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FOREWORD

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The title of this symposium, "The Death of Probable Cause," overstates the case, for "probable cause" is, of course, not dead.[1] Nor is this fundamental legal concept ever likely to pass entirely from the constitutional scene. (Perhaps a better title would therefore add a question mark: "The Death of Probable Cause?") But probable cause is on the ropes. Its scope of application is narrowing, its meaning mutating, its competitors thriving, starving it of resources.[2] Why is this so? Is it a good or a bad thing for the health of the republic? What does it, and, equally importantly, what should it, mean for the future of the Fourth Amendment and its statutory progeny? These are the questions this symposium seeks to answer.

I

PROBABLE CAUSE'S CHANGING MEANING

But no answer can be forthcoming without first understanding just what probable cause is. The concept of "probable cause" has four components: (1) one quantitative—how convinced must the fact finder be? (2) one qualitative—how trustworthy must be the evidence upon which the judgment is made? (3)

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1. *See* ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 186–97 (4th ed. 2010) (summarizing the current state of federal constitutional law, which often at least purports to require probable cause for full-blown searches or seizures).

2. For example, there are now so many "exceptions" to the occasionally stated rule that probable cause is presumptively required for Fourth Amendment searches and seizures that the "rule" itself rarely applies. *See id.* at 323–39 (discussing the stop-and-frisk exception to the probable-cause rule); *id.* at 382–467 (discussing the vehicle, search incident to arrest, plain view, protective sweep, administrative, and border-search exceptions, among others, to the probable-cause rule). At other times, the Court inconsistently but flatly denies that there is any such rule, seeing whether probable cause or some alternative to it is required as merely a question of "reasonableness"—largely of balancing state against individual interests—without any presumption at work. *See* New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985). Several decades ago, the Court subtly changed its language in defining probable cause from that of probability to that of a mere "substantial chance," *Illinois v. Gates*, 462 U.S. 213, 243–44 n.13 (1983), and, in the view of many scholars, thereby reduced the quantitative requirement for probable cause. More recently, according to several commentators, in *Maryland v. Pringle*, 540 U.S. 366 (2003), the Court further reduced probable cause's quantitative meaning while also diluting its requirement that it involve truly "individualized" determinations. *See* Tracey Maclin, *The* Pringle *Case's New Notion of Probable Cause: An Assault on* Di Re *and the Fourth Amendment*, 2003–2004 CATO SUP. CT. REV. 395, 409–15 (2004) (discussing dilution of the individualized-suspicion requirement); Andrew E. Taslitz & Margaret L. Paris, *Catering to the Constable: The Court's Latest Fourth Amendment Cases Give the Nod to the Police*, 19 CRIM. J. 5 (2004) (discussing quantitative lowering).

one moral—is the evidence sufficiently individualized? and (4) one temporal—when must the judgment be made? The meaning of each of these components has been changing, a change accelerating in the past few years.

A. The Quantitative Component

Although it is hard to describe standards of proof like that embodied in the phrase "probable cause" in purely mathematical terms,[3] judges and scholars have long found rough mathematical approximations of the standard useful. Thus, for several decades, most judges understood probable cause's quantitative requirement to hover around a preponderance of the evidence, usually falling slightly under fifty-percent confidence that a particular person did the crime or that evidence of crime would be found in a specific location.[4] Surveys of judges confirmed this fact,[5] leading scholars like Wayne LaFave found it to be consistently evidenced in lower-court opinions,[6] and the United States Supreme Court's admittedly vague definition of the term fostered this understanding.[7]

No more. Just two terms ago, the high Court decided a case, *Maryland v. Pringle*,[8] widely (though not universally) interpreted as meaning that probable cause's quantitative requirement has now fallen, at least in some instances, to about thirty-three percent, rather than just under a fifty-percent, confidence level.[9] Alternatively, *Pringle* might mean that probable cause has no fixed quantitative meaning, its meaning instead changing based upon circumstances, a meaning that can, however, fall to a level so low as to be equivalent to what used to be considered the hallmark of the less-muscular concept of "reasonable suspicion," that is, about a one-third likelihood of guilt.[10]

If this latter interpretation is correct, however, the Court has given no guidance for determining when the standard of proof should be lowered. The judgment for now seems to be left to the discretion of lower courts and law enforcement, both of whom generally avoid expressly confronting what

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3. The Court indeed insists that probable cause is a "fluid," "nontechnical" concept that cannot be reduced to any simplistic or rigid formula, whether quantitative or otherwise. *Pringle*, 540 U.S. at 370–71 (quoting *Gates*, 462 U.S. at 232).

4. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1307—07 (1982).

5. *See id.* at 1327.

6. WAYNE R. LAFAVE, JEROLD ISRAEL & NANCY KING, CRIMINAL PROCEDURE § 3.3, at 144–45 (4th ed. 2004).

7. *See Gates*, 462 U.S. at 235–39.

