–57 (Daniels, J., concurring).

78. *Id*. at 623.

79. *Id*. at 625.

80. *Id*. at 644 (Wayne, J., concurring).

While neither set of holdings explicitly mentioned "judicial power," when read together they implied to Bishop that the commitment process was something separate and less than "judicial power." Based in part on *Prigg*, Bishop concluded that magistrates, if not exercising "judicial power" under the constitution, must fall on the ministerial end of the judicial-ministerial binary.[81] Bishop's other citation in this passage, to *Gist*, supports a similar chain of inferences in holding that Congress could allow state justices of the peace to arrest violators of federal law under the Judiciary Act of 1789, without impermissibly ceding "judicial power." In the 1897 case of *Robertson v. Baldwin*, the Supreme Court depended on both *Prigg* and *Gist* to hold that state justices of the peace could arrest seamen deserting their ships in violation of federal law, again without any unconstitutional cession of "judicial power."[82] Separately, Justice Story held that the states were not required to aid in enforcement of the federal law, even if they could voluntarily (and safe from preemption).[83] This holding led to a wave of "personal liberty laws," whereby Northern states banned their law enforcers from aiding in fugitive removals, leading in turn to passage of a strengthened second Fugitive Slave Act in 1850.[84]

Bishop's reasoning, equating constitutionally "non-judicial" to "ministerial," works on a first glance. Yet *Gist*, upon which Bishop depended, expressed the exact rule Bishop had struggled to circumvent,

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81. BISHOP, *supra* note 49, § 237 n.1. Story's opinion also appeared to examine whether the issuance of a warrant of removal was a "ministerial" task. *Id.* at 621–22. I say "appeared" because his holding dodged the question, essentially saying that Congress could confer the power to issue warrants of removal if the states and their officials consented to Congress' taking and exercising it. *Id*. At least one official issuing a warrant of removal under the later Fugitive Slave Act of 1850 resolved the same issue by calling the warrant-issuing power "ministerial." THE BOSTON SLAVE RIOT, AND TRIAL OF ANTHONY BURNS, CONTAINING THE REPORT OF THE FANEUIL HALL MEETING, THE MURDER OF BATCHELDER, THEODORE PARKER'S LESSON FOR THE DAY, SPEECHES OF COUNCIL ON BOTH SIDES, CORRECTED BY THEMSELVES, VERBATIM REPORT OF JUDGE LORING'S DECISION, AND A DETAILED ACCOUNT OF THE EMBARKATION 80–82 (1854).

82. Robertson v. Baldwin, 165 U.S. 275, 280 (1897).

83. *Prigg*, 41 U.S. at 622.

84. *See infra* text accompanying notes 208–211.

siding with the authorities holding that the commitment process was judicial and not ministerial.

> We concede, that the power or authority conferred by this section of the judiciary act is in its nature judicial. The justice of the peace is called upon to exercise judgment and discretion: he is to judge of the sufficiency of the affidavit on which the warrant of arrest is founded; he must determine, upon the evidence adduced against the prisoner, whether there is a reasonable ground of suspicion against him, so as to require that he should be put upon trial for the offence; and he is to imprison, or take bail for the appearance of the party at court to abide his trial.[85]

Try as Bishop might, he could find no way through these thickets to the conclusion that the justice of the peace exercised only "ministerial" powers in arresting, examining, and committing. Yet the weakness of his reasoning (which he himself acknowledged) says much. To cite these cases and still draw the conclusion he drew shows that Bishop was incorporating a customary understanding of the role of the magistrate, one that his readers might be prepared to accept even without the benefit of precise reasoning.

Yet, it would be going too far to call Bishop's analysis tendentious. Even the cases supporting the "judicial" view tend to describe the magistrate's discretion in a cabined way. They evince an embarrassment in ceding a total "judicial" discretion to the common magistrate, who was thought to operate beneath the level of educated legal professionals.[86] The court in *Gist*, which labeled the commitment process judicial, described only two exercises of discretion: "judge of the sufficiency of the affidavit" and determine whether the evidence supports a "probable cause" determination.[87] In the 1856 Delaware malicious-prosecution case of *Bailey v. Wiggins*, the court held that a committing magistrate had acted judicially. Nonetheless, it reasoned that the magistrate had been "required to exercise judgment" on the "complaint" and that, had he "refused to decide that question of probable cause," he could have been held liable. This formulation implies that the decision to commence probable-cause proceedings was "ministerial" even if the final probable cause decision was not.[88] The 1868 New Jersey Supreme Court case of *Mangold v. Thorpe* used a similar formula, first calling the committing magistrate a "judicial officer[]," but then reasoning

85. Ex parte Gist, 26 Ala. 156, 161 (1855).
86. *See infra*, Part III.D.
87. *Id*.
88. Bailey v. Wiggins, 6 Del. 299, 305 (Del. Super. Ct. 1856).

that the "proofs [i.e. from the sworn complaint] manifestly placed before the justice a case, upon which it was his duty to exercise his official judgment. He was bound to decide whether the circumstances proved were such as to call for the arrest of the party inculpated."[89] "Duty to exercise;" "Bound to decide." Under these holdings, if a magistrate had judicial "discretion," it was only within the narrowest bounds. He could not decline jurisdiction for a policy reason. He could determine probable cause in his discretion but could not make legal, equitable, moral, or policy-based judgments about the facts before him.

The 1828 treatise of Daniel Davis, *A Practical Treatise Upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions*, follows a similar outline.[90] Davis began his explanation of the "Complaint, and Application for Process" by writing that "every man of common right is entitled to prefer an accusation against a party whom he suspects to be guilty of an offence."[91] He explained that the magistrate should carefully examine the complainant for "motives of private interest."[92] "A justice of the peace" could "upon deliberate consideration, refuse to institute" further proceedings.[93] But this could not "be legally done where there [was] an accusation upon oath of an offence of a higher nature than is within his jurisdiction [i.e., generally a felony], if there appear any reasonable ground for the charge."[94] Yet (again), if "there is no credit to be given" to the complaint, the magistrate could "decline receiving the complaint and issuing a warrant."[95] According to Davis, the magistrate's decision on the complaint was limited to considering whether the complainant might have ulterior motives or could not be credited at all. After arresting the accused, according to Davis, the magistrate could go further in inquiring into facts but could still only discharge after a hearing if "it manifestly appear[ed], either that no crime was committed by any person, or that the suspicion entertained against the prisoner was wholly groundless. But if there be an express charge of felony on oath, against the prisoner, though his guilt appear doubtful, the justice cannot discharge him."[96] The magistrate might receive evidence from the accused, but could not enter judgment and discharge based on an affirmative defense, and could only discharge in

89. Mangold v. Thorpe, 33 N.J.L. 134, 137 (Sup. Ct. 1868).

90. DAVIS, *supra* note 40. No treatise I have been able to find from this period deals with the preliminary examination process in the same detail as Davis.

91. *Id.* at 5.

92. *Id*. at 10.

93. *Id*. at 11–12.

94. *Id*.

95. *Id*. at 11–12.

96. *Id*. at 75.

general if it "appear[ed] in the clearest manner that the charge [was] malicious as well as groundless," regardless of his personal belief in the guilt or innocence of the accused.[97]

The sum of these sources is that the committing magistrate exercised only a narrow discretion, even if not universally recognized as acting ministerially. He was expected upon complaint to make a probable cause determination and could only decline to prosecute if he had a specific, articulable reason to believe that a complaint was totally groundless. To the extent he had discretion, then, it was nothing like that of the modern law enforcer. He could not decline the case for just any policy reason or preference.[98] He could only do so if he found an absence of probable cause.

B. Practice Before Committing Magistrates: Mandatory Initiation and Duty of Arrest

Courts were reluctant to call the entire commitment process "ministerial," likely because they wished to shield committing magistrates from liability. But recall that the commitment process had two stages: complaint and arrest, then examination. Statutes and case law of the era tended to describe at least the initiation of the process—that is, receipt of the complaint and arrest—as mandatory, duty-bound, and (often) "ministerial."

State statutes in the era around 1866 were generally written to imply strong, non-discretionary duties on the part of committing magistrates who received a complaint on oath. Out of thirty-five English common-law derived jurisdictions, seven used language that left magistrates no arguable latitude in issuing an arrest warrant after a complaint. Florida's statute exemplified these: "When any complaint shall be made upon affidavit, before any Justice of the Peace, of any offence committed against the laws of this State, or the laws of the United States, it shall be his duty forthwith

97. *Id*. at 76.

98. Scholars have long noted the nearly unfettered discretion of law enforcers like police officers. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (3d ed. 1976).

to issue his warrant."[99] Five jurisdictions used the arguably vaguer phrase "shall issue" with regards to issuance of the arrest warrant after receiving a complaint under oath, but used mandatory language with regards to the initial examination of the complainant prior to issuing a warrant. New York's statute was typical of this class of statutes:

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99. MANUAL OR DIGEST OF THE STATUTE LAW OF THE STATE OF FLORIDA, 4th Div.,Tit. II, §.1, para. 1 (Thompson ed., 1847). The other states are Ohio, Alabama, Florida, Illinois, Kentucky, Arkansas, and Oregon. *See* THE REVISED STATUTES OF THE STATE OF OHIO , ch. 65, sec. 1 (Critchfield ed., 1870) ("he is authorized and required, on view, or complaint made on oath or affirmation . . . ."); CODE OF ALABAMA, secs. 3379–3381 (Ormond, Bagby, Goldthwaite eds.,1852) ("If the magistrate is satisfied therefrom, that the offence complained of has been committed, and there is reasonable ground to believe the defendant is guilty thereof, he must issue a warrant of arrest."); STATUTES OF ILLINOIS, part. II, div. XVIII, sec. 207 (Treat ed., 1858) ("When a charge shall be exhibited upon oath . . . it shall be the duty of the judge or justice of the peace . . . to issue his warrant."); CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF KENTUCKY, the Criminal Code, Ch. 1, tit. III, sec. 28 (Stanton ed., 1859) ("It shall be the duty of a magistrate to issue a warrant for the arrest of a person charged with the commission of a public offense, when, from his personal knowledge, or from information given to him on oath, he shall be satisfied that there are reasonable grounds for believing the charge."); CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF ARKANSAS, tit. III, sec. 28 (1869) ("It shall be the duty of a magistrate to issue a warrant for the arrest of a person charged with the commission of a public offense, when, from his personal knowledge, or from information given him on oath, he shall be satisfied that there are reasonable grounds for believing the charge."); ORGANIC AND OTHER GENERAL LAWS OF OREGON, Criminal Code, tit. I, ch. XXXIII, §§ 343–44 (1874) ("Thereupon, if the magistrate be satisfied that the crime complained of has been committed, and that there is probable cause to believe that the person charged has committed it, he must issue a warrant of arrest.")

