

# The *Pringle* Case's New Notion of Probable Cause: An Assault on *Di Re* and the Fourth Amendment

Tracey Maclin\*

## I. Introduction

Among Americans, guilt by association has never been a popular method of categorizing individuals. Particularly when it comes to criminal charges, Americans have rightly believed that an individual should not be judged solely on the basis of the company that he keeps. Fourth Amendment law has embraced a similar norm. Generally speaking, a full search or seizure of a person "must be supported by probable cause *particularized* with respect to that person."<sup>1</sup> In the arrest context, this means probable cause to arrest exists when police have reliable information or evidence that singles out a person or persons for arrest.<sup>2</sup> The requirement of particularized or individualized probable cause targeting a person "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises

\*For their very helpful comments on an earlier version of this article, I want to thank Yale Kamisar and Wayne LaFave. I also want to thank Meredith Scull for her work as my research assistant. In the interest of full disclosure, the reader may want to know that I was counsel of record and author of an amicus brief filed on behalf of the American Civil Liberties Union and the National Association of Criminal Defense Lawyers in the *Pringle* case.

<sup>1</sup>*Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added).

<sup>2</sup>When I say evidence that "singles out" a person or persons for arrest, I agree with Professor Silas Wasserstrom's analysis that this means that before an officer can arrest a person, he needs enough proof to support the belief that the "suspect arrested *did commit* the offense." Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 *Am. Crim. L. Rev.* 257, 337 (1984). "Such a belief would clearly not be warranted if the facts available to the officer made it as likely as not that he was wrong." *Id.* at 307 (footnote omitted).

where the person may happen to be.”<sup>3</sup> Put simply, guilt by association is not a permissible ground for arrest.<sup>4</sup>

It might be argued that mere proximity to others suspected of crime is insufficient proof of probable cause because every individual is “clothed with [their own] constitutional protection.”<sup>5</sup> After all, it is just as likely that a person’s association with others suspected of criminality has an innocent explanation. Under this view, “the phrase ‘probable cause’ suggests a quantum of evidence at least sufficient to establish more than a fifty percent probability—at least some sort of more-likely-than-not or preponderance of the evidence standard.”<sup>6</sup> The problem with this argument is that the modern Court has expressly denied that probable cause mandates such proof. In *Illinois v. Gates*,<sup>7</sup> the Court explained that probable cause does not require a more-likely-than-not showing of guilt.<sup>8</sup> In fact, the *Gates* opinion, written by then-Justice Rehnquist, asserted that “probable cause requires only a probability or *substantial chance* of criminal activity, not an actual showing of such activity.”<sup>9</sup>

<sup>3</sup>Ybarra, 444 U.S. at 91. In this article, I will sometimes use the terminology “particularized” or “individualized” suspicion. When I use these terms, I am referring to the degree or quantum of evidence needed to establish probable cause under the Fourth Amendment. See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (acknowledging the creation of an exception to the “individualized probable cause” rule); *id.* at 311–13 (Stevens, J., dissenting) (using the terminology “individualized probable cause” and “individualized suspicion” interchangeably). The current Supreme Court does not dispute that probable cause requires a “belief of guilt [that] must be particularized with respect to the person to be searched or seized.” *Maryland v. Pringle*, 124 S. Ct. 795, 801 (2003) (citing Ybarra, 444 U.S. at 91). My use of this terminology should not be confused with the reasonable suspicion or individualized suspicion that is required under *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. The individualized suspicion required under the *Terry* cases is a lesser standard of proof than the probable cause standard.

<sup>4</sup>See *Sibron v. New York*, 392 U.S. 40, 62 (1968) (“The inference that persons who talk to narcotics addicts [over a period of eight hours] are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual’s personal security.”).

<sup>5</sup>Ybarra, 444 U.S. at 91.

<sup>6</sup>Wasserstrom, *supra* note 2, at 306 (footnote omitted).

<sup>7</sup>462 U.S. 213 (1983)

<sup>8</sup>*Id.* at 235 (observing that a preponderance of the evidence standard is not the equivalent of probable cause, and that “it is clear that ‘only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause’”) (citations omitted).

<sup>9</sup>*Id.* at 243 n.13 (emphasis added).

In *Maryland v. Pringle*,<sup>10</sup> the Court confronted the tension between an individualized conception of probable cause (and the related rule that “mere proximity” does not provide probable cause) and the modern Court’s view that probable cause does not require a more-likely-than-not showing of guilt. In *Pringle*, police stopped a car occupied by three men for a traffic violation. A consensual search of the car revealed a large amount of cash in the glove compartment and five glassine baggies of cocaine hidden in the backseat armrest. After the men refused to provide any information about the money or narcotics, all three were arrested. A unanimous Court explained that the arrest of all three men was permissible because it is “an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.”<sup>11</sup> In reaching this result, the Court insisted that its holding was consistent with the principle of particularized probable cause and was not an endorsement of guilt by association.<sup>12</sup>

This article contends that the Court’s actions speak louder than its words, and demonstrate that the Court’s fidelity to individualized probable cause is more apparent than real. Prior to *Pringle*, a person’s mere presence with others independently suspected of criminality did not, by itself, provide probable cause for a search or arrest.<sup>13</sup> In a post-*Pringle* world, however, police have significantly more authority to arrest a person based on his mere association with others suspected of a crime.

<sup>10</sup>124 S. Ct. 795 (2003).

<sup>11</sup>*Id.* at 800.

<sup>12</sup>*Id.* at 800–01.

<sup>13</sup>See, e.g., *United States v. Di Re*, 332 U.S. 581 (1948) and *Ybarra*, discussed *infra* notes 40–56 and accompanying text. The result in *Ker v. California*, 374 U.S. 23 (1963), is not to the contrary. In *Ker*, the Court found there was probable cause to arrest a suspect’s wife, Diane Ker, who was present when police entered George Ker’s home to arrest him. After a warrantless entry to arrest George Ker, police encountered Diane Ker as she exited her kitchen. Inside the kitchen, officers observed a brick-shaped package of marijuana in plain view. The *Ker* Court observed: “Even assuming that [Diane Ker’s] presence in a small room with the contraband in a prominent position on the kitchen sink would not alone establish a reasonable ground for the officers’ belief that she was in joint possession with her husband, that fact was accompanied by the officers’ information that [George] Ker had been using his apartment as a base of operations for his narcotics activities.” *Id.* at 36–37. Thus the facts in *Ker* involved an arrestee with something more than mere spatial association with another suspected of criminality.

## II. The Context of *Pringle* as It Arrives at the Court

The facts in *Pringle* are undisputed. On August 7, 1999, at 3:16 a.m., Officer Jeffrey Snyder of the Baltimore County Police Department stopped a car for speeding and for the driver's failure to wear a seatbelt. Inside the car were three men: Donte Partlow, the driver and owner of the vehicle; Joseph Pringle, the passenger in the front seat; and Otis Smith, the backseat passenger. When Partlow opened the glove compartment to obtain his registration, Officer Snyder noticed a large roll of cash. After determining that there were no outstanding warrants for Partlow, the officer issued Partlow a verbal warning.

After a second officer arrived on the scene, Officer Snyder asked Partlow if he had any weapons or narcotics in the car. Partlow said no, and gave Snyder permission to search the car. The search disclosed \$763 from the glove compartment and five glassine plastic baggies containing cocaine concealed from view in the backseat armrest. Officer Snyder questioned the men separately about the drugs and told them that unless someone told him who possessed the drugs, "you are all going to get arrested."<sup>14</sup> None of the men provided any information about the drugs or money, and Officer Snyder proceeded to arrest all three suspects. Two hours later at the police station, Pringle waived his *Miranda* rights<sup>15</sup> and confessed to owning the cocaine. Pringle also told the police that Partlow and Smith did not know or have anything to do with the money or drugs. The police then released Partlow and Smith.