8. *See Pringle*, 540 U.S. 366.

9. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 187–92.

10. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1(c)-(d) (4th ed. 2009); McCauliff, *supra* note 4, at 1332 ("The most common complaint was that percentages are misleading because burdens of proof deal with qualitative judgments rather than quantitative judgments."); *id.* at 1309–10 (describing reasonable suspicion as a traditionally lower standard than probable cause).

standard of proof they are using anyway.[11] Furthermore, if the quantitative requirement for probable cause has been lowered, at least in some cases, then surely the quantitative requirement for reasonable suspicion has also been lowered. Moreover, if that requirement can rise and fall based upon circumstances for both concepts, then what, exactly, is it that distinguishes "probable cause" from "reasonable suspicion" in the first place? In any event, lower courts and commentators seem to be finding in *Pringle* a signal that their degree of confidence in suspecting crime before searching or seizing can decline with no retribution likely from the Supreme Court.[12]

B. The Qualitative Requirement

The high Court has also long made it clear that probable cause cannot be based on mere hunches or suspicions.[13] Nor can it be based upon simple deference to the officer's judgment.[14] Rather, there must be specifically identified supporting evidence to allow a reviewing magistrate to make an independent judgment that such support is trustworthy.[15] The trustworthiness of the supporting-evidence inquiry has been most thoroughly discussed in the context of informants' tips.[16] Initially, the Court used a robust "two-pronged" test requiring that any informants' tip must be from a "credible" (truthful) informant based upon "reliable" information,[17] such as personally observing, rather than just hearing rumors about, a drug transaction.[18] This was a conjunctive rule of inadmissibility: any tip not meeting both prongs was effectively inadmissible, that is, could not even be considered in the probable-cause determination.[19] In the 1980s, however, the Court transformed this inadmissibility rule into one of weight.[20] Weakness in one prong or the other might be relevant in determining how much weight to give a tip, but the tip would always be considered in the probable-cause determination as part of the "totality of the circumstances."[21] Combined with a new, highly deferential standard of review of the magistrate's finding of probable cause, ever-less-

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11. *See generally* Crosby v. Monroe County, 394 F.3d 1328, 1332–34 (11th Cir. 2004); Horton v. Williams, 572 F. Supp. 2d 1292, 1299–1302 (M.D. Ala. 2008).

12. *See Crosby*, 394 F.3d at 1332–34; *Horton*, 572 F. Supp. 2d at 1299–1303; TASLITZ, PARIS & HERBERT, *supra* note 1, at 186–96.

13. *See* PETER HENNING ET AL., MASTERING CRIMINAL PROCEDURE 41–45 (2010) (describing probable cause as an objective standard and the Court's application of it).

14. *See id.*

15. *See id.* at 45.

16. *See* Illinois v. Gates, 462 U.S. 213, 230–31 (1983) (articulating the Court's "totality of the circumstances" test for the trustworthiness of informants' tips as a basis for probable cause).

17. *E.g.*, Spinelli v. United States, 393 U.S. 410, 412–13 (1969); Aguilar v. Texas, 378 U.S. 108, 114–15 (1964).

18. *See* HENNING ET AL., *supra* note 13, at 51–52 (explaining the *Aguilar–Spinelli* test).

19. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 200–15 (discussing the *Gates* totality-of-the-circumstances test).

20. *See id.* at 197–215.

21. *See id.*; *see also Gates*, 462 U.S. at 233; HENNING ET AL., *supra* note 13, at 52.

trustworthy evidence has been declared adequate to support the probable-cause determination.[22] In recent years, again in the context of informants, this race to the bottom has quickened. An empirical study of warrants issued near the end of the twentieth century in San Diego, California, reported some surprising results.[23] Magistrates were routinely approving warrants based upon boilerplate language relying on confidential informants.[24] The boilerplate would recite the officer's judgment that the confidential informant (CI) is trustworthy but that it would be dangerous to the informant to report many details that might inadvertently reveal his identity.[25] Accordingly, the warrant applications revealed little detail about the informants' credibility or reliability. The word of the officer was enough.[26] The practice of warrant-approval in San Diego thus seemed to tolerate far less-trustworthy evidence than even the Supreme Court's flexible standard permits.[27] The willingness of magistrates to countenance weak applications also means that, even when appellate courts agree that probable cause is lacking, often no evidence will be suppressed on the theory that the officers acted in "good faith" reliance on the magistrate's judgment.[28]

But there was more. There were extreme racial disparities in the choice of search targets and in the apparent accuracy of the underlying information.[29] The vast bulk of warrants were directed at African Americans or Hispanics.[30] Yet error rates were high; that is, many searches done of racial-minority-group members did not yield evidence of the crime for which the warrant was issued or evidence indeed of any crime at all.[31] On the other hand, searches of whites' homes, cars, and businesses, though far fewer in number (but still large enough