> Whenever complaint shall be made to any such magistrate that a criminal offence has been committed, it shall be the duty of such magistrate to examine on oath the complainant, and any witnesses who may be produced by him. . . . If it shall appear from such examination, that any criminal offence has been committed, the magistrate shall issue a proper warrant.[100]

The same number of states as used clearly mandatory language (twelve) employed the arguably vaguer "shall." Of these, Massachusetts's statute was typical:

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100. IV STATUTES AT LARGE OF THE STATE OF NEW YORK, Part IV. Tit. II, Secs. 2–3 (Edmonds ed., 1863). The other jurisdictions in this category were Iowa, Missouri, California, and Nevada. *See* CODE OF CIVIL AND CRIMINAL PRACTICE AS PASSED BY THE EIGHTH GENERAL ASSEMBLY OF THE STATE OF IOWA, Code of Criminal Practice, ch. XIV, sec. 111 (1860) ("If the magistrate be satisfied therefrom, that the offense has been committed, and that there is reasonable ground to believe, that the person alleged to be guilty thereof, has committed it, he shall issue a warrant of arrest."); REVISED STATUTES OF THE STATE OF MISSOURI, ch. 127, Sec. 3 (Hardin ed., 1854–1855) ("If it appear on such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant."); GENERAL LAWS OF THE STATE OF CALIFORNIA, pars. 1692 and 1694 (Parker ed., 1865) ("When a complaint is laid before a magistrate of the commission complaint, &C. of a public offense, triable within the county, he must examine on oath the complainant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. . . . If the magistrate be satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest."); COMPILED LAWS OF THE STATE OF NEVADA, pars. 1731 and 1733 (Bonnifield, Healy eds., 1873) ("When a complaint is laid before a magistrate of the commission of a public offense triable within the county, he must examine on oath the complainant or prosecutor, and any witness he may produce. . . . If the magistrate be satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest.").

> Upon complaint made to any such magistrate, that a criminal offence has been committed, he shall examine on oath the complainant and any witnesses produced by him, shall reduce the complainant to writing, and cause the same to be subscribed by the complainant, and if it appears that such offence has been committed, the court or justice shall issue a warrant.[101]

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101. GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, Part IV, Tit. II, Ch. 170, Sec. 10 (1859). The other jurisdictions in this category were Virginia, Delaware, Kansas, Michigan, Maine, Minnesota, Rhode Island, Tennessee, West Virginia, and Wisconsin. *See* CODE OF VIRGINIA, tit. 55, ch. CCIV, par. 2 (1860) ("On complaint to any such officer, of a criminal offence, he shall examine on oath the complainant and any other witnesses; and if he sees good reason to believe that an offence has been committed, shall issue his warrant reciting the accusation."); REVISED STATUTES OF THE STATE OF DELAWARE, Tit. XV, sec. 16 (1852) ("When complaint is made in due form to a justice, that an offence has been committed, the justice shall carefully examine the complainant on oath, or affirmation, and if he considers there is probable ground for the accusation, he shall issue his warrant."); JOHN GENERAL STATUTES OF THE STATE OF KANSAS, ch. 82, sec. 36 (1868) ("Upon complaint, made to any such magistrate, that a criminal offense has been committed, he shall examine, on oath, the complainant, and any witness produced by him . . . if it shall appear that any such offense has been committed, the court or justice shall issue a warrant."); COMPILED LAWS OF THE STATE OF MICHIGAN, vol. II, par. 5978 (Cooley ed., 1857) ("If it shall appear from such examination, appear that an offence has been that any criminal offence, not cognizable by a Justice of the Peace, has been committed, the magistrate shall issue a warrant."); REVISED STATUTES OF THE STATE OF MAINE, tit. XL, ch. 132, sec. 6 (1857) ("When complaint is made to them, charging any person with the commission of an offence, they shall carefully examine the complainant and witnesses by him produced, on oath, in the circumstances, and, when satisfied that the person committed the offence, issue a warrant."); GENERAL STATUTES OF THE STATE OF MINNESOTA, ch. CVI, sec. 2 (1867) ("upon complaint being made to any such magistrate that a criminal offense has been committed, he shall examine on oath the complainant, and any witness provided by him . . . if it appears that any such offense has been committed, the court or justice shall issue a warrant."); GENERAL STATUTES OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, tit. 25, ch. 186, § 12 (1872) ("the trial justice or clerk of such justice court shall forthwith issue his warrant."); CODE OF TENNESSEE, par. 5022 (1858) ("If the magistrate is satisfied therefrom that the offence complained of has been committed, and there is reasonable ground to believe the defendant is guilty thereof, he shall issue a warrant of arrest."); CODE OF WEST VIRGINIA, ch. CLVI, sec. 2 (1868) ("On complaint to any such officer of a criminal offense, he shall examine, on oath, the complainant and any other witnesses, and if he see good reason to believe that an offense has been committed, shall issue his warrant."); REVISED STATUTES OF THE STATE OF WISCONSIN, vol. II, tit. XXVII, § 2 (Taylor ed., 1872) ("Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine on oath the complainant and any witnesses produced by him . . . ; and if it shall appear that any such offense has been committed, the court or justice shall issue a warrant.").

Five additional states elided clear language about the duties of committing magistrates, and six used open-ended language. For instance, replacing "shall" in "shall examine" or "shall issue" with "may."[102]

However, there is good reason to construe "shall" and even open-ended or silent statutes as implying ministerial or mandatory duties at the initial complaint and arrest stages. In the "shall" states, accompanying authorities or case law described the committing magistrate's initial duties as non-discretionary in some degree. As already discussed above, cases in both Delaware and New Jersey—states whose statutes both stated that the magistrate "shall" issue a warrant after a complaint—described the duty to make an arrest as non-discretionary, even as they described the subsequent probable-cause factfinding itself as judicial and discretionary.[103] The Delaware case went as far as cautioning that the Justice "would have been himself criminally liable for a breach of his official duty" had he refused to initiate criminal proceedings, hearkening to case law holding that magistrates might be liable for failing in a ministerial duty.[104] Cases and statutes in other jurisdictions likewise held that magistrates might be criminally liable where they failed to make an arrest.[105] As a further example, margin notes provided by the statutory compiler in Rhode Island used the phrase "duty to issue a warrant" to label the passage about warrant issuance, even where the statute used the phrase "shall forthwith issue."[106] And the State of Georgia—which used the facially discretionary "may"—

102. These states are New Jersey, Georgia, Pennsylvania, Indiana, Maryland, North Carolina, and South Carolina (all vague or elided), and Texas, Connecticut, Mississippi, New Hampshire, and Vermont (all "may" or "is empowered.") *See* LUCIUS Q.C. ELMER & JOHN T. NIXON, DIGEST OF THE LAWS OF NEW JERSEY, p. 781 (4th ed. 1868); FREDERICK C. BRIGHTLY, ESQ. A DIGEST OF THE LAWS OF PENNSYLVANIA, "Justices of the Peace," sec. 120 (1857); STATUTES OF THE STATE OF INDIANA, "Criminal Pleading and Practice," Art. V., Sec. XVII (2d ed. 1862); REVISED STATUTES OF THE STATE OF SOUTH CAROLINA, part IV, tit. II, ch. CXXXVIII (1873); REVISED CODE OF NORTH CAROLINA, ch. 35 sec. 1 (Moore, Biggs eds., 1855) (all vague or elided). THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS, Art. 218 (1857); GENERAL STATUTES OF THE STATE OF CONNECTICUT, tit. XII, sect. 216 (1866); REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI, ch. LXIV, art. 329 (1857); SAMUEL D. BELL, PRACTICAL FORMS, FOR THE USE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS AND CONSTABLES, ch. 38 § 15 (1856); GENERAL STATUTES OF THE STATE OF VERMONT, tit. XV, Ch. 31, sect. 6 (1870) (all "may" or "is empowered"). I was unable to find any description of the relevant procedures in contemporary compilations of Maryland law.

103. *See supra* notes 88–89.

104. Bailey v. Wiggins, 6 Del. 299, 304 (Del. Super. Ct. 1856).

105. State v. Leigh, 20 N.C. 126, 128 (1838), though, tellingly, the court there went to great lengths to strictly construe and ultimately dismiss the indictment. *See* A. VAN DOREN HONEYMAN, HONEYMAN'S JUSTICE OF THE PEACE: PRACTICE AND FORMS IN NEW JERSEY, "When Justice May Refuse to Act" (1904). Honeyman found the magistrate's potential criminal liability in the general statute punishing breaches of duty. Such statutes were common, but unlikely to lead to many decisions rendered. After all, a determined complainant could go to a grand jury if a justice of the peace refused to proceed.

106. The margin notes of the compiler in Rhode Island used the word "duty" in glossing the "shall language" describing the Justice's role in issuing warrants. *See* GENERAL STATUTES OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS tit. 25, ch. 186, §§ 10–12 (1872) and notes thereto.

would probably be better described as a mandatory state, because the statute itself prescribed a simple form of affidavit that it said "shall *in all cases* be deemed sufficient."[107]

Returning to the ministerial-judicial discussion, while courts were reluctant to hold magistrates liable for mistakes of judgment in deciding whether to commit a prisoner, a decision courts usually regarded as "judicial" and therefore immune, they were more likely to find the initial complaint and arrest stages "ministerial."[108] Contemporaneous decisions in Illinois (which used mandatory language) and North Carolina (which used open-ended language) both held magistrates liable for mistakes in issuing an initial warrant.[109] Further decisions in Massachusetts and Wisconsin, both states that used "shall" in describing the duty to issue a warrant, described the issuance of a warrant as a "ministerial" duty, at least in contexts outside of the personal liability of a committing magistrate.[110]

These statutes and laws gave rise to a fixed expectation on the part of Americans. They expected to be able to complain directly to judicial officials, and they expected those officials to commence criminal proceedings. Unlike today, prosecutors would not intervene to stop cases that they feared might not convince a jury, and police would not decline an arrest because they deemed some crime a low enforcement priority.