Pringle was charged with possession of cocaine and with possession with intent to distribute cocaine. The trial court found there was probable cause to arrest Pringle, and denied Pringle's suppression motion. Pringle was later convicted of possession of cocaine and possession of cocaine with intent to distribute. The Maryland Court of Special Appeals affirmed the trial court's holding. The Maryland Court of Appeals, the state's highest court, reversed the appellate court and held there was no probable cause to arrest Pringle.

The state high court explained that the facts did not show that Pringle had knowledge and dominion or control over the drugs,

<sup>14</sup>Joint Appendix at 47, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) (hereinafter "Joint Appendix").

<sup>15</sup>See *Miranda v. Arizona*, 384 U.S. 436 (1966).

which were elements of the crime of possession under Maryland law. Accordingly, the court held that “a police officer’s discovery of money in a closed glove compartment and cocaine concealed behind the rear armrest of a car is insufficient to establish probable cause for an arrest of a front seat passenger, who is not the owner or person in control of the vehicle, for possession of cocaine.”<sup>16</sup> Three judges dissented. Writing for the dissenters, Judge Battaglia contended there was probable cause to arrest all three men. He argued that the majority had erroneously conflated “the probable cause standard for an arrest and the sufficiency of evidence standard for a conviction.”<sup>17</sup>

When *Pringle* arrived at the U.S. Supreme Court, several factors made it an attractive case for full review. For starters, the prosecution had lost below.<sup>18</sup> Second, Judge Battaglia’s dissent undoubtedly had been noticed by some members of the Court. For “law-and-order” conservatives, Judge Battaglia made a plausible (and perhaps appealing) claim that the majority had improperly grafted onto the probable cause standard a requirement that police officers have probable cause for each element of the crime *before* undertaking an arrest.<sup>19</sup>

Third, the state’s certiorari petition claimed that tension existed between two categories of probable cause cases. The State of Maryland interpreted *United States v. Di Re*<sup>20</sup> and *Ybarra v. Illinois*<sup>21</sup> “to stand for the proposition that probable cause must be examined on an individualized basis, and not by a person’s mere proximity to someone else suspected of criminal activity.”<sup>22</sup> The state prosecutor

<sup>16</sup>*Pringle v. Maryland*, 805 A.2d 1016, 1028 (Md. 2002).

<sup>17</sup>*Id.* at 1034 (Battaglia, J., dissenting).

<sup>18</sup>See, e.g., *California v. Carney*, 471 U.S. 386, 396–401 (1985) (Stevens, J., dissenting) (criticizing the Court’s tendency to review search and seizure cases where a state supreme court has upheld a citizen’s assertion of a constitutional right).

<sup>19</sup>See *Pringle*, 805 A.2d at 1035 (“What more would the majority require to justify an arrest? From the emphasis in its opinion, the majority would seemingly require police officers to consider whether the evidence gathered would be legally sufficient for a possession conviction *prior* to making the arrest.”).

<sup>20</sup>332 U.S. 581 (1948).

<sup>21</sup>444 U.S. 85 (1979).

<sup>22</sup>Petition for Certiorari at 8, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) (hereinafter “Pet. Cert.”).

argued, however, that *Wyoming v. Houghton*<sup>23</sup> cast doubt on the continuing validity of the proposition established by *Di Re* and *Ybarra* “in the context of a car search during which both a driver and passengers were present.”<sup>24</sup> *Houghton* had stated that a car passenger “will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing.”<sup>25</sup> The state prosecutor maintained that *Houghton’s* “common enterprise” approach departed from the individualized suspicion model of probable cause adopted in *Di Re* and *Ybarra*.

Finally, the facts in *Pringle* gave the Court an opportunity to resolve a “probable cause” issue that had bedeviled the lower courts for a long time. That issue, as Professor LaFave explained in his treatise, often surfaces “when the police are investigating a known crime and obtain information concerning the offender which does not point exclusively to one particular individual, in which case the question is whether they may nonetheless arrest a person or perhaps two or more persons from the suspect class.”<sup>26</sup>

The Supreme Court granted certiorari to decide the following question: Where drugs and a roll of cash are found in the passenger compartment of a car with multiple occupants, and all deny ownership of those items, is there probable cause to arrest all occupants of the car?

### III. The Court’s Probable Cause Precedents

To understand and appreciate *Pringle’s* argument, one has to grapple with the Court’s previous probable cause cases. Before police can make a warrantless arrest, they must have probable cause that the arrestee has committed or is about to commit a crime. For decades, the Court has adopted the formal position that police have probable cause to arrest where “the facts and circumstances within their knowledge and of which they had reasonably trustworthy

<sup>23</sup>526 U.S. 295 (1999).

<sup>24</sup>Pet. Cert. at 8.

<sup>25</sup>*Houghton*, 526 U.S. at 304–05.

<sup>26</sup>2 Wayne R. LaFave, *Search and Seizure* § 3.2(e), at 60 (3d ed. 1996). See also Wayne R. LaFave, *Arrest: The Decision To Take a Suspect into Custody* 259 (1965) (“The basic question is when, if ever, it is permissible to arrest a group of suspects, or one suspect from a group of suspects, when it reasonably appears that the actual offender is within the group.”).

information were sufficient to warrant a prudent man in believing that [a particular person] had committed or was committing an offense."<sup>27</sup>

This straightforward description of probable cause masks the difficulty in explaining how probable cause functions in the legal world. This difficulty is a long-standing problem. As one historian has observed, while courts, for centuries, have used the terms "probable cause" and "reasonable cause" to summarize or supplement the causes of suspicion that may trigger a lawful arrest, the terminology had been utilized "without much concern for the precise meaning of probable or reasonable."<sup>28</sup>

Recently, the Supreme Court abandoned the task of trying to explain what probable cause means under the Fourth Amendment. "Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."<sup>29</sup> The Court has stated that probable cause and its counterpart reasonable suspicion should not be viewed as legal technicalities, but rather as "common-sense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"<sup>30</sup> Thus, the Court has eschewed "[r]igid legal rules"<sup>31</sup> and embraced a totality-of-the-circumstances model for determining whether probable cause exists in a particular case.

Generally speaking, the Court has accepted the notion that under the Fourth Amendment, probable cause represents "the best compromise" between safeguarding citizens from "unfounded charges of crime" and giving "fair leeway" for law enforcement to provide the community with adequate "protection."<sup>32</sup> As part of that compromise, the Court has interpreted probable cause to require an individualized or particularized basis for an intrusion. The Court's early (and seminal) probable cause cases involved fact patterns where

<sup>27</sup>Beck v. Ohio, 379 U.S. 89, 91 (1964).

<sup>28</sup>Barbara J. Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence 141 (1991).

<sup>29</sup>Ornelas v. United States, 517 U.S. 690, 695 (1996).

<sup>30</sup>*Id.* at 695 (citations omitted).

<sup>31</sup>Illinois v. Gates, 462 U.S. 213, 232 (1983).

<sup>32</sup>Brinegar v. United States, 338 U.S. 160, 176 (1949).

police had sufficient information to justify singling out or targeting a specific person or persons for search or seizure.