22. *See* Alabama v. White, 496 U.S. 325, 328–31 (1990) (applying the *Gates* test and finding an anonymous tip was sufficiently corroborated to supply the required reasonable suspicion); *see also Gates*, 462 U.S. at 289–90 (Brennan, J., dissenting) (predicting such consequences for the Court's jettisoning of *Aguilar–Spinnelli* and replacing it with the more flexible *Gates* test); *accord* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1 (c) (4th ed. 2004) (describing the Court's recent decision in *Pringle* thus: "[T]he Court has made a good many leaps in logic in concluding there was probable cause that the occupants of the vehicle consisted not only of a 'dealer' of drugs but also others who had been 'admit [ted]' to the 'enterprise' of drug dealing."); Maclin, *supra* note 2, at 425–26 (describing the Court in *Pringle* as accepting a weak "evidentiary basis" for its finding of probable cause).

23. Laurence A. Benner, *Racial Disparity in Narcotics Search Warrants*, 6 J.GENDER, RACE, & JUST. 183 (2002); Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. WESTERN. L. REV. 221 (2000).

24. *See* Benner & Samarkos, *supra* note 23, at 239–40.

25. *Id.*

26. *See id.* at 266.

27. *See id.* at 265–66.

28. The "good faith" exception of the Fourth Amendment's exclusionary rule prevents the suppression of evidence seized pursuant to a faulty warrant if it is determined that the evidence was discovered in "objectively reasonable," good-faith reliance on the search warrant. *See* Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483 (2006) (discussing the effects and implication of the "good faith" exception).

29. *See* Benner, *Racial Disparity*, *supra* note 23, at 215, 219–20.

30. *Id.* at 215–17.

31. *Id.* at 219–20.

to support statistically valid conclusions), had high accuracy rates.[32] One fair reading of the data is this: police are more willing to seek, and judges more willing to approve, warrants directed at racial minorities that are based on questionable tips than is the case for white suspects.[33] Differences in offending rates did not explain these disparities.[34] Rather, fewer whites were searched, or at least this is arguably so, because law enforcement and the judiciary required more-trustworthy evidence than was true with racial minorities to justify interfering with whites' rights to privacy, property, and freedom of movement.[35]

There is reason to believe that San Diego, which boasts one of the more progressive police departments in the country, is likely doing better in judging trustworthiness than are most other jurisdictions.[36] Moreover, numerous cases have been documented throughout the country of police relying on nonexistent informants, informants with sorry track records, and informants with powerful reasons to lie, flaws that a more vibrant requirement of warrant-affidavit specificity about the tips' trustworthiness might have revealed, preventing approval of such bad warrants.[37] In a number of cases, there is strong reason to believe that a CI's tip prodded police into tunnel vision about who did a crime, leading to convictions of the innocent, even though the CI, in order to protect his identity, never testified.[38]

C. The Moral Requirement

The moral requirement of probable cause is that it involves individualized suspicion—suspicion based on the thoughts, actions, character, and history of *this individual* rather than upon stereotypes, assumptions, averages, or group membership.[39] We refer to this requirement as a "moral one" in the sense that it can be seen as an aspect of the political morality underlying the probable-cause concept—the idea that in a republic each of us should be judged for what we do as individuals, not for who our associates are; nor for what groups we are born into, or find ourselves thrust into; nor for what others assume about us from our

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32. *Id.* at 187, 221.

33. *See* Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants' Example*, 37 SW. L. REV. 1091, 1126–27 (2008). *See generally id.* at 1124–31 (analyzing Professor Laurence A. Benner's data gathered in the San Diego Search Warrant Project).

34. *See id.* at 1126–28.

35. *See id.*

36. *See* SAN FRANCISCO POLICE COMMISSION, 2007 ANNUAL REPORT 78 (2007) (claiming to promote progressive policies through community policing); *see also* Benner& Samarkos, *supra* note 23, at 223 ("Overall, this article reports findings which generally show San Diego law enforcement in a favorable light.").

37. *See* AM. BAR ASS'N, ACHIEVING JUSTICE 63–78 (2006); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 69–72 (2009).

38. *See* Taslitz, *supra* note 33, at 1134–35.