As an illustration, in the 1861 Maryland case *Cecil v. Clarke*, the plaintiff sued for malicious prosecution, after the defendants complained to a magistrate that the plaintiff had been attempting to kidnap slaves.[111] On an appeal regarding the jury instructions, the court described the evidence at trial in this way:

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107. CODE OF THE STATE OF GEORGIA pt. 4, tit. 1, div. 16, § 4596. (Clark, Cobb, Irwin eds., 1861).

108. *See* cases in *supra* note 65.

109. *Id.*

110. See, for example, Commonwealth v. Roark, 62 Mass. 210, 215 (1851), where the court described the power to arrest and commit as "ministerial," when a convicted defendant challenged his initial detention as void. The defendant argued that the statute in question did not allow the Justice of the Peace to commit an accused for trial before another court (the police court of Lowell). After interpreting the statutes, the court added that the Justice had acted ministerially in issuing an arrest warrant, tending to alleviate any issue that might be taken with a concurrent exercise of jurisdiction by the Justice and the police court of Lowell. *Id.* In State v. Keyes, 75 Wis. 288, 44 N.W. 13, 16 (1889) the court denied a writ of prohibition against a committing magistrate, brought by a witness resisting a subpoena issued during the pre-arrest stage of a commitment proceeding, on the basis that a writ of prohibition would not lie against an officer performing a ministerial duty such as issuing an arrest warrant. Likewise, though the statute used clearly mandatory language that speaks for itself, the court in Moliter v. State, 1888 WL 289, at *4 (Ohio Com. Pl. 1888), *aff'd sub nom*, Molitor v. State, 1892 WL 289 (Ohio Cir. Ct. 1892) held that a clerk could issue an arrest warrant, as such issuance was merely "ministerial." The contrast between these cases and cases about the liability of individual magistrates for failures of duty is apparent: Courts were far more comfortable describing a magistrate's duties as "ministerial" where it meant upholding the magistrate's power rather than challenging it.

111. Cecil v. Clarke, 17 Md. 508 (1861).

> On the plaintiff's arrival at Clarksville, after an unsuccessful search for [the slaves], the defendant, Thaddeus Clarke, demanded to see his authority, which was exhibited . . . . William Welling and others said they were no authority to plaintiff to seize negroes, and Welling further remarked, that plaintiff could not be arrested without some one making an oath. John R. Moore replied, that he would make the oath. The plaintiff was then permitted to depart. The next day Moore went before justice Nichols and made an oath, and a warrant was issued. On the 11th of August 1857, the plaintiff was arrested and committed to jail, where he remained until the 13th of the month, when he was released on bail by justice Allen.[112]

Here, in a slavers' dispute over the ownership of slaves, at a heated moment when it appeared someone would seek the prosecution of the plaintiff for attempted kidnapping, Welling cautioned that there could be no arrest "without some one making an oath."[113] In saying so, he was conveying an understanding about how criminal procedure would operate. All of the participants expected that an arrest and criminal prosecution could begin at will, as ultimately it was here, but that someone would have to take an oath. (Again, it would have to be one of the slavers—the oath of the enslaved was unlikely to be accepted.) The parties believed that commencing a prosecution came at the risk of damage to a man's reputation and a perjury charge, but that anyone willing to venture those risks could start a criminal prosecution at will. Note, too, that Maryland is one of the states whose statute used vague language regarding the duties of magistrates—even more reason to suppose that vagueness or silence should be construed in favor of a ministerial view of the committing magistrate's duties at the initial arrest stage.[114]

That a criminal arrest warrant would issue almost automatically becomes less remarkable in light of the period's practice of permitting arrests in civil cases.[115] Authorities used arrests to coerce any number of desired responses, such as keeping the peace, as discussed above, taking responsibility for a bastard child,[116] or answering for a debt.[117] To take another notable

112. *Id.* at 518–19.

113. *Id*.

114. *See supra* note 102.

115. *See, e.g.*, Herman v. Brookerhoff, 1839 WL 3564 at *242 (Pa. 1839); Collins v. Hayte, 50 Ill. 353, 354 (1869); Bradley v. Morris, 44 N.C. 395, 395 (1853); Richard Bache, *The Manual of a Pennsylvania Justice of the Peace*, 132 (1810). The period's statutes also amply attest this.

116. *See, e.g.*, State v. Simons, 30 Vt. 620, 623 (1858); Moore v. State, 47 Kan. 772, 28 P. 1072, 1074 (1892).

117. *See, e.g.*, Wever v. Baltzell, 6 G. & J. 335, 339 (1834).

illustration, recall that Pennsylvania law allowed for the arrest of "fugitive" slaves by state officials on the complaint of the slaver.[118] The purpose of that law would not have been to criminally punish the "fugitive," but to secure the "property" of the slaver, and this would have appeared a typical use of civil jurisdiction to contemporary observers (to the same extent it shocks the modern conscience and infuriated contemporary abolitionists).[119] Finally, legal authorities of the era considered it the duty of both citizens and officials to arrest felons on credible information, and this duty was also said to underpin the right to begin a criminal prosecution on complaint.[120] The ease of obtaining a criminal arrest warrant, thereby opening the process of criminal prosecution, harmonized with these related principles and practices.

Lest it appear that committing magistrates were rubber-stamping complaints by crime victims, the prerequisite that they examine witnesses "under oath" was more substantive than it may first sound to modern ears. First, again consider that oaths were taken much more seriously in this period.[121] Second, as Professor Sacharoff has shown, in the era of the founding, "oath" was a term of art that implied "personal knowledge," and statutes or constitutional provisions requiring an "oath" before issuance of a warrant therefore required that the complaining witness have personal knowledge of the occurrence.[122] In the rare instance a magistrate was held liable or potentially liable for breach of a ministerial duty, it was usually because the complainant lacked personal knowledge and could therefore only file a complaint on "information" or "suspicion," themselves terms of

118. *See* Prigg v. Com. of Pennsylvania, 41 U.S. (16 Pet.) 539, 551–52 (1842).

119. In other words, the law disdainfully considered the arrest of the "fugitive" as a sort of impoundment of chattels, permitting a more casual procedure than one that would apply to the arrest of citizens with cognizable rights; that is exactly what infuriated its critics. *Cf*. Gilmore v. Holt, 21 Mass. 258, 272–73 (1826) (discussing a Massachusetts ordinance allowing Justices to order the appraisement and sale of impounded cattle) ("Next it was objected, that the application for a warrant of appraisement is insufficient, because it does not appear to have been in writing. It is a sufficient answer to this, that the statute does not require it to be in writing, and it was competent to the legislature to authorize a verbal application, where the warrant sought for relates to chattels, though by the constitution no arrest of the person can be justified without a warrant founded on a complaint in writing; or at least such is the judicial construction of the declaration of rights, in this respect.").

120. BISHOP, *supra* note 49, § 164; Fulton v. Staats, 41 N.Y. 498, 499 (1869) (describing how constable had offered in his defense at trial for assault and battery that he had had duty to arrest on an accusation of felony); H.S. MCCALL, NEW YORK CIVIL AND CRIMINAL JUSTICE 537, 538 (1865) ("As private persons who are present when a felony is committed, are bound to arrest the felon, so it is the common duty and right of every citizen to prefer an accusation against a party whom he suspects to be guilty.").

121. *See supra* Part II.

122. *See* Sacharoff, *supra* note 56.

art implying lack of personal knowledge.[123] The case *State v. Keyes*[124] illustrates the process a magistrate would follow before ordering an arrest, in the more complex situation where the complainant lacked personal knowledge and could not swear an "oath." *Keyes* involved a magistrate's response to a secondhand report of a riot.[125] Because the original informant lacked personal knowledge about who was culpable, and because the potential percipient witnesses appeared hostile to the prosecution, the justice of the peace was forced to issue subpoenas.[126] The case involved a witness's challenge to the justice's subpoena power.[127] The court struck down the witness's objections as inconsistent with the justice's duty to examine some witness on oath—that is, with personal knowledge—before moving forward with a warrant.[128] The court explained that

> [i]f an examining magistrate, who under our statute has no right to issue a criminal warrant on a complaint based on mere suspicion, and cannot do so without such facts as will make it appear that the offense has been committed, has no right to examine any other witnesses than the complainant and such as may have voluntarily appeared before him at the time with the complainant, then he has no jurisdiction competent or efficient for the arrest and examination of offenders.[129]

Here, suspicion is a term of art meaning the absence of a witness with personal knowledge.[130] In other words, the *Keyes* court explained, unless the magistrate could issue subpoenas to percipient witnesses, he would lack power to turn mere suspicion into actionable oath and would therefore be unable to arrest in many cases.

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123. *See* cases in *supra* note 65. Cases discussing defenses to the validity of prosecutions amply attest that the oath requirement continued to encompass a personal knowledge requirement into the nineteenth century, at least when it came to complaints filed by crime victims rather than law enforcers. *See, e.g.*, Broadhead v. McConnell, 1848 WL 4970 (N.Y. Gen. Term. 1848) (citing cases, upholding invalidation of a warrant issued without personal knowledge).

124. 75 Wis. 288, 44 N.W. 13, 14 (1889).

125. *See id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 17.

130. The case Osborn v. Sargent, 23 Me. 527 (1844), demonstrates how "suspicion" was used as a term of art contrasting with "probable cause," which in turn implied "supported by oath" (as in the Fourth Amendment). The court in Sargent contrasted an older statute that permitted arrest upon "suspicion" with a newer statute requiring "probable cause." *Id.* at 533. As explained elsewhere in the case, the new statute required a complaint on "oath." *Id.* at 532. Interestingly, while the older statute left the magistrate discretion, the newer made it his "duty" to arrest. *Id.*

The upshot is that an individual who had personally witnessed a crime had a right to commence a criminal action; their oath would unlock nondiscretionary duties of inquiry, arrest, and examination on the part of committing magistrates. The reverse of the coin was that the process could not be unlocked unless the complainant had personal knowledge—a robust limitation which, if followed, cloaked the committing magistrate in immunity, at least in the majority of jurisdictions.[131]

C. Practice Before Committing Magistrates: Arrest versus Examination

There is a simple reason to suppose that the initial arrest was basically automatic upon the swearing of an oath. Recall again that taking the oath and issuing an arrest warrant was preliminary to examining the defendant at a probable cause hearing. The inference from this bifurcation is that arrest was a mere preliminary to the examination.[132] It was after this examination that the magistrate decided on the evidence whether to release the accused or commit for further proceedings. This bifurcation implies that the initial arrest involved comparatively less factfinding.