For example, in *Carroll v. United States*,<sup>33</sup> a prohibition era case, federal law enforcement officers had particular reason to focus on “the Carroll boys” because they had offered to sell liquor to the officers on a previous occasion and because shortly after that proposed sale, the officers had observed the suspects heading to Detroit, which the Court assumed to be “one of the most active centers for introducing illegally into this country spirituous liquors for distribution into the interior.”<sup>34</sup> The probable cause determination in *Carroll* turned on whether the officers had probable cause to search the suspects’ vehicle when, “[t]wo months later these officers suddenly met the same men on their way westward presumably from Detroit.”<sup>35</sup> The *Carroll* Court concluded there was probable cause to stop and search the vehicle for illegal liquor.

Similarly, in *Brinegar v. United States*,<sup>36</sup> a federal prohibition agent had reason to target Brinegar because the agent “had arrested [Brinegar] about five months earlier for illegally transporting liquor; had seen [Brinegar] loading liquor into a car or truck in Joplin, Missouri, on at least two occasions during the preceding six months, and knew [Brinegar] to have a reputation for hauling liquor.”<sup>37</sup> In *Brinegar*, the probable cause issue focused on whether the prohibition agent had sufficient evidence to search Brinegar’s car when he saw the vehicle heading for the Oklahoma border and it “appeared to be ‘heavily loaded’ and ‘weighted with something.’”<sup>38</sup> The Court ruled there was probable cause to search Brinegar’s vehicle.

Finally, in *Illinois v. Gates*,<sup>39</sup> police had particularized suspicion focusing on the Gateses because of an anonymous letter that accused them of drug trafficking and specified in detail their *modus operandi*. The existence of probable cause in *Gates* turned on whether the police corroboration of the letter’s predictions was sufficient to prove

<sup>33</sup> 267 U.S. 132 (1925).

<sup>34</sup> *Id.* at 160.

<sup>35</sup> *Id.*

<sup>36</sup> *Supra* note 32.

<sup>37</sup> 338 U.S. at 162.

<sup>38</sup> *Id.* at 163.

<sup>39</sup> 462 U.S. 213 (1983).



the reliability of and basis of knowledge supporting the informant's allegations. Departing from the so-called *Aguilar-Spinelli* two-pronged standard for determining probable cause,<sup>40</sup> *Gates* held that probable cause is to be determined from a totality-of-the-circumstances approach, and ruled that probable cause had been established under the facts.

*Carroll*, *Brinegar*, and *Gates*—which involved scenarios where the police had reason to believe that particular persons were engaged in *unknown* crime—represent one strand of probable cause precedent. In these cases, the question is whether there is probable cause that a crime has been committed. But there is no uncertainty about who the offenders were *if* it was sufficiently probable that there was an offense in the first place. There is, however, another strand of probable cause precedent, exemplified by *United States v. Di Re*.<sup>41</sup> In *Di Re*, the police, during the course of investigating a *known* crime, encountered a person who, but for his presence with others suspected of criminality, could not have been arrested. *Di Re* presented the Court, for the first time, with an opportunity to address in detail whether association or access to others involved with crime constitutes probable cause to arrest or search.

In *Di Re*, an informant, Reed, told a federal investigator that he planned to purchase counterfeit gasoline coupons from Buttitta. Accompanied by a Buffalo police detective, the investigator followed Buttitta's car to the place where Reed said the purchase would occur. The officers approached the car and observed Reed in the backseat holding the counterfeit coupons. Reed told the officers that Buttitta had given him the coupons. Buttitta was driving the car, and *Di Re* sat next to Buttitta. All three men were arrested. A search of *Di Re*'s person at the police station disclosed one hundred coupons in an envelope concealed between his shirt and underwear.

The government defended the search in *Di Re* on two grounds. First, the government asserted the search was reasonable because there was probable cause to search the car itself. The government asked the Court "to extend the assumed right of car search

<sup>40</sup>See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969). Under the two-pronged test, a police affidavit based on an informant's tip had to show both a sufficient "basis of knowledge" for the tip and provide sufficient facts establishing the "reliability" or "veracity" of the informant.

<sup>41</sup>332 U.S. 581 (1948).

[announced in *Carroll*] to include the person of occupants because ‘common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person.’”<sup>42</sup> The *Di Re* Court rejected this argument, explaining that *Di Re*’s mere presence in a vehicle suspected of holding contraband did not provide probable cause to justify a search of *his* person. The Court was “not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”<sup>43</sup>

Alternatively, the government argued that the search of *Di Re* was justified as incident to a lawful arrest. The government defended the arrest on the theory that *Di Re*’s presence in the car gave the officers probable cause to believe that *Di Re* was involved in a conspiracy to possess counterfeit coupons. The Court rejected this contention, and explained that:

The argument that one who “accompanies a criminal to a crime rendezvous” cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain-sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal.<sup>44</sup>

The Court cautioned against inferring “[p]resumptions of guilt” from mere proximity with others involved with crime.<sup>45</sup> Finally, the *Di Re* Court noted that “whatever suspicion” might attach to *Di Re*’s “mere presence seems diminished, if not destroyed,” when the informant, Reed, failed to implicate *Di Re*, as he did Buttitta, as part of the “conspiracy” and “[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.”<sup>46</sup>

*Di Re* is one of two cases upon which Pringle’s challenge to the legality of his arrest heavily relied. The other case was *Ybarra v.*

<sup>42</sup> *Id.* at 586.

<sup>43</sup> *Id.* at 587.

<sup>44</sup> *Id.* at 593.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 594.

Illinois.<sup>47</sup> *Ybarra* involved a valid search warrant of a tavern and a bartender for narcotics. It was argued, *inter alia*, that the existence of a valid warrant eliminated the requirement that police have individualized suspicion with respect to each person subject to search.<sup>48</sup> The *Ybarra* Court rejected that argument. The Court reiterated that particularized suspicion is an essential component of probable cause, and thirty years after *Di Re* was decided, endorsed the principle announced in that case that police may not search or arrest everyone found at the scene of a crime, even when the intrusion may serve a legitimate investigative function of the police.

*Ybarra* was a patron of a tavern when the police arrived to execute a search warrant. A search of *Ybarra* revealed narcotics. The Court addressed two issues that were pertinent in *Pringle*. First, the Court rejected the claim that the police had probable cause to search *Ybarra*. Concededly, the warrant permitted a search of the premises and *Ybarra* was on the premises at the time of the search. The Court, however, held that this connection was not enough to support a search. A person's "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."<sup>49</sup>

*Ybarra* explained that the probable cause standard requires a suspicion that is "particularized with respect to" the target of the search or seizure.<sup>50</sup> The requirement of individualized or particularized suspicion "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."<sup>51</sup> The Court explained that each patron of the tavern was "clothed with constitutional protection," and that "individualized protection was separate and distinct" from the protection possessed by the owner of the tavern and the bartender.<sup>52</sup> Thus, the warrant to search the premises and the bartender provided "no authority

<sup>47</sup> 444 U.S. 85 (1979).

<sup>48</sup> *Id.* at 107 (Rehnquist, J., dissenting) ("[I]n place of the requirement of 'individualized suspicion' as a guard against arbitrary exercise of authority, we have here the determination of a neutral and detached magistrate that a search was necessary.").

<sup>49</sup> *Id.* at 91 (citing *Sibron v. New York*, 392 U.S. 40, 62–63 (1968)).