39. *See* HENNING ET AL., *supra* note 13, at 59.

social position or appearance, but rather what they *know* of us.[40] This principle recognizes that being arrested, stopped, or searched is a humiliating, stigmatizing event to which none of us should be subject without bringing suspicion fairly upon ourselves by our own actions.[41] The principle is one that restrains governmental intervention into our private lives absent strong justification, while protecting individual dignity.[42] It is also an aspiration that protects freedom of association and speech, for our mere connection with political groups or positions cannot justify government action against us.[43] It is a principle that, in word, the Court repeatedly reaffirms in glowing, noble terms, recognizing it as one of the hallmarks of what makes the American republic a great one.[44]

But indeed the story is a different one. The Court increasingly finds "individualized" suspicion in assumptions about the neighborhood where one lives,[45] about the political groups one joins, about the associates with whom one has only the most tenuous social connection.[46] It has even branded mere travel to and from one state—Florida—as indicative of an individual's involvement with crime, specifically, in the drug trade.[47] The Court has found mere presence in a car with another who has engaged in criminal activity to be sufficient to cast doubt on the honesty of a traveler.[48] The Court has also indirectly endorsed "profiling"—matching the descriptions of supposed "average" criminal offenders of a certain type without ever inquiring into empirical support for such generalizations, support that is routinely lacking, and relying instead on inherently contradictory assumptions.[49] Furthermore, though not doing so explicitly, by declaring inquiry into officers' subjective racial bias irrelevant under the Fourth Amendment and hinting that disparate racial impact will be similarly irrelevant, the Court has opened the door to *racial* profiling's nosing its head into the constitutional tent without fear of being molested by the judiciary.[50] Lower courts, once again, have taken the Court's cue.[51]

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40. *See* Andrew E. Taslitz, *What is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 LAW & CONTEMP. PROBS. 145, 176-77 (Summer 2010).

41. *See* Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 124-26 (Summer 2010).

42. *See* Taslitz, *supra* note 40, at 209-10.

43. *See id.* at198-99.

44. *Id.*

45. Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 100 (1999).

46. *See* Maclin, *supra* note 2, at 397 ("In a post-*Pringle* world . . . police have significantly more authority to arrest a person based on his mere association with others suspected of a crime.").

47. *See* Illinois v. Gates, 462 U.S. 213, 271 (1983) (White, J., concurring).

48. *See* Maryland v. Pringle, 540 U.S. 366, 372–74 (2003).

49. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 363–69 (summarizing racial-profiling data and case law).

50. *See* Whren v. United States, 517 U.S. 806 (1996) (holding that racial animus is irrelevant under the Fourth Amendment); TASLITZ, PARIS & HERBERT, *supra* note 1, at 512–19 (analyzing the role of racial animus and impact under the Fourth and Fourteenth Amendments).

Statutory changes in the individualized justice requirement have also been accepted by the courts. Notably, the Foreign Intelligence Surveillance Act requires probable cause to believe that a person is an agent of a foreign power, not that he has violated any criminal statute.[52] Although in the special context of foreign intelligence, this definition is nevertheless a far cry from traditional standards of suspicion that a specific individual has engaged in conduct that has violated some criminal statute.[53] In the view of some scholars, material-witness warrants, which permit arrests of witnesses when there is probable cause to believe they will not appear in court, are being used as a pretext to arrest suspects when evidence to prove traditional probable cause is inadequate, namely, probable cause to believe that those alleged "witnesses" in fact committed the crime of which they are suspected.[54] The Court has also endorsed "area warrants," probable cause to believe that civil legal violations are occurring somewhere in a specific geographic area, thus justifying searches of homes within that area.[55] Scholars have joined the bandwagon, some arguing that there is no defensible logical difference between "individualized" and "generalized" suspicion because reasoning without generalization is impossible, others accepting that there *is* a difference but arguing that ample empirical and logical justification supports using generalizations, averages, and group behavior as bases for suspecting wrongdoing by individuals.[56] Some scholars also endorse the idea of "group" probable cause.[57]

D. The Temporal Requirement

The Court has periodically stated that, to be reasonable, searches must be done only via warrants, subject to a few well-recognized, clearly delineated exceptions.[58] Warrants are often justified as moving the probable-cause decision from the competitive enterprise of law enforcement into the hands of a neutral,

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51. *See generally* TASLITZ, PARIS & HERBERT, *supra* note 1, at 494–95; Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L. J. 331, 342–57 (2000) (summarizing the structural barriers to civil litigation based on alleged violations of Fourth and related Fourteenth Amendment rights).

52. Foreign Intelligence Surveillance Act of 1978, Pub. L. No 95-511, § 105(a)(3)(A), 92 Stat. 1783 1790.

53. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 558.

54. Bradley A. Parker, *Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment*, 36 RUTGERS L. REC. 22 (2009) (describing the Federal Material Witness Statute, 18 U.S.C. § 3144, and its application before and after 9/11); Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681 (2009) (describing material witness detention as a longstanding police strategy).

55. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 418–19; Camara v. Municipal Court, 387 U.S. 523 (1967) (striking down a warrantless inspection of a home by a health inspector pursuant to the San Francisco Housing Code but approving the use of a warrant based solely upon such factors as time passage, the nature of the building, and the general condition of buildings in the geographic area rather than requiring individualized suspicion of Code violations in a particular dwelling).

56. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 86-87.

57. *See generally* Slobogin, *supra* note 41.

58. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 36–37.

detached magistrate, and as allowing specific descriptions that limit police discretion in warrant execution.[59] But there is another aspect of warrants not overtly recognized by the Court that affects the definition of probable cause in the real world: warrants require judges to gauge probable cause before knowing what, if anything, will be found. Warrants thus avoid the problem of "hindsight bias."[60] Simply put, if a suppression court reviewing the constitutionality of a warrantless search knows that the search uncovered the horribly mutilated body of a torture victim and a kilo of cocaine, it becomes harder for that court to find that there was no probable cause. That evidence *was* found suggests that there was ample reason to believe beforehand that evidence *would be* found. Moreover, to suppress evidence of such significant import, perhaps freeing a very dangerous offender to roam the streets seeking more blood, is a difficult choice to make. Ample psychological theory and empirical data, albeit mostly in other contexts, supports the idea that hindsight bias is at work in the probable-cause determination.[61] In other words, though this happens largely at a subconscious level, judges deciding whether to approve warrant applications, not knowing whether any damning evidence will be found, are likely to apply higher quantitative, qualitative, and moral standards in gauging probable cause's existence than if they first make the decision only after evidence of crime has been found. The more warrantless searches are permitted, therefore, the weaker the meaning of probable cause.

Yet the Court has enormously expanded the number of exceptions to the warrant requirement and continues to do so. Warrants are usually not needed when probable cause to search concerns cars, "regulatory" invasions of businesses, "frisking" individuals reasonably suspected of carrying weapons, anyone "voluntarily" consenting to the search, young children or teens in public schools, or any situation in which there are "exigent circumstances."[62] Warrants are also usually not needed when probable cause to seize persons or things concerns brief stops for questioning, full-blown arrests on the street, impoundment of automobiles, and a host of other circumstances.[63] In short, warrants, not their absence, are becoming the exception rather than the rule.

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59. *See id.* at 237–38; HENNING ET AL., *supra* note 13, at 66, 212.

60. *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 44 (2007).

61. HENNING ET AL., *supra* note 13, at 46, 62; *see generally* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998) (summarizing empirical data).

62. *See* HENNING ET AL., *supra* note 13, at 106–07 (stop-and-frisk exception); *id.* at 138 (automobile-search exception); *id.* at 153–54 (consent exception); *id.* at 165–66 (exigent-circumstances exception); *id.* at 173–74 (plain-view exception); *id.* at 179–81 (administrative-search exception).

63. *See, e.g.*, *id.* at 128–34 (describing searches incident to arrest); *id.* at 138–40 (searches during noncustodial traffic stops); *id.* at 146–51 (impounded-vehicle inventory and vehicle searches generally).

The Court has routinely seen the warrant and probable-cause requirements as distinct.[64] They are not. The dilution of the former inevitably dilutes the latter.

E. Indirect Assault via the Fifth Amendment

Some alterations in probable cause's meaning occur without even mentioning the words "probable cause." More precisely, loosening the stringency of the privilege against self-incrimination often sub silentio weakens probable cause. The *Pringle* case again offers an example.[65] There, an officer stopping a car with three occupants, one of whom was in the back seat, found a controlled substance hidden behind an upraised armrest in the back seat. The officer threatened to arrest all three occupants unless someone confessed to the crime. When no one admitted guilt, the officer made good on his threats, after which Pringle, the front-seat passenger, ultimately confessed, exculpating the other two arrestees. The Court considered the group's silence in the face of the officer's threats as one powerful indicator of criminality contributing to probable cause to arrest. Threatening to retaliate against silence with arrest sounds like a classic case of compulsion violating the Fifth Amendment's protection against being "compelled" to be a witness against one's self.[66] Yet the Court saw no Fifth Amendment problem and, in holding silence permissible grounds for finding probable cause, allowed silence previously presumed to be constitutionally protected and thus irrelevant to criminality to become its very hallmark.

II
PROBABLE CAUSE'S SCOPE AND COMPETITORS

A. Narrowed Scope

The Court has continued its drive to narrow the situations in which probable cause is required. Sometimes the Court finds that the Fourth Amendment does not govern at all, for example, by applying a thin, counterintuitive notion of when privacy expectations are "reasonable" (no invasion of a reasonable expectation of privacy, no search, thus, absent a seizure, no Fourth Amendment

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64. *See* TASLITZ, PARIS & HERBERT, *supra* note 1, at 380-82 (making general point), 399, 407–08, 411–12 (respectively discussing the "exigent circumstances," "plain view," and automobile exceptions to the warrant requirement, all of which still demand proof of probable cause).