This bifurcation can be observed in judicial discussions of malicious prosecution cases. One element of the malicious prosecution tort is that the allegedly malicious case terminated in favor of the plaintiff, and so defendants sometimes argued that a given prosecution could not have "terminated" if it was merely dismissed by a magistrate.[133] To this defense, courts generally responded that the magistrate's release of the prisoner after examination was a sufficient "termination" of the cause of action, without the plaintiff needing to plead or prove acquittal by a court, grand jury, or jury.[134] Plaintiffs, for their part, would argue that acquittal by the magistrate furnished proof of lack of probable cause, and this inference was usually

131. *See infra* Part III.D.

132. BISHOP, *supra* note 49, § 238; *see, e.g.*, Brant v. Higgins, 10 Mo. 728, 734 (1847), discussed below. Depending on statute and local practice, these examinations could be substantive and extensive. *See* Burlingame v. Burlingame, 1828 WL 1902 (N.Y. Sup. Ct. 1828) (defendant argued for three to four hours, and convinced the magistrate that the witness to the crime did not deserve credit).

133. Secor v. Babcock, 1807 WL 857 (N.Y. Sup. Ct. 1807) (discharge by magistrate could infer probable cause); Long v. Rogers, 17 Ala. 540 (1850) (same); Chapman v. Dodd, 10 Minn. 350, 354 (1865) (record of proceedings, admitted to prove the termination of the previous action but showing that the magistrate made his findings on the basis of the prosecution's failure to prosecute, did not contradict allegation in the complaint that the magistrate acquitted the plaintiff).

134. *See Secor*, 1807 WL 857 (disagreeing with petitioner on appeal, holding that the discharge of the prisoner was properly an "acquittal" from which absence of probable cause could be inferred); *Long*, 17 Ala. at 546 ("We think a discharge by the justice of the peace, upon an examination into the alleged causes of the plaintiff's arrest, is altogether sufficient. Nothing further can be done with that prosecution."); *Chapman*, 10 Minn. at 363 (overruling objection on appeal that the record inappropriately replaced the word "discharge" with "acquittal"; the court held that either word would have the same effect on the jury).

allowed in some form.[135] Indeed, the determination of a magistrate would be better proof of lack of probable cause than acquittal by a petit jury, since probable cause to arrest is sometimes consistent with innocence. As the Supreme Court of Missouri explained in 1847:

> [I]n a criminal proceeding, the final acquittal of the accused can have but little weight as evidence of probable cause, compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and the grand jury have the very question of probable cause to try. . . . Under such circumstances, the refusal of the examining tribunal to hold the accused over to trial, must necessarily be very persuasive evidence that the prosecution is groundless. But this would not be the case with a verdict of acquittal, after a full investigation of the case, and an examination of the testimony on both sides. . . . It would be hard if every suitor who fails to recover, whether upon technical grounds or on the merits, should, for such failure, be presumed to have instituted a groundless action. The result of the action may depend upon facts and contingencies which no skill or foresight, however honest and persevering, could anticipate or prevent.[136]

The decision whether to issue an initial warrant would not be as substantive as the findings of "examining tribunals."

"Bifurcated" may not even go far enough. After all, as already shown, proceedings before the magistrate were usually only preliminary to proceedings before the grand jury, depending upon the crime and jurisdiction. An arrest, then, was a mere preliminary to a preliminary, and it follows that it would entail only a slight inquiry, if any at all; a mistake in the initial arrest was to be corrected at the examination or by the grand jury, and so the arrest could be made without apprehension.

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135. Straus v. Young, 36 Md. 246 (1872); *see* Paukett v. Livermore, 5 Iowa 277, 281–82 (1857) (In discussing jury instructions, explaining that probable cause could be inferred from discharge of accused); *but see* Williams v. Vanmeter, 8 Mo. 339, 341–42 (1844) (discharge by magistrate satisfied only part of plaintiff's burden of proof).

136. Brant v. Higgins, 10 Mo. 728, 734 (1847). The court was rejecting a jury instruction to the effect that the jury should presume lack of probable cause from acquittal in a civil case. In this passage, the court was explaining why that inference would be permitted, by contrast, in a criminal case, and especially where it was the grand jury or magistrate that had discharged the accused.

D. Practice Before Committing Magistrates: The Victim's Responsibility for the Legal Validity of His Affidavit

A criminal case, then, could be commenced by an affidavit swearing that the affiant had personally witnessed a crime. The initial arrest was likely considered a matter of right, even if there was no guarantee that a committing magistrate would find probable cause at the subsequent examination. As further corroboration that commencement of a criminal case was as-of-right, case law shows that the affidavit could be crafted without (for better or worse) significant intercession by a state official or attorney.[137] Indeed, the majority view throughout the nineteenth century was that the affiant-crime witness crafting their affidavit could not plead the advice of the magistrate as a defense in a subsequent malicious prosecution case,[138] while they could plead the advice of their own attorney.[139] It was the prosecutor and not the magistrate who owned the legal and factual contents of the initiating instrument, and a shrewd prosecutor would consult with an attorney in framing their affidavit.

A case from the minority position explains why courts usually declined to allow affiants to depend upon the advice of magistrates. *Monaghan v.*

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137. Frierson v. Hewitt, 20 S.C.L. 499 (S.C. App. L. & Eq. 1834) (complainant swore affidavit of criminal misconduct and procured arrest of defendant, though conduct turned out not to be criminal); Leidig v. Rawson, 2 Ill. 272 (1836) (affidavit on which warrant of arrest issued included pronoun "I" referring to complainant); Whitfield v. Westbrook, 40 Miss. 311 (Miss. Err. & App. 1866) (complainant first consulted with a judge before swearing out affidavit); Steel v. Williams, 18 Ind. 161 (1862) (complainant's affidavit defectively charged no crime); Ctr. v. Spring, 2 Iowa 393, 394 (1856) (warrant issued on complainant's affidavit); Goggans v. Monroe, 31 Ga. 331 (1860) (defendant arrested "on the instance and upon the affidavit" of the complainant); Laville v. Biguenaud, 15 La. Ann. 605, 605 (1860) (oath of complainant initiated case); Cooper v. Turrentine, 17 Ala. 13 (1849) (same); Chubb v. Griffin, 13 Tex. 392 (1855) (same); Ctr. v. Spring, 2 Iowa 393, 394 (1856) (same); Cox v. McLean, 3 Ill. App. 45, 47 (Ill. App. Ct. 1878) (complainant swore out affidavit after consulting attorney).

138. Olmstead v. Partridge, 82 Mass. 381, 382 (1860) (upholding decision of trial court to exclude testimony of justice of the peace on issue of probable cause); McCullough v. Rice, 59 Ind. 580, 586 (1877) (upholding jury instruction that advice of justice of the peace was inadmissible to negate malice); Rigdon v. Jordan, 81 Ga. 668, 7 S.E. 857, 860 (1888) (reversing court that admitted advice of justice of the peace); Sutton v. McConnell, 46 Wis. 269, 50 N.W. 414, 415 (1879) (reversing instruction that advice of magistrate could be relied upon as complete defense); Straus v. Young, 36 Md. 246, 256 (1872) (upholding trial court that held advice of magistrate, a "nonprofessional man," was inadmissible on question of malice); *but see* Hall v. Hawkins, 24 Tenn. 357, 359 (1844) (circumstances under which complainant sought advice of a third-party justice of the peace was not a complete defense but could be admitted in defense of malice); White v. Tucker, 16 Ohio St. 468, 470 (1866) (same). Yet I am aware of no cases from the period that went as far as to hold the advice to be a *complete* defense.

139. *E.g.,* Walter v. Sample, 25 Pa. 275, 277 (1855) (advice of counsel would negate lack of probable cause and therefore would be a complete defense to malicious prosecution); Bartlett v. Brown, 6 R.I. 37 (1859) (advice of counsel negated malice element and therefore was a complete defense to malicious prosecution, even though the advice of counsel was wrong); Griffin v. Chubb, 7 Tex. 603, 612 (1852) (advice of counsel should have been admitted on question of malice, though not, in this case, as a complete defense).

Cox, decided in 1892, reversed an earlier Massachusetts case.[140] The earlier case, *Olmstead v. Partridge*, had sided with the majority and excluded the testimony of a justice of the peace on the defendant's advice-of-counsel defense.[141] In reversing, and holding the advice of a magistrate to be admissible for the defendant, the Court in *Monaghan* explained:

> Olmstead v. Partridge was decided in the year 1860. Since that time the authority to issue warrants for criminal offenses has been taken from ordinary justices of the peace, and is lodged in officers specially designated for the purpose, and in trial justices, and the justices of police, district, and municipal courts. A very large majority of the gentlemen now having this authority are members of the bar, and all have been selected with care, and are known to the community as wise and discreet men. Besides this, they are disinterested and independent, and not, as was sometimes felt to be the case with justices of the peace under the old system, under the control or influence of particular persons.[142]

The majority exclusionary rule was based on the understanding that justices of the peace were uninformed on questions of law and prone to corrupt influence. The Court in *Monaghan* was only willing to change the old rule because the magistracy of whiggish Massachusetts had improved in professionalism between 1860 and 1892. Yet the old doctrine has remained persuasive wherever states continue to depend on laypeople to enforce criminal law.[143]

While legal professionals in Massachusetts might have looked down their noses, the magistrate's lack of legal training was probably viewed as a

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140. 155 Mass. 487, 488, 30 N.E. 467, 467 (1892).

141. 82 Mass. 381, 382 (1860).

142. 30 N.E. at 468. *See also* Brobst v. Ruff, 100 Pa. 91, 94 (1882) ("When a prosecutor fully and fairly submits to his counsel learned in the law all the facts which he knows are capable of proof, and is advised that they are sufficient to sustain a prosecution, and, acting in good faith on that opinion, does institute the prosecution, he is not liable to an action for malicious prosecution, although the opinion be erroneous. Shall the advice of a committing magistrate have the same effect? We think not. Justices of the peace are not required to be learned in the law. In fact, generally through the state they are not. They are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession. They are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them.")