<sup>50</sup> 444 U.S. at 91.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 91–92.

whatever to invade the constitutional protections possessed individually by the tavern's customers."<sup>53</sup>

The other issue addressed in *Ybarra* concerned the state's claim that the reasonable suspicion standard of *Terry v. Ohio*<sup>54</sup> should be extended to promote the evidence-gathering function of a search warrant. In an argument that would resemble the position Maryland proposed in *Pringle*, the state of Illinois urged the *Ybarra* Court "to permit evidence searches of persons who, at the commencement of the search, are on 'compact' premises subject to a search warrant, at least where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.'"<sup>55</sup> The Court's response was clear: "Over 30 years ago, [we] rejected a similar argument in *United States v. Di Re*."<sup>56</sup>

There were obvious differences between *Di Re* and *Ybarra*. For example, the officers in *Di Re* lacked a search warrant, whereas the police in *Ybarra* had one. *Di Re* involved a vehicle and *Ybarra* involved a public tavern. Also, the state of Illinois did not concede, as the United States did in *Di Re*, that a valid search warrant for a building would not authorize the search of all persons found on the premises. Despite these differences, the *Ybarra* Court concluded that "the governing principle in both cases is basically the same," namely probable cause requires adequate information—particularized suspicion—that justifies singling out the target of a police intrusion.<sup>57</sup>

#### IV. The *Pringle* Decision

In *Pringle*, Chief Justice Rehnquist wrote a compact and cryptic opinion for a unanimous Court. After describing the facts and procedural history of the case, the chief justice offered a cursory statement of the black-letter law of probable cause: that probable cause "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of

<sup>53</sup> *Id.* at 92.

<sup>54</sup> 392 U.S. 1 (1968).

<sup>55</sup> *Ybarra*, 444 U.S. at 94.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 95.

the circumstances."<sup>58</sup> And he acknowledged that the crux of probable cause depends both upon a reasonable ground for belief of guilt, and a finding that "the belief of guilt must be particularized with respect to the person to be searched or seized."<sup>59</sup>

The chief justice began his analysis with the statement that it is a "reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine."<sup>60</sup> Thus, according to the chief justice, "a reasonable officer could conclude that there was probable cause to believe that Pringle committed the crime of possession of cocaine, either solely or jointly."<sup>61</sup>

The chief justice peremptorily dismissed Pringle's reliance on *Di Re* and *Ybarra*. First, he distinguished *Ybarra* because Pringle and his companions were in a relatively small car, not a public tavern. Pringle's location in a vehicle was significant because the Court, three years earlier, had stated in *Wyoming v. Houghton* that "'a car passenger—unlike the unwitting tavern patron in *Ybarra*—will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."<sup>62</sup> Therefore, the Court found it reasonable for Officer Snyder to "infer a common enterprise" among Pringle and his companions because "[t]he quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."<sup>63</sup> The chief justice then summarily rejected Pringle's reliance on *Di Re*. He explained that—unlike in *Di Re* where the informant had singled out the driver as part of a criminal conspiracy, but had not singled out *Di Re*—"no such singling out occurred in this case; none of the three men provided information with respect to the ownership of the cocaine or money."<sup>64</sup>

<sup>58</sup> *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003).

<sup>59</sup> *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

<sup>60</sup> *Pringle*, 124 S. Ct. at 800.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 801 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304–05 (1999)).

<sup>63</sup> *Pringle*, 124 S. Ct. at 801.

<sup>64</sup> *Id.*

## V. Troublesome Aspects of *Pringle*

The length, tone and unanimity of the chief justice's opinion suggest that the Court viewed *Pringle* as a rather trivial case. Although unanimous or lopsided majority decisions occasionally mask deep divisions within the Court on a particular issue,<sup>65</sup> *Pringle* seems to reflect the views of most, if not all, of the current justices regarding the meaning of probable cause in the twenty-first century: namely, the view that probable cause, like its counterpart reasonable suspicion, should not be seen as a rigid or fixed legal concept. To the modern Court, probable cause is better understood as a common-sense, elastic measure of guilt—geared for laypersons, not legal minds. In short, probable cause is the equivalent of reasonableness. Did the police, based on the facts available, act reasonably in arresting the suspect? In the real world, this understanding of probable cause authorizes broad police discretion.<sup>66</sup> Viewed from this perspective, *Pringle* becomes an easy case.

<sup>65</sup>See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda and the Continuing Quest for Broad-But-Shallow*, 43 *Wm. & Mary L. Rev.* 1, 3 (2001) (explaining the fact that “Chief Justice Rehnquist, for decades an implacable critic of *Miranda*, wrote the majority opinion [in *Dickerson v. United States* is] . . . a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*'s continued validity.”).

<sup>66</sup>See *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (asserting that “the term probable cause, according to its usual acceptance, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which *warrant suspicion*.”) (citation and internal quotations omitted) (emphasis added); *id.* at 238 (stating that the task of the magistrate when issuing a search warrant “is simply to make a practical, common-sense” decision whether, based on the totality of the facts, “there is a *fair probability* that contraband or evidence of a crime will be found in a particular place”) (emphasis added). As Professor Wasserstrom has pointed out, the former passage in *Gates* “effectively define[s] probable cause as reasonable suspicion.” Wasserstrom, *supra* note 2, at 336. The latter passage's use of the words “fair probability” instead of the words “probable cause” is objectionable because

“‘Fair probability[.]’ . . . is a vague concept; it possibly could mean a twenty percent chance, a ten percent chance, or even a five percent chance that the evidence will be found. Fair probability can only mean ‘some possibility,’ which, in turn, translates to ‘reason to suspect.’”

*Id.* at 338. See also *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (stating that “[a] determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct”); see also *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000) (conceding that Fourth Amendment doctrine accepts the risk that “persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent”).

Normally, one should pause before undertaking a harsh critique of a unanimous opinion of the Court. In this case, however, I feel fortified because Professor LaFave, the nation's foremost expert on the Fourth Amendment,<sup>67</sup> agrees with me that *Pringle* is a poorly reasoned decision.<sup>68</sup> Indeed, *Pringle* is a much more significant, and disturbing, case than the opinion of the Court would lead one to believe. Three things are particularly striking about the chief justice's opinion. First, while the chief justice does not deny that individualized suspicion is an element of probable cause, he never explains why that element is satisfied under the facts. Second, *Pringle* claims to follow the "totality-of-the-circumstances" standard for measuring whether probable cause exists in a particular case. But a closer look at the inferences that the chief justice accepts indicates that the Court effectively creates a *per se* rule that police discovery of contraband or evidence of criminality provides probable cause to arrest multiple suspects on the scene. Finally, the chief justice's opinion would have the reader believe that the result in *Pringle* is consistent with the Court's probable cause precedents. The chief justice's opinion, however, provides no serious analysis of *Di Re* and *Ybarra*, which may suggest that the two rulings no longer command the full respect of the Court. I examine each feature of the opinion in greater detail below.

*A. Individualized Suspicion as an Element of Probable Cause*

Although the Court has been reluctant to define the concept of probable cause with any precision or quantification, the Court's precedents have recognized that particularized or individualized suspicion is an essential element of probable cause. Chief Justice Rehnquist's opinion in *Pringle* readily concedes the point when he notes that probable cause requires "that the belief of guilt must be particularized with respect to the person to be searched or seized."<sup>69</sup>

<sup>67</sup>The justices of the Rehnquist Court have cited to Professor LaFave's Fourth Amendment scholarship at least twenty-one times since the start of the 1986–1987 Term. Search of Westlaw SCT database (July 17, 2004) (searching for United States Supreme Court citations to Professor LaFave on Fourth Amendment issues from January 1, 1986, to the present).

<sup>68</sup>See 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c) (4th ed. forthcoming 2004) (on file with author).

<sup>69</sup>*Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

The chief justice's unqualified endorsement of the individualized suspicion component is somewhat surprising, particularly because the solicitor general's brief had questioned the continuing validity of *Di Re's* reasoning.<sup>70</sup> But while the chief justice pays lip service to individualized suspicion, he never explains why that element is satisfied in *Pringle*.