65. Maryland v. Pringle, 540 U.S. 366 (2003).

66. *Id.* at 369 (despite a police officer's threatening to arrest all three occupants of a car unless someone confessed to possessing drugs and money found in the passenger compartment, the Court ignored the Fifth Amendment compulsion argument in its opinion); Brief of Respondent at 31–34, Maryland v. Pringle, 540 U.S. 366 (2003) (No. 02-809) (arguing that the officer's threatening to arrest Pringle and two other individuals if someone did not confess to possessing the drugs found in the car constituted "compulsion" for Pringle to be a witness against himself, in violation of the Fifth Amendment's privilege against self-incrimination).

protection at all).[67] This method virtually eliminates any privacy protections while on the street, permitting constitutionally unrestricted governmental video surveillance, governmental monitoring of conversations between friends or lovers, and electronic tracking of cars because all occur in "public."[68] But other concepts of privacy treat it, unlike the Court, not as an either–or commodity but as a thing of varying degrees in which we are each free justifiably to care about who sees us, for what purposes, for how long, in what manner.[69] Under that concept, the Fourth Amendment would apply limited privacy protections even in "public," an oxymoronic idea for the Court.[70]

A particularly important finding of the Court is that the Fourth Amendment has no application to subpoenas that are not unduly vague.[71] Combined with the Court's narrow notion of reasonable privacy protections, this rule allows the state to obtain nearly unlimited information from third parties via subpoena in a world in which it is nearly impossible to avoid third parties having access to much information about individuals.[72] Thus Internet-service providers, on-line businesses, and even the banks in which we have personal accounts can be compelled via subpoena to reveal extraordinarily detailed information about us without Fourth Amendment regulation, thus without proving probable cause or meeting any lesser burden.[73]

When the Court does find that the Fourth Amendment governs, it often turns primarily to two other tests: (a) reasonable suspicion, or (b) no suspicion at all.

B. Reasonable Suspicion

Reasonable suspicion is not only lower in quantity, but may be based on lower-quality evidence than is probable cause.[74] Furthermore, reasonable suspicion has been subject to the same devolution as probable cause, that is, relying on ever greater generalizations despite purported commitment to individualized justice, turning on even poorer quality evidence than previously permitted, and being established on less quantitative proof than was true in the

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67. *See* HENNING ET AL., *supra* note 13, at 26–36 (surveying many situations where the Court found no reasonable expectation of privacy); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society*,*"* 42 DUKE L.J. 727, 733–39, 759–61 (1993) (empirical study finding Americans' actual expectations of privacy depart widely from the Court's judgment of what expectations are reasonable).

68. *See* Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 133–41 (Spring 2002).

69. *See id.* at 140 ("Privacy is not a discrete commodity, possessed absolutely or not at all.").

70. *See id.* at 141–43.

71. *See* United States v. Miller, 425 U.S. 435, 444–46 (1976).

72. *See* SLOBOGIN, *supra* note 60, at 152–54.

73. *See id.*

74. Alabama v. White, 496 U.S. 325, 330 (1990); HENNING ET AL., *supra* note 13, at 98–100.

past.[75] Reasonable suspicion now has an extraordinarily wide scope, permitting street stop-and-frisks for investigative purposes, full-blown searches of students' purses, and roving searches of probationers' and parolees' homes (despite the purported "sacred" status of the home under the Fourth Amendment).[76]

The Court has recently, albeit in dicta, even revived the idea that "investigative warrants" based solely upon reasonable suspicion to arrest someone for fingerprinting, DNA samples, and the like, may be constitutional—again despite seemingly unequivocal Fourth Amendment language declaring that "*no* warrants" shall issue that are not based upon probable cause.[77] The Court has also begun using reasonable suspicion to mount a rear-guard attack on what evidence may be used to establish probable cause by narrowing the Fifth Amendment privilege against self-incrimination. Most notably, in the recent *Hiibel* case,[78] police stopped a car driven by Mr. Hiibel, with Hiibel's daughter in the passenger seat, based upon reasonable suspicion that a man driving a car of a similar description had been hitting a woman passenger. When Hiibel repeatedly refused to reveal his name to the officer unless the officer would explain why he had been stopped, the officer arrested Hiibel for violating a criminal statute mandating name-revelation to the officer. The Court, in a 5–4 decision, found no violation of the privilege in compelling Hiibel to give his name upon pain of arrest and criminal prosecution. Unwanted revelation of a name may seem a small matter, but it had large implications, as the dissenters angrily pointed out.[79] The Court had previously repeatedly justified *Terry* investigative stops on mere reasonable suspicion partly on the grounds that such stops were relatively nonintrusive because persons questioned during such stops *had no obligation to answer*.[80] But here the Court majority permitted reasonable suspicion to justify compelled responses to

75. David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 976–77 (1998).

76. *See* Samson v. California, 547 U.S. 843, 850 (2006) (concluding that parolees have even fewer expectations of privacy than probationers); United States v. Knights, 534 U.S. 112 (2001) (approving warrantless search of probationer's home upon an officer's developing reasonable suspicion that the probationer had engaged in a crime unrelated to the offense of conviction); Griffin v. Wisconsin, 483 U.S. 868, 878 (1987) ("We think that the probation regime would . . . be unduly disrupted by a requirement of probable cause."); New Jersey v. T.L.O., 469 U.S. 325 (1985) (discussing student searches); Terry v. Ohio, 392 U.S. 1, 19–20 (1968) (discussing the "reasonableness" requirement for a stop-and-frisk search); HENNING ET AL., *supra* note 13, at 41–59.