143. Harris v. Harris, 542 So. 2d 284, 287 (Ala. Civ. App. 1989) (rejecting complete defense where defendant relied upon the advice of "the investigating officer rather than the advice of counsel"); Williams v. Confidential Credit Corp., 114 So. 2d 718, 720 (Fla. Dist. Ct. App. 1959) ("Although individual justices of the peace may have broad experience and knowledge of the law, the courts may not conclusively presume that they are qualified to determine whether probable cause for an arrest exists. This is especially true in Florida where such officers are not required to have legal training.")

feature, not a flaw. Americans viewed their criminal justice institutions as expressions of popular sovereignty, to be guarded against intrusions by experts and legislators.[144] At the same time, there was an "intense popular dislike of lawyers" in the period of the early republic.[145] The committing magistrate took his place in this milieu. As Alexis de Tocqueville observed:

> The Americans have borrowed from their English forefathers the conception of an institution which has no analogy with anything we know on the Continent, that of justices of the peace. A justice of the peace is halfway between a man of the world and a magistrate, an administrator and a judge. A justice of the peace is an educated citizen but does not necessarily have any knowledge of the laws. For that reason his responsibility is only to be society's policeman, a matter requiring good sense and integrity more than knowledge. When a justice of the peace has a share in the administration, he brings with him a taste for formalities and for publicity, which renders him a most inconvenient instrument for a despotism; but he is not the slave of these legal superstitions which make magistrates so little capable of administration.[146]

In this telling, the magistrate's lack of legal training kept him close to popular sovereignty, forcing him to follow clear and simple rules that average folk could understand.[147] Being uneducated in the law, he was expected to follow the rules ministerially—the "taste for formalities" noted by De Tocqueville.[148]

The sum of this evidence—the precise and duty-bound way in which statutes and courts described the commitment procedure, the analyses furnished by contemporary treatise-writers, and the observations of historians on the period's legal culture—suggests that magistrates could not even apply case law to reject a complaint. Even if for instance a Supreme Court ruling invalidated some criminal statute or proceeding, applying that ruling would appear to lie outside the scope of the magistrate's limited duty to find probable cause. For example, recall *Prigg*. After *Prigg* weakened the

144. ELIZABETH DALE, CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939 45–64 (2011). See EDWARDS, THE PEOPLE AND THEIR PEACE (2009), for an argument that in the nineteenth century, magistrates and individual citizens occupied a level of "local," popular law—separate from either state or federal law—that regulated daily social and economic relationships.

145. GORDON S. WOOD, EMPIRE OF LIBERTY 402–403 (2009).

146. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 75–76 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1966). Confusingly, in this translation, "magistrate" means continental judges.

147. *See id*.

148. *Id*.

Fugitive Slave Act of 1793, Congress passed a new Fugitive Slave Act in 1850, punishing any use of state legal process to impede a removal.[149] Though this new law—not to mention the explicit holding of the *Prigg* decision—put it beyond doubt that Northern states could not enforce state kidnapping laws against slave hunters, abolitionist activists continued to take out arrest warrants for kidnapping on slavecatchers who ventured north, often under circumstances where the committing magistrate likely understood that the warrant violated the Fugitive Slave Act of 1850.[150] As a final example, consider *In re Neagle*, a famous case about federal law enforcers' immunity to criminal prosecution.[151] In that colorful case, an unhinged complainant was able to obtain the arrest of a United States Supreme Court Justice on an allegation of assault, after the *complainant's* husband had attacked the Justice and been killed by a federal marshal.[152]

This kind of behavior on the part of committing magistrates, while it may appear strange to us, is consistent with the principles that ruled in this era. It was not the magistrate's role to decide questions of law, such as whether a Supreme Court decision had invalidated a state criminal law. When a magistrate heard a good oath (on personal knowledge), he relinquished all potential liability, which was taken up instead by the complainant. It was the complaining affiant who took responsibility for the contents of their affidavit (or oral oath), factually and legally.

E. The End of the Examination

Before analyzing these procedures and putting them in the context of Reconstruction, one more feature of the preliminary magistrate hearing should be explained. Recall that the magistrate proceeding was preliminary to a grand jury.[153] With an eye towards the grand jury and an eventual trial, the examining magistrate would take witness depositions, freezing the record and protecting the testimony against the subsequent unavailability of witnesses for a trial that could be weeks or months in the future.[154] That is,

149. SYDNEY LUBET, FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERS ON TRIAL 44 (2010).

150. *See, e.g.,* ALBERT J. VON FRANK, THE TRIALS OF ANTHONY BURNS, FREEDOM AND SLAVERY IN EMERSON'S BOSTON 33–34 (1998); LUBET, *supra* note 149, 241–47, 280–83, 298–99.

151. *In re* Neagle, 39 F. 833, 840 (C.C.N.D. Cal. 1889), *aff'd sub nom.* Cunningham v. Neagle, 135 U.S. 1 (1890).

152. *Id*.

153. *See supra* Part III.A.

154. *See, e.g.,* Texas Code of Criminal Procedure, Arts. 778–80 (1857); JOHN W. EDMONDS, STATUTES AT LARGE OF THE STATE OF NEW YORK 732 (1863); CODE OF VIRGINIA INCLUDING LEGISLATION TO THE YEAR 1860 825 (1860); JOHN J. ORMOND, ARTHUR P. BAGBY, & GEORGE GOLDTHWAITE, CODE OF ALABAMA 608 (1852).

while a deposition could not be used in a criminal trial without the defendant's consent, it could be used where a previously-deposed witness was unavailable because they were "dead . . . insane . . . or if it appeared satisfactorily to the court that he was kept out of the way by means of the procurement of the defendant . . . or so ill as to be unable to travel."[155] Freezing the evidence through depositions ensured that a conviction would not be lost because of the passage of time or bad faith of the defendant. The magistrate, then, performed an important public service in gathering and preserving evidence. As will be further discussed in the context of Reconstruction, this gathering of depositions by the magistrate was an important constituent of the victim-complainant's right to testify in criminal proceedings.

Finally, Americans in the mid-late nineteenth century likely enjoyed a right to appoint their own counsel and prosecute their own case.[156] Thus, many if not most complainants had the opportunity to prosecute their criminal case from arrest through trial.

F. Summary and Preliminary Analysis

This article began by proposing that the right to swear an oath implied a right to access criminal justice proceedings on the part of crime victims and witnesses. It first adduced some preliminary evidence about the passage of the 1866 CRA, to justify an initial hypothesis that the Fourteenth Amendment aimed to protect a right to access criminal justice.[157] This article then studied contemporary cases, statutes, and treatises to show that in the time period around 1866, a witness's complaint under oath to a magistrate prompted an arrest followed by a probable cause hearing.[158] Based on this initial evidence, I propose that Americans enjoyed a right to access criminal justice proceedings. Therefore, the "give evidence" clause of the 1866 Civil Rights Act contemplated and incorporated that right. Or, since it was universally understood that an eyewitness's oath unlocked non-discretionary duties of arrest and a probable-cause hearing, protecting the rights to "give evidence" and to access "proceedings for the security of person and property" necessarily protected access to criminal process and

155. BISHOP, *supra* note 49, § 1093.

156. Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 156 (2022).

157. *See supra* Part II.

158. *See supra* Part III.

would have been understood by contemporaries as doing so.[159] Yet another way, if an official had a "duty" to arrest, "then somebody else ha[d] a corresponding right" to the arrest.[160]

I can imagine the following objection: law enforcers may have a "duty" to enforce the law, but that does not imply that a crime victim has an individualized, court-enforceable right to law-enforcement services.[161] That is the view endorsed by the Supreme Court in cases such as *Leeke* and *Linda R.S.*[162] In a similar vein, pre-modern (and some early modern) scholars believed that the wealthy had a duty to feed the poor, because the poor had a natural right to live (which was the will of God).[163] Yet these scholars often conceded that the right was unenforceable by the hungry.[164]

I will offer a preliminary response to this fair objection and then defer a final response until the conclusion. The evidence presented so far hopefully proves that the criminal law-enforcement duties of magistrates in the nineteenth century were taken literally. Perhaps the sense of duty was weakening, a shift that may be guessed from the ambiguity of Bishop's criminal procedure treatise, and from the reluctance of courts to hold magistrates liable according to the old rules. Yet there remained a strong sense amongst litigants that their oath had the power to compel a law-enforcement response, while statutes treated the initiation of criminal process as non-discretionary—sometimes even holding magistrates criminally liable when they failed to initiate process. The evidence of nineteenth century criminal justice is corroborated by evidence about the era's legal culture and the role of the justice of the peace within that culture: not to decide legal questions or to advise on the wisdom of commencing a prosecution, but simply to follow known procedures, gather evidence, and pass that evidence onward to higher authorities.

Before taking up this objection again, this Article turns to the Reconstruction era, which furnishes numerous examples substantiating that the "give evidence" provision of the 1866 CRA contemplated complainant access to criminal justice.

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159. In other words, magistrates were officials with "a jurisdiction competent . . . for the arrest and examination of offenders," as one contemporary case put it. State v. Keyes, 75 Wis. 288, 44 N.W. at 17. Such language is unimaginable to describe the official acts of police officers or state's prosecutors today; these officials instead occupy a position prior to the state's criminal jurisdiction, and they are, instead, the gatekeepers of that jurisdiction.

160. Duty, Black's Law Dictionary (12th ed. 2024).

161. *See* Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); Leeke v. Timmerman, 454 U.S. 83, 86–87 (1981) (per curiam) (quoting Linda R.S., 410 U.S. at 619).

162. *Id.*

163. BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS (1997).

164. *Id.* The Church eventually created a procedure whereby episcopal authorities could compel alms upon the plea of an indigent person. *See id*.

IV. THE RECONSTRUCTION APPROACH TO CRIMINAL LAW ENFORCEMENT

During Reconstruction, Congress sought to protect the freed people against criminality when that protection was denied by Southern authorities. Their actions and enactments, especially the 1866 CRA, are best understood in the context of the period's criminal procedure. Congress, acting in cooperation with Union army officers, sought to protect the freed people's right to access not only (or even primarily) the witness box, but the duty-bound commitment proceedings of local magistrates. The story of this early phase of Reconstruction completes the backdrop for understanding the "give evidence" clause—and by extension, the Fourteenth Amendment.

A. The Struggle Over Anti-Testimony Legislation

As the Civil War gave way to a tense peace, the South remained under martial law.[165] In March 1865, shortly before the war's end, Congress partially organized the army's peacekeeping function under the Freedmen's Bureau.[166] The First Freedmen's Bureau Act gave the Bureau "control of all subjects related to refugees and freedmen" under regulations to be prescribed by the Freedmen's Bureau Commissioner. On May 30, 1865, Commissioner Oliver Otis Howard issued "Circular No. 5," "Rules and

165. *See* GREGORY P. DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015) *passim*.