The requirement of particularized probable cause to validate a search or seizure did not have its origin in the Warren Court's revolution in criminal procedure. On the contrary, the requirement predates the adoption of the Fourth Amendment. As Professor Thomas Davies recently explained, "'probable cause' alone was not the common-law standard for criminal warrants; . . . common law required that arrest or search warrants had to be based on an allegation of an offense or theft 'in fact' as well as 'probable cause of suspicion' as to a particular person to be arrested or place to be searched."<sup>71</sup>

The American colonists and the Framers of the Constitution also recognized that searches and arrests were unreasonable if conducted without particularized or individualized suspicion. Prior to the 1780s, the colonists focused their wrath on writs of assistance and general warrants. These law enforcement tools granted customs officials and law enforcement officers unchecked discretion to intrude into the homes and businesses of the colonists. Although writs of assistance and general warrants were universally damned by the colonists, by the 1780s, colonial protests against British search and seizure practices also extended to general excise searches and search warrants, which were often issued groundlessly.<sup>72</sup> The colonists widely denounced these intrusions for a lack of particularized suspicion. As Justice O'Connor has noted, these protests demonstrated

<sup>70</sup>Brief of United States as Amicus Curiae Supporting Petitioner at 7, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) (stating that "the continuing validity of *Di Re* is uncertain in light of later decisions clarifying that a car's passengers normally may be assumed to be engaged in a joint enterprise with each other").

<sup>71</sup>Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 703 (1999) (footnote omitted).

<sup>72</sup>William Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791, 1402* (unpublished Ph.D. Dissertation, Claremont Graduate School 1990).



that “the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself.”<sup>73</sup>

It is a fair summary of the history of the Fourth Amendment to say that the provision reflected the Framers’ desire to control the discretion of ordinary law enforcement officers and to eliminate governmental intrusions lacking particularized suspicion.<sup>74</sup> The intrusions that motivated the Framers’ thinking and protests were broad, suspicionless *searches*.<sup>75</sup> On the other hand, the Framers found *arrest* authority less troubling because common-law rules established strict limits on an officer’s power to arrest. “Except for the vicarious concerns over the use of general warrants for arrests in connection with the English Wilkesite cases, which involved both arrests and searches of houses and papers, the prerevolutionary controversies were devoid of any consideration of arrest authority.”<sup>76</sup> The absence of protest regarding a constable’s arrest authority is not surprising because “the Framers understood that justifications for warrantless arrests and accompanying searches were quite limited,” and they “did *not* perceive the peace officer as possessing any significant *ex officio* discretionary arrest or search authority.”<sup>77</sup> And despite many statements to the contrary in the Court’s Fourth Amendment jurisprudence and academic articles, “framing-era common law never permitted a warrantless officer to justify an arrest or search according to any standard as loose or flexible as ‘reasonableness.’”<sup>78</sup>

<sup>73</sup>Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 678 (1995) (O’Connor, J., dissenting).

<sup>74</sup>See, e.g., Davies, *supra* note 71, at 556, 590 (the “larger purpose for which the Framers adopted the [amendment . . . was] to curb the exercise of discretionary authority by officers”; the Framers “were concerned that legislation might make general warrants legal in the future, and thus undermine the right of security in person and house. Thus, the Framers adopted constitutional search and seizure provisions with the precise aim of ensuring protection of person and house by prohibiting legislative approval of general warrants.”).

<sup>75</sup>*Id.* at 590, 601.

<sup>76</sup>*Id.* at 601 (referring to the British legal cases starting in 1763 sparked by John Wilkes’s publication of a seditious journal against the British Crown; Wilkes and his colleagues challenged the Crown’s authority to search and arrest any person connected with the seditious publication).

<sup>77</sup>*Id.* at 640 (emphasis added); see also *id.* at 641 (“The bottom line is that the Framers perceived warrant authority as the salient mode of arrest and search authority.”).

<sup>78</sup>*Id.* at 578 (footnote omitted).

The common law treated particularized suspicion as an intrinsic prerequisite for a warrantless arrest. As Professor Davies explains, the “felony in fact” rule was the “operative common-law justification for a warrantless arrest” in American law in 1789.<sup>79</sup> Under this rule, an officer could justify a warrantless arrest “only upon proof that a ‘felony in fact’ had actually been committed by someone and that there was ‘probable cause of suspicion’ to think the arrestee was that person.”<sup>80</sup> The “felony in fact” rule imposed substantial limitations on a constable’s arrest authority. Arrests based solely on probable cause were impermissible.<sup>81</sup> Not only did the officer have to know that a “felony in fact” had been committed, but he also needed probable cause of suspicion to think that a particular person—the arrestee—committed the crime.

It is not surprising that Chief Justice Rehnquist omits any reference to the “legal pedigree” of the individualized suspicion requirement in *Pringle*. Three years ago the Court announced—in an opinion written by Justice Scalia, and joined by the chief justice—that a historical inquiry is the starting point for *every* Fourth Amendment case. Since then, the Rehnquist Court’s consideration of history in search and seizure cases has neither been predictable, nor consistent.<sup>82</sup> In this case, however, the chief justice’s omission of historical concerns is readily explained: *Pringle* recognizes that individualized suspicion is an element of probable cause.

What is less readily explained is *why* the chief justice believed that element had been satisfied. As Professor LaFave notes, the chief justice “never offers a single word by way of specific explanation”<sup>83</sup> that would justify a finding of individualized suspicion. Instead, the chief justice suggests, in conclusory fashion, that it is “an entirely

<sup>79</sup> *Id.* at 632.

<sup>80</sup> *Id.*

<sup>81</sup> The authority to arrest on probable cause alone was established in England in 1827, long after the Fourth Amendment had been ratified. See Beckwith v. Philby, 108 Eng. Rep. 585 (1827). The “first American reported decisions to endorse the [stand-alone] probable cause standard for warrantless arrests by officers were the 1844 Pennsylvania decision *Russell v. Shuster*, [8 Watts & Serg. 308 (Pa. 1844)] and the 1850 Massachusetts decision *Rohan v. Swain*, [59 Mass. (5 Cush.) 281 (1850)].” Davies, *supra* note 71, at 636–37 (footnotes omitted).

<sup>82</sup> See generally, Tracey Maclin, Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged, 82 B.U. L. Rev. 895 (2002).

<sup>83</sup> 3 LaFave, *supra* note 68, § 7.1(c).

reasonable inference . . . that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine" found hidden in the backseat armrest.<sup>84</sup> Therefore, "a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either *solely* or jointly."<sup>85</sup>

That inference, however, is baseless. Professor LaFave already has noted that "it is not easy to see what logic would support" the chief justice's inference that Pringle alone was in possession of cocaine.<sup>86</sup> "[I]f an inference of sole possession was to be drawn, it would most logically be drawn as to Partlow, who was both the driver and the owner of the vehicle."<sup>87</sup> The fact that Partlow granted the officer consent to search the car hardly points to Pringle's guilt as the sole possessor of the cocaine. And it is not obvious why Pringle's guilt should be inferred from the fact that there was a large roll of cash in the glove compartment "directly in front of Pringle."<sup>88</sup> As Professor LaFave points out, "there is no fact in the case suggesting it was more likely that Pringle put the money in the glove compartment during the journey than that Partlow had put the money there beforehand, nor is there even an indication that the contents of the glove compartment had been visible to Pringle prior to the time that Partlow opened the compartment to get his registration upon the request of the police."<sup>89</sup>

Although it may not always please the justices and their critics, Fourth Amendment cases often turn on factual details that seem innocuous at first reading. For better or for worse, the Court's Fourth

<sup>84</sup>Maryland v. Pringle, 124 S. Ct. 795, 800 (2003).