77. *See* Hayes v. Florida, 470 U.S. 811, 815 (1985); *see also* United States v. Askew, 529 F.3d 1119, 1139–40 (D.C. Cir. 2008) (describing statement in *Hayes* as dicta); *accord* Kaupp v. Texas, 538 U.S. 626, 631 (citing the *Hayes* dicta with approval).

78. Hiibel v. Sixth Jud. Dist. Ct., 542 U.S. 177 (2004).

79. *See id.* at 193–96 (Stevens, J., dissenting); *id.* at 198–99 (Breyer, J., dissenting).

80. *Terry*, 392 U.S. at 34 (White, J., concurring) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."). *See also* Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (explaining that allowing officers to stop and question a fleeing person under *Terry* is "quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning"); Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (adopting for the full Court language strikingly similar to that in White's *Terry* concurrence).

questions during such a stop, then further permitting silence in the face of those questions to bootstrap reasonable suspicion into probable cause for arrest, hardly a minor inconvenience.

C. No Suspicion

The Court has similarly widely expanded the number of situations in which no level of suspicion is required whatsoever. This occurs primarily in connection with "administrative" searches and seizures but has a huge scope, including drunk-driving roadblocks, automobile-inventory searches, random drug testing of safety-sensitive personnel and of high-school students involved in extracurricular activities (including even the chess team), automobile-parts-lot searches, and Occupational Safety and Health Administration searches, among numerous others.[81] Even searches or seizures having the clear purpose of imposing criminal punishment are often characterized as administrative because, in the Court's view, their "primary" objective, programmatic purpose is administrative.[82]

III
WHAT MAKES THIS SYMPOSIUM UNIQUE AND IMPORTANT

Pieces of the probable-cause story told above have been written about by many authors, though sometimes in only a small portion of an article or book chapter. But no one has examined as a comprehensive, systematic phenomenon the erosion (or, if you approve of the law's direction, the mutation) of the probable-cause concept. This symposium examines the causes, the actual and potential consequences, and the moral, political, and psychological wisdom of the neo-probable cause era. Accordingly, the symposium crosses disciplinary boundaries, looking at history, social science, neuroscience, and philosophy, as well as at more-common legal sources, to answer the questions posed.

When, if ever, may the probable cause "requirement" be jettisoned and, if it is, what should replace it? Professor Christopher Slobogin's contribution, *Government Dragnets*, addresses these questions. Slobogin defines "government dragnets" as group-based searches.[83] These searches include health-and-safety inspections, roadblocks, group DNA-swabbing, certain pretextual searches, public video surveillance, airport searches, and data-surveillance. By their very nature group searches cannot be justified by "individualized" suspicion, if they can be justified at all.

Slobogin builds on political-process theory to argue that group searches should generally be permissible outside of such core protected areas as arrests

81. *See* HENNING ET AL., *supra* note 13, at 180 ("[T]he balance in administrative search or seizure cases is found to favor suspicionless, warrantless searches or seizures."). *See generally id.* at 179–202 (describing the myriad circumstances in which the Court has upheld such searches).

82. *See id.* at 179–83.

83. Slobogin, *supra* note 41.

and full-blown home searches if authorized by clear, specific legislation. Group-process theory argues that elected representatives who permit abusive legislation will face the wrath of the electorate. Moreover, the representative nature of the electorate ensures that the voices of those regulated will be heard, giving them a say in the regulatory process. Accordingly, such regulation merits deference, and any resulting searches are therefore "reasonable" under the Fourth Amendment. Group searches authorized by legislation that leaves undue discretion in the hands of the executive or that is engaged in absent any authorizing legislation whatsoever would, however, be subject to strict scrutiny. This strict-scrutiny test would turn on principles of proportionality and exigency, and Slobogin illustrates the ways in which these principles would apply given concerns unique to the area of group searches, for example, considering the relevance of search "hit rates."

Craig Bradley's piece, *Reconceiving the Fourth Amendment and the Exclusionary Rule*,[84] is less concerned with probable cause than with the consequences of its absence, specifically, the exclusion of evidence at trial. Bradley argues that the exclusionary rule should be applied only when the police acted unreasonably (negligently) in their understanding or application of existing Fourth Amendment doctrine. The consequence of his approach would be to change outcomes from the current status quo in three primary circumstances: first, when the police relied on clear precedent that the United States Supreme Court changes; second, when the police relied on a reasonable interpretation of ambiguous precedent; and third, when the police reasonably misunderstood the nature of the facts supporting probable cause. In none of these instances would Bradley counsel suppression. Although Bradley relies on a variety of sources to support his argument, his piece is a primarily comparative one, finding wisdom in portions of the varied approaches to the exclusionary rule in Canada, England, Wales, Germany, and France.