166. 13 Stat. 507. The Bureau was established in "the War Department" and was to continue during the rebellion plus one year.

regulations for assistant commissioners."[167] Regarding the anti-testimony laws of the former slave states, Howard's Circular No. 5 provided:

> In all places where there is an interruption of civil law, or in which local courts, by reason of old codes, in violation of the freedom guaranteed by the proclamation of the President and the laws of Congress, disregard the negroes' rights to justice before the laws, in not allowing him to give testimony- the control of all subjects relating to refugees and freedmen being committed to this bureau-the assistant commissioners will adjudicate, either themselves or through officers of their appointment, all difficulties arising between negroes themselves, or between negroes and whites or Indians, except those in military service, so far as recognizable by military authority and not taken cognizance of by the other tribunals, civil or military, of the United States.[168]

The order was drafted broadly to address "all difficulties," necessarily encompassing criminal cases. Freedmen's Bureau field reports corroborate that one of the chief "difficulties" contemplated by Circular No. 5 was the inability of the freed people to obtain arrests and prosecute criminal aggressors.[169] The powerlessness of the freed people to access criminal justice was especially troubling given the racist violence roiling the region.[170] Against the backdrop of the period's criminal procedure, Circular No. 5 aimed to restore the right to access the ministerial commitment proceedings denied by anti-testimony laws.[171] For instance, in Georgia, a local Judge in late 1865 called on Union troops to control White violence

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167. WILLIAM A. BLAIR, THE RECORD OF MURDERS AND OUTRAGES: RACIAL VIOLENCE AND THE FIGHT OVER TRUTH AT THE DAWN OF RECONSTRUCTION 5 (2021).

168. REPORT OF COMMISSIONERS OF FREEDMEN'S BUREAU, 39 CONG. EXEC. DOC. NO. 70 AT 102 (1866) ("1866 Bureau Report").

169. *See, e.g.,* 1866 Bureau Report at 237 ("The civil authorities will neither arrest nor punish said Roberts, as there is no testimony except of colored persons."); 398 ("In case, however, when the civil authority refused to offer relief to the freedmen, or refused to receive their testimony or hear their complaints, as they are bound to do by law, it was ordered that the matter should be laid before the nearest military commander, who would make arrests or take such action as the case required.") Carl Schurz likewise reported that magistrates' rejection of freed people's oaths made it impossible for the freed people to access justice. *See, e.g., Schurz Report* at 161 ("Little or no business is done before other magistrates, as the colored people are aware, from experience, that their oath is a mere farce and their testimony against a white man has no weight; consequently all complaints of the colored people come before this bureau.")

170. *See* RICHARD D. WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE 1865–1896 54–55 (2017); STEVEN HAHN, A NATION WITHOUT BORDERS: THE UNITED STATES AND ITS WORLD IN AN AGE OF CIVIL WARS, 1830–1910 303–304 (2016).

171. *See supra* Part III.

against freed people, in a plea summarized by a New York Times correspondent:

> Several bands, calling themselves bushwhackers, jayhawkers, and regulators, are perpetrating the most shameful outrages—shooting, burning and beating negroes, to get money and for revenge. Their barbarous acts cannot be made known for legal effect except through negro testimony, and therefore cannot be punished. He asks that officers may be sent to take affidavits, and carry the offenders to Augusta for punishment, if any can be awarded them.[172]

In this account, the correspondent, reader, Judge, and military authorities all spoke a common legal language, with "affidavit" signifying the commencement of as-of-right law enforcement proceedings.

Ex-Confederates realized that Howard's Circular No. 5 gave them a path back to jurisdiction, since it conditioned the Freedmen's Bureau's extraordinary jurisdiction on (1) interruption of civil law or (2) the continuation of slave-code anti-testimony laws.[173] They understood that if a state opened its courts and repealed its anti-testimony laws, it could eject the Freedmen's Bureau.[174] Under Howard's Circular No. 5, Mississippi's provisional governor negotiated a withdrawal of the Freedmen's Bureau courts in October, 1865 by ordering the state's judges to accept the testimony of Black residents.[175] A newly elected governor, responding to pressure from the Johnson administration, pressed the state's legislature to permit Black people to testify in the courts,[176] leading shortly after to passage of a limited law.[177] Governor Parsons in Alabama likewise pressed the legislature there,[178] leading to passage of a testimony law in December.[179] Elsewhere, too, the Johnson administration prodded Southern governments to embrace limited testimony rights. When North Carolina attempted to game the occupation by passing a law conditioning the right to

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172. *Washington News*, N.Y. TIMES, Dec. 11, 1865.

173. *See supra* note 169 (quoting 1866 Bureau Report, *supra* note 168).

174. Carl Schurz reports one racist Southerner stumping in favor of accepting the testimony of freed people, in order to eject federal authorities from jurisdiction. *See Schurz Report* at 141 ("If you refuse his testimony, as is being done, the result will be the military courts and Freedmen's Bureau will take it up, and jurisdiction is lost.").

175. *See* DOWNS, *supra* note 165, at 78; Mississippi, *Proclamation of Gov. Sharkey on Negro Testimony*, N.Y. TIMES, Oct. 11, 1865, at 5.

176. *Mississippi, Message of Gov. Humphreys to the Legislature on Negro Troops—He Holds that the Courts Should be Open to the Negro—His Views of the Freedmen's Bureau*, N.Y. TIMES, Dec. 3, 1865; *see also* DOWNS, *supra* note 165, at 84.

177. *See* statutes listed *infra* note 189.

178. *Testimony of Colored Persons*, N.Y. TIMES, Sept. 5, 1865.

179. *See* statutes listed *infra* note 189.

testify upon the withdrawal of occupation troops, Johnson pressed the legislature "not to inflame northern opinion."[180]

Though little acknowledged in the secondary literature, Johnson's support for testimony rights bespeaks the contemporary importance of this civil right.[181] Because of his later opposition to Congressional efforts to secure the civil rights of Black people, including vetoing the 1866 CRA, Johnson usually features as the villain of Reconstruction, a dragon slain by Radical Republicans in Congress.[182] For instance, in his message vetoing the 1866 CRA, Johnson espoused the view that the Thirteenth Amendment—Congress's source of power for passing the 1866 CRA—did not secure civil rights to the former slaves.[183] Yet, in 1865 and 66, Johnson deployed the military to enforce the Thirteenth Amendment,[184] and insisted that Southern governments adopt limited testimony rights. In the twilight between the war and Radical Reconstruction, Southern politicians like Provisional Governor Sharkey even adopted the theory that the end of slavery implied a limited right to testify—a convenient theory for politicians trying to save face with Southern constituencies.[185] Both Johnson and the new Southern governments were responding to a popular sentiment: Americans believed that the inability to testify radically negated the protection of criminal laws, and they found the denial of this protection abhorrent.[186] Even as he blocked the most radical Reconstruction plans, Johnson knew he could not face Northern voters without this most fundamental civil right installed in Southern law codes.

So it was that reluctant ex-Confederates began passing laws to permit Black people to testify, even as those same ex-Confederates passed Black Codes throughout 1865 and 1866 otherwise impairing the civil rights of the freed people.[187] Historians have sometimes described the testimony laws of 1865–66 as though they cleared away all substantive disabilities on Black

180. DOWNS, *supra* note 165, at 85.

181. Foner for instance, does not ascribe any role to the Johnson administration in changing testimony laws between 1865 and 66. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 204 (updated ed. 2014).

182. *See* DOWNS, *supra* note 165, at 63–64.

183. *See* S. Exec. Doc. No. 31 (1866).

184. *See* DOWNS, *supra* note 165, at 1–84.

185. *Mississippi, Proclamation of Gov. Sharkey on Negro Testimony*, N.Y. TIMES, Oct. 11, 1865, at 5 ("the late constitutional amendment which abolishes slavery, abolishes also all laws which constituted a part of the policy of the system of slavery.")

186. *See supra* Part II.

187. BLAIR, *supra* note 167, at 5; *see* FONER, *supra* note 181, at 204–205; *see also* DOWNS, *supra* note 165, at 84–87.

testimony.[188] Not so. Southern legislators limited these laws as much as they could get away with, but the North would not let them get away with denying Black citizens the protections of criminal law outright. Southern states would restrict Black Americans' civil right to testify to a bare minimum; the North would insist that the right would not be restricted past the point of barring Black Americans' ability to file criminal complaints. The record left by this political struggle shows that everyone in the United States, North and South, understood how the right to testify secured the right to access criminal justice.

The Southern testimony laws of 1865–66 came with two major limitations. First, they generally permitted Black testimony only in cases where Black people were interested parties, i.e., either plaintiff or defendant in a civil action, or complaining witness or defendant in a criminal action.[189] This would allow them to access the courts as parties or complaining witnesses, hopefully (from the point of view of the Southerners) doing what was strictly necessary to satisfy federal authorities, but no more. Remarkably, the interested-party limitation would prejudice only White litigants, in cases where a White person litigated against another White person and attempted to call a Black witness.[190] Here was a surprisingly principled racism, running so deep that Whites would prejudice themselves to limit Black testimony as much as possible. How can that be? Recall that White Americans believed that Black Americans could not understand the sacred nature of an oath.[191] Whites in the South likely believed that it would be all too easy to buy, sell, fraudulently obtain, or otherwise coerce Black testimony, making it important in their eyes to protect Whites from other Whites willing to act in bad faith.[192] These laws, in sum, distinguished between cases where permitting Black testimony was necessary to secure personal rights to Black residents and thus (it was no doubt hoped) oust federal authorities, and cases where the testimony was not necessary to that goal. These lawmakers (and sometimes the federal officials for whose eyes they legislated) believed that testimony laws were important because they secured personal rights in civil and criminal cases, and they identified an outer zone where testimonial laws did not secure any personal civil rights.

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188. *See, e.g.,* FONER, *supra* note 181, at 204 ("By mid-1866, most of the Southern states allowed blacks to testify on the same terms as whites."); *see* THEODORE BRANTNER WILSON, SLAVE CODES OF THE SOUTH (1965).

189. 1865 Miss. Laws 82; 1865 S.C. Acts 282; 1865–66 Ala. Laws 98; 1865 Ga. Laws 239–40; Fl. Const. Art. XVI Sec. 2 (1865); 1866 Va. Acts 89–90; 1866 N.C. Sess. Laws 102; Texas. Const. Art. VIII Sec. 2 (1866).

190. *See* DOWNS, *supra* note 165, at 85.

191. *See supra* Part II.

192. *See id*.