<sup>85</sup>*Id.* (emphasis added).

<sup>86</sup>3 LaFave, *supra* note 68, § 7.1(c).

<sup>87</sup>*Id.*

<sup>88</sup>Pringle, 124 S. Ct. at 800.

<sup>89</sup>3 LaFave, *supra* note 68, § 7.1(c). Professor LaFave also notes that none of the facts make "Partlow a more likely sole participant than the rear-seat passenger Smith, who was the closest to the hidden cocaine which, considering its hiding place, might well have been quickly concealed as the vehicle was being pulled over. Though the Court contends that the hidden cocaine was 'accessible to all three men,' it would have taken a contortionist to hide the drugs there from a front-seat position during the stopping of the vehicle." *Id.*

Amendment jurisprudence is replete with “hair-splitting distinctions” that decide cases.<sup>90</sup> What is striking about *Pringle* is that the logic upholding one of the chief justice’s explanations of the case—that Pringle was in sole possession of the cocaine—is not supported by the facts.

Equally troublesome is the conflict between the chief justice’s legal conclusion and the individualized probable cause rule established in *Di Re* and *Ybarra*. Chief Justice Rehnquist makes no serious effort to reconcile the result in *Pringle* with *Di Re*. Recall that the *Di Re* Court began its analysis by rejecting the government’s claim that Di Re’s presence in a car containing contraband provided probable cause to search Di Re himself. “We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.”<sup>91</sup> If Di Re’s presence in a vehicle containing contraband in *plain view* did not provide probable cause to search Di Re, why does Pringle’s presence in a car containing *hidden* contraband provide probable cause to arrest Pringle? Chief Justice Rehnquist never explains this discrepancy.

The *Di Re* Court also rejected the government’s alternative argument that there was probable cause to arrest Di Re. Although the government conceded in *Di Re* that the only person who committed an offense in the “open presence” of the police was the informant, Reed, the government insisted that Di Re could also be arrested on conspiracy and possession charges.<sup>92</sup> The *Di Re* Court disagreed as to both counts. On the possession charge, the Court concluded that Di Re’s presence in the vehicle did not provide probable cause for an arrest, and explained that “[i]t is admitted that at the time of arrest the officers had no information implicating Di Re and no information pointing to possession of any coupons, unless his presence in the car warranted that inference.”<sup>93</sup>

If there was no probable cause to arrest Di Re on possession charges, notwithstanding his presence in a vehicle with someone who openly possessed contraband, then why was there probable

<sup>90</sup> *Quarles v. New York*, 467 U.S. 649, 664 (1984) (O’Connor, J., op.).

<sup>91</sup> *United States v. Di Re*, 332 U.S. 581, 587 (1948).

<sup>92</sup> *Id.* at 592.

<sup>93</sup> *Id.*

cause to arrest Pringle when the only contraband involved was hidden from view? Again, the chief justice provides no explanation for this inconsistency. The fact that the contraband was “accessible to” Pringle does not distinguish his case from that of *Di Re*, because *Di Re* had just as much access to contraband.

The chief justice’s opinion further conflicts with the Court’s holding in *Ybarra*. Like the defendant in *Ybarra*, Pringle “made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officer[.]”<sup>94</sup> Furthermore, as in *Ybarra*, Officer Snyder “knew nothing in particular”<sup>95</sup> about Pringle, except that he was present, along with two other occupants, in an automobile that contained illegal drugs. But *Ybarra* (and *Di Re*) had already established that a person’s mere presence or association with others suspected of criminality does not constitute probable cause to search or arrest that individual.

*Ybarra* held that the standard of probable cause requires particularized suspicion of the person searched or seized. The particularized suspicion requirement “cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.”<sup>96</sup> The chief justice cites this principle, but offers no explanation as to why the facts demonstrate individualized probable cause that Pringle solely possessed the cocaine.

In short, *Pringle*—while paying lip service to individualized suspicion—effectively appears to have denuded probable cause of any such requirement.

#### *B. “Common Enterprise” as Probable Cause*

The second striking aspect of *Pringle* is the expansive nature of the “common enterprise” inference drawn by Chief Justice Rehnquist. Although the chief justice insists that his reasoning is consistent with prior precedent and the totality-of-the-circumstances test for measuring probable cause, a closer look at *Pringle* indicates that there is reason to doubt the chief justice on both points.

<sup>94</sup>*Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

As noted above, the chief justice first concludes that an inference that Pringle solely possessed the drugs is reasonable under the facts. He also supports his holding on the alternative inference that “*any or all three* of the occupants had knowledge of, and exercised dominion and control over, the cocaine” discovered hidden in the backseat armrest.<sup>97</sup> A few paragraphs later, the chief justice reiterates that “it was reasonable for the officer to infer a *common enterprise* among the three men.”<sup>98</sup> He then explains that the “quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.”<sup>99</sup>

The chief justice’s conclusion that it was reasonable to infer a drug conspiracy from these facts mirrors the arguments presented by the prosecutors. Maryland had argued that “when multiple occupants are present in a car containing illegal drugs, a commonsense inference can be drawn that *any or all* of the occupants have knowledge of the drugs found in the car.”<sup>100</sup> Likewise, the amicus brief of the solicitor general had stated that “the presence of drugs—without more—immediately reveals criminal activity. . . . [T]he discovery of an amount of narcotics suitable for distribution in the passenger compartment supports an inference that *all* of the car’s occupants were aware of, and hence involved with, the drugs.”<sup>101</sup>

There are several problems with the chief justice’s “common enterprise” theory: First, the inference flies in the face of the *Di Re* Court’s refusal to draw the same inference from facts that were even more incriminating than the facts in *Pringle*; second, the chief justice makes no effort to tie his inference with the common experience of drivers and passengers; and finally, as a practical matter, the inference drawn by the chief justice translates into a rule that allows police to arrest everyone on the scene anytime they discover contraband in compact spaces. Simply stated, the chief justice’s inference is unlikely to be confined to “car” cases.

<sup>97</sup> *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003) (emphasis added).

<sup>98</sup> *Id.* at 801 (emphasis added).

<sup>99</sup> *Id.*

<sup>100</sup> Brief of Petitioner at 17, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) (emphasis added).

<sup>101</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 15, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) (emphasis added).

1. Is Pringle's "Common Enterprise" Theory Consistent With Di Re?

The inference that Pringle and his companions were involved in a drug trafficking conspiracy cannot be reconciled with *Di Re*'s holding. As described earlier, in *Di Re* the government argued that Di Re's presence in a vehicle with others who openly possessed contraband provided probable cause to believe Di Re was involved in a conspiracy. The *Di Re* Court, however, concluded that "[a]n inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case."<sup>102</sup> The Court explained that "[t]here is no evidence that it is a fact or that the officers had any information indicating that Di Re was in the car when Reed obtained ration coupons from Buttitta, and none that he heard or took part in any conversation on the subject."<sup>103</sup> Yet, the record in *Pringle* is also devoid of any facts or evidence that Officer Snyder "had any information indicating that [Pringle] was in the car when [the cocaine was hidden inside the armrest], and none that [Pringle] heard or took part in any conversation on the subject."<sup>104</sup>

The *Di Re* Court was also unwilling to infer a conspiracy where "the alleged substantive crime is one which does not necessarily involve any act *visibly* criminal."<sup>105</sup> In *Pringle*, "the alleged substantive crime" did not involve conduct visible to the occupants of the car or to Officer Snyder. Indeed, a comparison of *Di Re* and *Pringle* indicates that Chief Justice Rehnquist was "too generous in finding an inference of 'common enterprise' where the evidence of criminality was at all times concealed from view and where there was absolutely no indication as to whether the 'enterprise' of drug dealing would be activated in minutes, hours, days or weeks, while the Court in *Di Re* refused to draw inferences which were much more compelling."<sup>106</sup> Unless a reader of *Pringle* was well-versed on the facts and holding in *Di Re*, he would never know from Chief Justice Rehnquist's opinion that the *Di Re* Court, faced with facts *more*

<sup>102</sup>United States v. Di Re, 332 U.S. 581, 593 (1948).