Historian Thomas Davies' piece, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*,[85] argues that the modern idea of what he calls "bare probable cause" is in fact far less protective of liberty than the earlier idea that, in addition to probable cause, most searches and arrests also required a sworn statement by a potentially accountable victim that a crime had "in fact" occurred. This standard had its roots in due process, not the Fourth Amendment. The bare-probable-cause standard arose in the context of customs inspections, probably because there was no single "victim" or "complainant" on whom to rely in such cases. The Fourth Amendment sought to prohibit the general warrants for customs searches that the colonists so despised, thus embracing the alternative, individualized probable-cause standard. But the Framers avoided requiring more than probable cause because they knew that

84. 73 LAW & CONTEMP. PROBS. 211 (Summer 2010).
85. 73 LAW & CONTEMP. PROBS. 1 (Summer 2010).

the new federal government would have to rely substantially on customs searches for revenue. Only in the mid–eighteenth century did the migration of the bare-probable-cause standard to ordinary criminal cases begin, a process that reached something resembling current understandings only during the Prohibition Era. Carefully tracing the Framing and Post-Framing history with great detail, Davies concludes that only an almost willful misreading of history can explain the dominance of bare probable cause when more-muscular protections once ruled. Yet the modern Court has, in Davies' view, unacceptably diluted even the minimal protections of bare probable cause as well.

Sherry Colb, in her piece, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*,[86] examines the logic and psychology of how we react to abstract, statistical descriptions of harm versus concrete instances of harm. For example, if an officer finds two people in a house, both of whom live there, and finds cocaine somewhere in that house, he might announce that he will arrest both persons if one does not confess to possessing the cocaine. Assuming that only one of the two possesses it, and assuming that the officer is aware of this fact, he will know with absolute certainty that one of these two people is innocent of the crime. Nevertheless, when neither confesses, he arrests both. Being confronted with the arrest of a concrete, flesh-and-blood individual whom we know to be innocent intuitively affronts us, argues Colb. Yet we are intuitively less-disturbed by the officer's arresting a single individual because we conclude that there is a fifty-percent likelihood of his guilt based upon some formula (perhaps a profile). Such reactions, Colb maintains, occur in a wide variety of instances relevant to search and seizure, including the reaction to exclusion as a remedy. Colb explores the moral wisdom and logic of this distinction, including by comparing its role in other areas of law, such as disparate-impact litigation, death-penalty cases, and ordinary tort suits. Colb finds virtues and vices in the distinction, finding them difficult to balance, and thus reaches only the tentative conclusion that, in the context of probable cause, the distinction is neither moral nor rational.

Andrew Taslitz's contribution, *What is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*,[87] in part stands in contrast to Colb's (and Slobogin's) apparently ready embrace of the role of generalizations in the probable-cause determination. Taslitz begins by engaging with philosophers who argue that there is little, if any, logical or practical difference between "individualized" and "generalized" suspicion. Taslitz argues that there is a real logical distinction, while conceding that the terms lie on a spectrum rather than being dichotomous. He also finds practical distinctions between the two concepts in accounting for the problems of uncontrolled police discretion and imperfect police knowledge. Having

86. 73 LAW & CONTEMP. PROBS. 69 (Summer 2010).
87. Taslitz, *supra* note 40.

established the reality of the "individualized suspicion" concept, which Taslitz sees as being at the heart of the probable-cause idea, he turns to cataloguing in great detail its social benefits and costs.

Its benefits include promoting procedural fairness, including voice and choice, which in turn heightens law's legitimacy and acceptance; encouraging transparency and impartiality; fostering distributive fairness, including equity and equality; promoting appropriate retribution for governmental wrongdoing; protecting privacy and its cousins; promoting dissent and diversity; paying homage to the drive to be understood as a unique person worthy of being treated with a measure of mystery and awe; and, particularly when generalizations might be spurious ones, promoting accuracy. Its potential costs include some of the guilty escaping justice; weakened general and specific deterrence; justice delayed; heightened out-of-pocket and opportunity costs; a narrowed scope of Fourth Amendment application; and impracticality as a standard when only group suspicion is feasible to further certain state goals. Taslitz relies on social science and normative philosophy to define these various benefits and costs and to illustrate their application. His goal is not to insist that probable cause be inflexibly required nor to permit its being readily dismissed. Rather, Taslitz argues that truly understanding probable cause's meaning and carefully parsing its costs and benefits better enable decisionmakers to decide when it must be retained, when not, and, if jettisoned under particular circumstances, what alternative safeguards can fill the social void left by probable cause's absence. Taslitz concludes by illustrating how this more careful approach to constitutional balancing would operate in several paradigm cases.