This might be the best evidence that access to criminal justice was a "cognizable right" in "American jurisprudence" when the Fourteenth Amendment was passed.[193]

Several Southern states wrote their Black codes to emphasize access to criminal justice. Mississippi specified that Black people would "be competent witnesses in all criminal prosecutions where the crime charged is alleged to have been committed by a white person upon or against the person or property of a freedman, free negro or mulatto."[194] To further reassure that commitment procedures would be open to Black residents, it provided that it would be

> lawful for any freedman, free negro or mulatto, to charge any white person, freedman, free negro or mulatto, by affidavit, with any criminal offense against his or her person or property and upon such affidavit the proper process shall be issued and executed as if said affidavit was made by a white person.[195]

This provision perfectly illustrates the common understanding that a criminal proceeding was commenced as-of-right, and that a bar on the testimony of Black people would act as a total bar to accessing those proceedings. Likewise, Florida's new constitution specified that Black people would be permitted to testify "[i]n all criminal proceedings founded upon injury to a colored person;"[196] and North Carolina's law similarly provided that Black people would be permitted to testify "in pleas of the State, where the violence, fraud or injury alleged shall be charged to have been done by or to persons of color."[197] But a recalcitrant Georgia initially sought to burden the right of Black people to file affidavits, with a law providing that "a free person of color" could "make and file any affidavit" only in cases where they were "party plaintiff, or defendant," omitting the filing of affidavits in criminal cases.[198]

In its bad faith, this legislation in Georgia resembled the other common limitation set on the testimony of Black people in the immediate postwar. To my knowledge, this limitation has not been commented on before; that may be because it is only recognizable once put in the context of nineteenth century criminal procedure. Mississippi, Alabama, Virginia, Texas, and

193. *See supra* note 7.
194. 1865 Miss. Laws 83.
195. 1865 Miss. Laws 86.
196. FL. CONST. art. XVI § 2 (1865).
197. 1866 N.C. Sess. Laws 102.
198. 1865 Ga. Laws 240. Georgia cleared away this limitation several months later. *Id.* at 239.

Florida all passed laws requiring that Black people testify only orally,[199] or suggesting that such oral testimony would be heavily favored.[200] This would have the potential to interrupt a key step in the commitment procedure. Recall that magistrates would freeze the record by taking the affidavit and depositions of witnesses to a crime.[201] In case a witness was made unavailable before trial, for instance by disability or procurement of the defendant, their testimony could be replaced by the affidavit or deposition taken previously by the magistrate.[202] The potential for mischief in the oral-testimony requirement would have been palpable—a criminal could kill, maim, or scare away a witness or complainant, without fear of an affidavit or deposition replacing the lost testimony. Violence like this is easily imaginable in the immediate post-war period. Moreover, unscrupulous magistrates likely could have used the impotence of the oral testimony requirement to refuse taking up the complaint to begin with. In other words, if an "affidavit" were required to commence a criminal complaint, and the affidavits of Black witnesses had no effect, a magistrate could claim at the outset that he lacked power to commence criminal process.[203]

B. The Coming of the Civil Rights Act of 1866

The 1866 CRA responded to and swept away the Southern Black Codes, including their anti-testimonial provisions.[204] It is easy to see, then, how the 1866 CRA secured the right to access criminal justice. The testimonial provisions of the Black Codes in 1865–66 meant to reassure a Northern audience that Black residents of the South would be protected against criminality. The Codes (and constitutions) of Mississippi, Florida, and North Carolina all specified a right to testify in criminal proceedings, at least insofar as those proceedings involved a Black victim.[205] Now, recall the expansive phrasing of the 1866 CRA, creating a right "to give evidence"

199. 1865 Miss. Laws 83 ("Provided that in all cases said witnesses shall be examined in open court on the stand."); 1865–66 Ala. Laws 98 ("And they shall be competent to testify only in open court."); 1866 Va. Acts 89–90 ("The testimony of colored persons shall, in all cases and proceedings, both at law and in equity, be given ore tenus, and not by deposition."); Tex. Const. Art. VIII Sec. 2 (1866) ("Africans and their descendants shall not be prohibited, on account of their color or race, from testifying orally, as witnesses in any case, civil or criminal.")

200. I place Florida in this category because, after passing a testimony law with no apparent limitation, the legislature clarified that it had declined "to authorize the testimony of colored persons to be taken by depositions in writing or upon written interrogatories, otherwise than in such manner as will enable the court of jury to judge of the credibility of the witness." 1865 Fl. Laws 36.

201. *See supra* Part III.E.

202. *See id.*

203. *See Washington News, supra* note 172 and *The Freedmen of Mississippi*, *infra* note 207.

204. *See supra* Part II.

205. *See supra* notes 195–97.

and to the "full and equal benefit of all laws and proceedings for the security of person and property."[206] This language certainly also contemplated protecting complainants' access to criminal justice. As we have now seen, the most reasonable inference is that this language in the 1866 CRA meant access not only to the witness box, but to initiation and commitment proceedings. But, with the "give evidence" clause, the 1866 CRA did better than the grudging Black Codes in two respects: it contained no interested party limitation and no oral testimony limitation. These limitations mattered to Northerners, and getting rid of them was a significant step. For instance, oral testimony limitations had likely led to the chicanery expected of Southern law in 1865–66. One moderate Republican publication in 1865, for instance, noted that Mississippi courts were rejecting the depositions of Black witnesses even after the proclamation of Mississippi's governor instructing the state's courts to receive their testimony.[207]

The 1866 CRA also contained enforcement provisions. More than even the "give evidence" and the catchall "proceedings" clauses, these enforcement provisions reflect contemporaneous understandings about the right to access to criminal justice. They created an alternative framework whereby victims and complainants could secure the arrest of criminals, even when state officials refused to make arrests.

In creating this framework, Congress acted with a sharp awareness of racist violence against Black people in the South.[208] That awareness informed not only the 1866 CRA, but also the Fourteenth Amendment.[209] With this awareness, Congress modeled the enforcement provisions of the Civil Rights Act of 1866 on the Fugitive Slave Law of 1850,[210] and a comparison between the two helps shed light on the 1866 CRA. Recall that after *Prigg* held the Fugitive Slave Act of 1793 to be non-binding on state officials, including committing magistrates, Northern states like Massachusetts began passing "personal liberty laws," banning the use of

206. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a)).

207. *The Freedmen of Mississippi—Opposition of the Courts to Negro Testimony—Terrible Sufferings of the Freedmen in Washington*, CHI. TRIB., Oct. 27, 1865, at 1 ("Notwithstanding the proclamation of the Governor directing the admission of negro testimony, many of the courts still refuse to receive their depositions.").

208. BLAIR, *supra* note 167, at 7–17 and *passim*.

209. John Crain, *The Constitutional Tort of Shielding Criminal Wrongdoers in Violation of the Equal Protection of the Laws*, 86 ALB. L. REV. 599, 611–12 (2023).

210. *See* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 204 (2005). This was a conscious imitation, and one intended to send a message about Congress's transformation into an anti-slavery institution. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1839–40 (2010).

state personnel and resources to enforce it.[211] Such laws would have forbidden magistrates from exercising their arrest and commitment powers in aid of the capture of a fugitive slave.[212] In response, Congress passed a stronger Fugitive Slave Act as part of the Compromise of 1850, putting the law enforcement duties previously entrusted to state officials in the hands of newly-created federal law enforcers.[213] The new law created magistrate-like "commissioners" to enforce the law, and empowered them to "issue warrants, appoint deputies, hold hearings, and issue 'certificates of removal.'"[214] Indeed, the new law explicitly set forth that commissioners would have the powers of a "justice of the peace, or other magistrate . . . in respect to offenders . . . by arresting, imprisoning, or bailing."[215]

Like the 1850 Act, the Civil Rights Act—after setting forth the rights already discussed, including to "give evidence" and "to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens"—created commissioners with powers of "arresting, imprisoning, or bailing."[216] It specified that the commissioners could be agents of the Freedmen's Bureau, or anyone appointed by the President.[217] These commissioners fulfilled the same law-enforcement duties as the slave commissioners of the 1850 Act, who had been explicitly modeled on "justice[s] of the peace" and "magistrates."[218] While the 1866 CRA did not specifically analogize its commissioners to "justices of the peace" as the Fugitive Act of 1850 had, it included language redolent of their ministerial duties, specifying that the commissioners and other officials were "authorized and required" to institute proceedings and "arrest" those who had violated the 1866 CRA.[219] The commissioners created by Congress under the 1866 CRA, then, would have occupied the familiar role of "justices of the peace" for those who filed complaints with

211. *See* LUBET, *supra* note 149, at 34.

212. *See id.*

213. *See* LUBET, *supra* note 149, at 42 *et seq.* ("[T]he new fugitive slave bill . . . was designed to respond to the Supreme Court ruling in *Prigg v. Pennsylvania* by completely federalizing the apprehension of runaways while denying states any power to interfere.")

214. *Id.* at 42–44.

215. 9 Stat. 462, Ch. LX sec. 1.

216. Civil Rights Act of 1866, ch. 31, § 4, 14 Stat. 27 (An Act to protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication).

217. *Id.*

218. *See* Kaczorowski, *supra* note 210.

219. *Id.* "Authorized and required" was a phrase used to delineate ministerial powers, for instance in the contemporary Ohio Statute describing the arrest and commitment power of justices of the peace. SWAN, J. R., CRITCHFIELD, L. J. , THE REVISED STATUTES OF THE STATE OF OHIO, OF A GENERAL NATURE, IN FORCE AUGUST 1, 1860: WITH NOTES DESIGNATING THE SECTIONS REPEALED PRIOR TO AUGUST 1, 1868, AND REFERENCES TO SWAN & SAYLER'S STATUTES FOR THE LAWS SUPPLYING THE REPEALED SECTIONS, ch. 65 sec. 1 (1870).

them. The 1866 CRA also provided for military enforcement of the act as necessary.[220]

Thus, the 1866 CRA gave law-enforcement powers to the commissioners and military. Presaging the Fourteenth Amendment and its enforcement statutes, the 1866 CRA also made it a violation for any person acting "under color of any law, statute, ordinance, regulation, or custom," to deprive any other person of the substantive enumerated rights of the 1866 CRA, including the rights "to give evidence" and to access "proceedings for the security of person and property."[221] This clause permitted the military to substitute itself for arresting authorities who refused to act against criminals. In his July 6, 1866, General Order 44, Ulysses Grant ordered field commanders

> to arrest all persons who have been or may hereafter be charged with the commission of crimes and offenses against officers, agents[,] citizens and inhabitants of the United States, irrespective of color, in cases where the civil authorities have failed, neglected, or are unable to arrest and bring such parties to trial; and to detain them in military confinement until such time as a proper judicial tribunal may be ready and willing to try them.[222]

Inferentially, as 1866 progressed, the problem was no longer the formal absence of laws to permit the testimony of Black Americans, it was that magistrates were unwilling to enforce those laws. In Virginia, for instance, a law permitting Black people to testify was passed in February,[223] but newspapers reported magistrates refusing to make arrests even after that time, necessitating military arrests under General Order 44.[224] As discussed at the beginning of this article, the United States might pass laws to permit the testimony of Black Americans, but it could not legislate an end to race discrimination.[225] The 1866 CRA and its enforcement powers stepped into the breach by replacing with military authority the criminal "proceedings

220. Civil Rights Act of 1866, ch. 31, § 9, 14 Stat. 27, 29.

221. *Id*. at 27.