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.* (emphasis added).

<sup>106</sup>3 LaFave, *supra* note 68, § 7.1(c).

suggestive of a criminal conspiracy, refused to draw the same inference of criminality that the chief justice draws in *Pringle*.

Chief Justice Rehnquist distinguishes *Di Re* by noting that the informant in *Di Re* had singled out the driver, but not *Di Re*, as the person who provided the contraband coupons. He then quotes the *Di Re* Court's statement that "'[a]ny inference that everyone on the scene of a crime is a party to [the conspiracy] must disappear if the Government informer singles out the guilty person.'"<sup>107</sup> By contrast, said the chief justice in *Pringle*, "no such singling out occurred [in the *Pringle* case]; none of the three men provided information with respect to the ownership of the cocaine and money."<sup>108</sup>

This is a rather curious, and misleading, way to distinguish *Di Re*. First, as noted, the facts in *Di Re* are just as incriminating as the facts in *Pringle*, given that the counterfeit coupons were in plain view and "accessible to all three men."<sup>109</sup> As Professor LaFave points out, *Di Re*'s involvement in the conspiracy hardly is negated by the fact that the driver in *Di Re* "was the one doing the handing over" of the coupons.<sup>110</sup> An inference that all three men in *Di Re* were involved in the conspiracy is supported by the "fact [that *Di Re*] was transported to the scene of the prearranged sale of the counterfeit coupons, which was (to use the language of the Court in *Pringle*) 'an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.'"<sup>111</sup>

Second, it is true that the *Di Re* Court stated that "'[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty party.'"<sup>112</sup> But what the chief justice does not directly acknowledge is that *prior* to making this statement, the *Di Re* Court had already concluded that *Di Re*'s

<sup>107</sup>Maryland v. Pringle, 124 S. Ct. 795, 801 (2003) (quoting United States v. Di Re, 332 U.S. 581, 594 (1948)).

<sup>108</sup>124 S. Ct. at 801.

<sup>109</sup>*Id.* at 800.

<sup>110</sup>3 LaFave, *supra* note 68, § 7.1(c).

<sup>111</sup>*Id.*

<sup>112</sup>*Di Re*, 332 U.S. at 594. The *Di Re* Court's characterization of the permissible inferences to be drawn from the facts is somewhat curious because the informant merely said that he had obtained the coupons from Buttita, the driver, which says nothing one way or the other about *Di Re*'s possible involvement.



mere presence in the vehicle did not support an inference of participation in a conspiracy. This is what the *Di Re* Court said prior to the quotation cited by Chief Justice Rehnquist:

The argument that one who “accompanies a criminal to a crime rendezvous” cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain-sight of passers-by, in a public street of a large city, and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal . . . . Presumptions of guilt are not lightly to be indulged from mere meetings.

Moreover, *whatever suspicion* might result from *Di Re's* mere presence seems diminished, if not destroyed, when Reed, present as the informer, pointed out Buttitta, and Buttitta only, as the guilty party. No reason appears to doubt that Reed willingly would involve *Di Re* if the nature of the transaction permitted. Yet he did not incriminate *Di Re*.<sup>113</sup>

Of course, it might be argued that *Di Re's presence* in the vehicle supported an inference of *Di Re's* participation in a conspiracy, but Reed's failure to single out *Di Re* to the police negated that inference. This interpretation of *Di Re*, however, is contrary to the language of the first paragraph quoted above, which plainly concludes that mere presence, under the circumstances, is not enough to infer a suspect's participation in a conspiracy. Furthermore, the use of the term “[m]oreover” in the second paragraph suggests that the “singling out” factor—which Chief Justice Rehnquist says was decisive—was not necessary to the result in *Di Re*. The chief justice's interpretation of *Di Re* is disingenuous. If the “singling out” incident was the crucial fact, one would expect the *Di Re* Court to zero in on that point early in its opinion, rather than wait until the end of the opinion to draw attention to this detail.

Third, even if Chief Justice Rehnquist's interpretation of the “singling out” factor is correct, his reliance on the additional factor that “none of the three men [in *Pringle*] provided information with respect to the ownership of the cocaine or money” is inconsistent with what *Di Re* said about an analogous argument the government had made

<sup>113</sup>*Id.* at 593–94 (emphasis added).

in that case. In *Di Re*, the government argued “that the officers could infer probable cause from the fact that Di Re did not protest his arrest, did not at once assert his innocence, and silently accepted the command to go along to the police station.”<sup>114</sup> The Court’s full reply to this argument merits repeating:

[C]ourts will hardly penalize failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway with an officer of the law. A layman may not find it expedient to hazard resistance on his own judgment of the law at a time when he cannot know what information, correct or incorrect, the officers may be acting upon. It is likely to end in fruitless and unseemly controversy in a public street, if not in an additional charge of resisting an officer. If the officers believed they had probable cause for his arrest on a felony charge, it is not to be supposed that they would have been dissuaded by his profession of innocence.

It is the right of one placed under arrest to submit to custody and to reserve his defenses for the tribunals erected by the law for the purpose of judging his case. *An inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted.* Probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman. It is the officer’s responsibility to know what he is arresting for, and why, and one in the unhappy plight of being taken into custody is not required to test the legality of the arrest before the officer who is making it.<sup>115</sup>

Apparently, the chief justice believes that Pringle or the others could have negated the inference that all three were involved in a conspiracy by offering an explanation to Officer Snyder as to who owned the cocaine. The failure to provide an explanation, presumably, confirmed the officer’s suspicion that the men were part of a drug trafficking conspiracy. This conclusion is mistaken for several reasons.

First, Pringle was under no obligation to bring forth “any information” to establish a lack of probable cause for his arrest. If courts

<sup>114</sup>*Id.* at 594.

<sup>115</sup>*Id.* at 594–95 (emphasis added).

cannot “penalize [a] failure to display a spirit of resistance or to hold futile debates on legal issues in the public highway” with police officers, why does it matter that Pringle did not provide any information to the police regarding the cocaine or money? Isn’t Pringle being “penalize[d]” by the Court when the probable cause analysis permits a negative inference to be drawn from the fact that he did not provide information or otherwise cooperate with the police?

Moreover, if it is an “unwarranted” application of Fourth Amendment principles to draw “[a]n inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers,” why, when determining whether probable cause exists, is it permissible to consider Pringle’s failure to deny ownership of the cocaine or otherwise implicate his companions? If “[p]robable cause cannot be found from submissiveness,” it is not self-evident why it can be found from silence.