222. JOHN Y. SIMON, THE PAPERS OF ULYSSES S. GRANT, vol. 16: 1866 (1988), 228 [hereinafter PUG]; DOWNS, *supra* note 165, at 147 (observing that Order 44 implemented the CRA 1866); *see also* PUG, VOL. 16: 1866 at 389–90 ("It is evident to my mind that the provisions of the Civil Rights Bill cannot be properly enforced without the aid of Order No. 44 or a similar one.").

223. 1866 Va. Acts 89–90.

224. *See, e.g.*, *In Limbo*, CHI. TRIB., July 23, 1866, at 2 (describing a Virginia magistrate's refusal to detain one J.H. Keene, who had attacked a Black man with a hammer in response to perceived "impuden[ce]".).

225. *See supra* Part II.

for the security of person and property" that Southern officials refused to provide.

General Order 44 did not authorize military commanders to "try" offenders, only to arrest them pending the presence of a "proper judicial tribunal."[226] Why this limitation? By July 6, 1866, Johnson had nominally ended the state of war, which would have ended the trial of civilians before courts martial.[227] The reality was more complicated, with military commanders responding flexibly to local conditions and President Johnson often turning a blind eye.[228] At this time Grant was a political trimmer, a moderate who was only slowly awakening to the problem of governing recalcitrant Southerners.[229] In this light, General Order 44 is best seen as an attempt to legalistically exploit the enforcement provisions of the 1866 CRA.[230] It was important for Grant to tread carefully, since the 1866 CRA was a peacetime law, meaning it applied to the entire country. Any action Grant took pursuant to its authority could have been taken anywhere in the country (wherever there was state neglect to enforce the law). Yet, neither he nor Congress thought that it would upset civil authority to displace the state magistrates who usually arrested offenders, even in jurisdictions where martial law was not in effect. There is a good reason it was not viewed as a stretch to replace state law enforcement by magistrates, even in peacetime: the 1866 CRA's enforcement provisions fit comfortably into an American legal custom, well documented in *Prigg*, that viewed arrest and commitment proceedings were as "ministerial." General Order 44 can even be seen as the mirror image of *Prigg*. If *Prigg* permitted states to provide ministerial support to federal law enforcement, the 1866 CRA permitted the federal government to provide ministerial support to state law enforcement. That is exactly what Grant did in General Order 44. His actions further confirm that the arrest power was seen as "ministerial" and, therefore, duty-bound. In the same way Congress previously legislated to replace local magistrates who

226. *See supra* text accompanying note 222.

227. *See* Andrew Johnson, Proclamation on the End of the Confederate Insurrection (Apr. 2, 1866), THE MILLER CENTER, https://millercenter.org/the-presidency/presidential-speeches/april-2-1866-proclamation-end-confederate-insurrection [perma.cc/F832-9GVN]; *see also* BLAIR, *supra* note 167, at 17; *see also* DOWNS, *supra* note 165, at 146–48.

228. DOWNS, *supra* note 165, at 146–48 and *passim*.

229. *See* BLAIR, *supra* note 167, at 7–10.

230. Military historian John Keegan observed that "Grant was law-abiding to his finger-tips." JOHN KEEGAN, THE MASK OF COMMAND 232 (1988).

refused to cooperate in arresting fugitives, so too could it replace local magistrates who refused to enforce criminal laws because of discrimination.

CONCLUSION

The foregoing history has been lost because military Reconstruction—that is, the return of the South to martial law in 1867—superseded the enforcement efforts of the immediate post-war. Later Supreme Court decisions further obscured Congress's post-war concern with securing access to criminal justice in the South. But the 1866 CRA, which the modern Supreme Court has established as a key to interpreting the Fourteenth Amendment, contains crucial clues about that concern. In securing the rights to "give evidence" and to equal access to "proceedings for the security of person and property," the 1866 CRA unmistakably intended to protect access to criminal justice proceedings, specifically the initial commitment proceedings. So in answer to the objection I imagined earlier, magistrates had not just a moral but a literal duty to enforce criminal law. Lawmakers could, and did, legislate access to criminal justice proceedings. Even if the right to criminal justice has been forgotten or obscured, in 1866 it was viewed as bedrock.

The proper response in the present is not, however, to enjoin the states to reestablish justices of the peace as they existed in 1866. By the literal-minded logic of the Supreme Court in *McDonald v. City of Chicago*, that might make sense, but it is impractical. More importantly, it ignores the principle that matters: the 1866 CRA was an antidiscrimination statute, and the right to arrest that it contemplated is best understood as a right of "equal protection." As I have advocated elsewhere,[231] the Fourteenth Amendment should be construed to protect against discriminatory denials of law enforcement; cases like *Castle Rock*, which held that there is no "due process" right to law enforcement protection, need not be disturbed.[232]

Still, to get to an equal-protection right to prosecute criminals, some rebuttal is needed to the long line of Supreme Court cases denying the civil rights of crime victims and witnesses. Go back to 1871 and the case *U.S. v. Blyew*, the first in the line, which held that a discriminatory denial of the right to testify could not be the basis of a civil-rights removal from state to federal court.[233] For background, to enforce the Civil Rights Act of 1866 Congress had provided for the removal of criminal actions to federal court

231. John Crain, *The Constitutional Tort of Shielding Criminal Wrongdoers in Violation of the Equal Protection of the Laws*, 86 ALB. L. REV. 599 (2023).

232. *See supra* note 7.

233. *See* United States v. Blyew, 80 U.S. (13 Wall.) 581, 591–93 (1872).

where a state denied Black Americans the right to testify against White criminals.[234] In *Blyew*, the United States had removed a case of assault and murder against a Black family, where the only witnesses against the White perpetrators were the Black survivors, and prosecution would therefore have been impossible in the courts of Kentucky.[235] Interpreting the text of the statute, the Court held that removal was not available because crime victims were not "affected" by the criminal case, as required under the text of the removal statute.[236] The Court excoriated the concept of a crime witness having rights:

> Those who may possibly be witnesses, either for the prosecution or for the defence, are no more affected by it than is every other person, for any one may be called as a witness. It will not be thought that Congress intended to give to the District and Circuit Courts jurisdiction over all causes both civil and criminal. They have expressly confined it to causes affecting certain persons. And yet, if all those who may be called as witnesses in a case, and who may be alleged to be important witnesses, were intended to be described in the class of persons affected by it, and if the jurisdiction of the Federal courts can be invoke by the assertion that there are persons who may be witnesses, but who, because of their race or color, are incompetent to testify in the courts of the State, there is no cause either civil or criminal of which those courts may not at the option of either party take jurisdiction.[237]

The *Blyew* opinion calls into question whether there was a consensus about the rights of crime victims in 1871. But there are several reasons to treat the *Blyew* opinion as a poor authority. It echoes a typical political attack on the Civil Rights Act of 1866, whose opponents in Congress likewise lambasted the concept of a right to testify.[238] And, to the point here,

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234. *Id*. at 591 (removal was provided for in cases "affecting persons who are denied, or cannot enforce in the courts of judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act.")

235. *See id.*

236. *Id*. at 591–92.

237. *Id*.

238. CONG. GLOBE, 39th Cong., 1st Sess. 480 (1866) (As Sen. Willard Saulsbury, a Delaware Democrat argued, "[i]t is no right in the citizen. A party to an action has the power to call for the testimony of a witness, but it is no right on the part of the person to testify.")

it willfully ignored actual practice, as observed by Justice Bradley in a dissent.

> The case before us is just as clearly within the scope of the law as such a case would be. I do not put it upon the ground that the witnesses of the murder, or some of them, are colored persons, disqualified by the laws of Kentucky to testify, but on the ground that the cause is one affecting the person murdered, as well as the whole class of persons to which she belonged. Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender. I say 'right,' for it is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property.[239]

Bradley goes on to reason that if an assault victim has a common law right to commence process against their wrongdoer, that right cannot be extinguished just because an assault escalates to murder.[240] Moreover, it cannot be extinguished, in Justice Bradley's view, because it belongs to the whole class of "persons affected," not to discrete individuals.[241] He then suggests that witnesses to the crime stand in for the murder victim and take on the right to report crime denied to the victim.[242] Still, while Bradley acknowledges the existence of a common-law right to file a criminal complaint, he falls short of saying that mere witnesses have such a right. He appears to think only victims literally did, while witnesses enjoyed a right derivative of the right of the victim. Nonetheless, treatises, cases, and background legal principles all suggest that there was a right in both victims *and* eyewitnesses, whether or not it was always described as a "right."[243] In sum, rather than viewing *Blyew* as an authoritative statement about the rights of crime victims, it is better viewed as a moot by legal professionals discussing an unsettled area of law in a time period in transition between victim-centric justice and state-centric justice, while straining to navigate

239. *Blyew*, 80 U.S at 598.
240. *Id*. at 598–600.
241. *See id.*
242. *See id.*
243. *See supra* Part III.

difficult questions of federalism.[244] Justice Bradley's dissent was truer to actual practice, but neither appears to be perfectly accurate.

There is no good reason to treat *Blyew* or any of its Reconstruction successor cases as accurate statements of "American jurisprudence" when it comes to the right to access criminal justice.[245] "American jurisprudence" is instead on the side of crime victims and witnesses, and cases like *Linda R.S.* and *Leeke* should be overturned as erroneous.

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244. *See supra* note 5.

245. This is similar to the historical findings in PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011). Brandwein found that the Reconstruction cases are overread and tend to say much less than scholars think once they are taken in their historical and political context.