Second, there are legitimate reasons why a person questioned by the police would not acknowledge or deny ownership of illegal narcotics under these circumstances. Inferences of guilt should not be easily drawn whenever a person relies on “the broad constitutional right to remain silent.”<sup>116</sup> The Fifth Amendment’s Self-Incrimination Clause protects drivers and passengers from incriminating themselves, and it is a crime to make a false statement to a federal or state law enforcement officer.<sup>117</sup> If Pringle had been allowed to call an attorney during his confrontation with Officer Snyder, “[a]ny lawyer worth his salt w[ould] tell [him] in no uncertain terms to make no statement to police under any circumstances.”<sup>118</sup>

Professor LaFave and others, however, have argued that a court, when making the probable cause determination, may validly consider the responses that suspects give to police officers’ questions.<sup>119</sup>

<sup>116</sup> *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 124 S. Ct. 2451, 2462 (2004) (Stevens, J., dissenting).

<sup>117</sup> See, e.g., 18 U.S.C. § 1001(2) (2002); Md. Code Ann. § 9-501 (2002).

<sup>118</sup> *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., op.).

<sup>119</sup> LaFave, *supra* note 26, § 3.6(f), at 330. In *United States v. Ortiz*, 422 U.S. 891, 897 (1975), the Court, in dicta, acknowledged that a suspect’s responses to police questioning “properly may be taken into account in deciding whether there is probable cause to search a particular vehicle.”

Prior to *Pringle*, the Court had repeatedly stated, in contexts involving consensual encounters and investigative detentions, that a suspect's refusal to answer police questions cannot be grounds for detaining or arresting the suspect.<sup>120</sup> According to Professor LaFave, however, "it does not necessarily follow that the suspect's refusal must be ignored completely by the officer."<sup>121</sup>

Professor LaFave contends that "the better view is that refusal to answer is one factor which an officer may consider, together with the evidence that gave rise to his prior suspicion, in determining whether there are grounds for an arrest."<sup>122</sup> Professor LaFave notes that this conclusion is based on the "commonsense" view that, as a general matter, innocent persons normally respond to police questioning.<sup>123</sup> Thus, the probable cause calculus can properly include a suspect's failure to respond to police questioning because that decision "is concerned with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.'"<sup>124</sup>

I disagree with Professor LaFave's conclusion because I am not sure how an "innocent" person would react in these circumstances.

<sup>120</sup>See, e.g., *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (in the context involving a consensual encounter, explaining that "[w]e have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure"); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (in the context involving a traffic stop, explaining that an "officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond.'). The result in *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 124 S. Ct. 2451 (2004), does not affect this norm. *Hiibel* upheld the conviction of a person who had refused to identify himself to a police officer during a lawful *Terry* stop. *Hiibel* did not involve a suspect's refusal to answer police inquires or questions about *criminal evidence* the police had found during a lawful investigative stop. In fact, the Court expressly observed "a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense." *Id.* at 2454. In a post-*Hiibel* world, someone in *Pringle*'s shoes may not have the right to refuse to identify himself without negative consequence, but *Hiibel* does not support the proposition that a refusal to answer police questions about criminal evidence can be grounds for arrest.

<sup>121</sup>2 LaFave, *supra* note 26, § 3.6(f), at 330.

<sup>122</sup>*Id.* at 330–31.

<sup>123</sup>*Id.* at 331.

<sup>124</sup>*Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

Perhaps, Professor LaFare is correct that, as a general matter, "common sense" or common experience suggests that innocent persons generally respond to police interrogations. But such reactions may be dictated by a fear of police authority, stem from a previous unpleasant experience with police who reacted negatively to the assertion of one's constitutional rights, or derive from ignorance of one's constitutional rights.

On the other hand, a well-informed, innocent person may choose to exercise his Fifth Amendment rights and not risk the fact that his explanation may be perceived as a false statement. The chief justice's observation that a negative inference can be drawn from a person's failure to provide any information regarding criminal evidence penalizes those who may simply, and correctly, believe they are not competent to deal with a police officer. Whatever the case, neither police officers nor the judiciary honor the spirit of the Self-Incrimination Clause if negative inferences can be drawn for Fourth Amendment purposes whenever a suspect—as in *Pringle*—refuses to respond to police questioning.<sup>125</sup>

Finally, another kind of "common sense" may explain why a saavy person in *Pringle's* shoes would remain silent in the face of police questioning. Providing an explanation for the cocaine or money, particularly one that the officer does not believe, again, to quote *Di Re*, is "likely to end in fruitless and unseemly controversy in a public street," if not in an "additional charge" of providing a false statement to a law enforcement officer.<sup>126</sup> Remaining silent was the best thing *Pringle* could do for himself.

Moreover, as a practical matter, there is no reason to believe that an explanation would have prompted the immediate release of any of the men. Even if *Pringle* (or one of his companions) had given a good faith explanation that described his innocence, or if the backseat passenger had confessed to the crime, there is no hint or suggestion

<sup>125</sup> Cf. Rachel Karen Laser, Unreasonable Suspicion: Relying on Refusals to Support Terry Stops, 62 U. Chi. L. Rev. 1161, 1178–79 (1995) (noting that the right to refuse a consensual search is undermined "if the exercise of that right can be used against a person . . . . The nature of a right is that its exercise is protected from harmful legal consequences. Such harmful legal consequences are present whether the refusal to consent is used against an individual as the sole factor or as one of many factors contributing to a *Terry* stop or search.") (footnote omitted).

<sup>126</sup> *United States v. Di Re*, 332 U.S. 581, 594 (1948).

in the chief justice's opinion (or any other precedent of the Court) that Officer Snyder was required to release the other men.

For example, if Smith, the backseat passenger, had claimed that he was a hitchhiker picked up shortly before the traffic stop, there is no search and seizure precedent of the Court (including *Pringle*) that requires the officer to accept that declaration and immediately release Smith.<sup>127</sup> Similarly, if Smith had confessed to owning the cocaine and money, and Pringle and Partlow claimed their innocence, under the government's theory of the case, the officer still could have arrested all three.<sup>128</sup>

Again, there is nothing in *Pringle* that disputes or suggests disagreement with the government's argument on this point. In fact, because the Court holds that the officer had probable cause to believe that Pringle committed the crime of possession of cocaine, "either solely or *jointly*,"<sup>129</sup> the chief justice seems to endorse the government's position that police are not required to credit a person's

<sup>127</sup>This hypothetical was discussed during the oral argument in *Pringle*:

QUESTION: The hitchhiker—the hitchhiker example poses a question for the arresting officer, because does he have to accept the declaration of someone that I'm just a hitchhiker here?

MR. BAIR (COUNSEL FOR MARYLAND): No, and—and that, of course, goes back to whether it's undisputed in some way, I don't know quite how it would be undisputed. You've always got the—the officer who on the scene is making a reasonable judgment [sic] from all the facts and circumstances, and one of those is, I don't have to believe the criminal or criminals in this car. I know there are drugs in the car, we have a known crime here being committed in the presence of the officer, possession or possession with intent to distribute drugs.

Transcript of Oral Argument at 18, *Maryland v. Pringle*, 124 S. Ct. 795 (2004) (hereinafter "Oral Argument Transcript").

<sup>128</sup>QUESTION: You'd think if the—if the backseat person or whoever it was that confessed had confessed while the officer was arresting him, there would have remained the probable cause as to the other two? Could he have said, I don't believe you, I'll take all three of you in anyway?

MR. SRINIVASAN (ASSISTANT TO THE SOLICITOR GENERAL): There might well have been, Justice Stevens, because an officer's not required to believe the version of events that's given to him by people on the scene. It might well be the case that they have a coordinated plan in advance to pin the blame on a particular person as opposed to the other two, and an officer can take into account the totality of circumstances in making that type of assessment.

Oral Argument Transcript at 23–24. Cf. *Di Re*, 332 U.S. at 594 ("If the officers believed they had probable cause for [Di Re's] arrest on a felony charge, it is not to be supposed that they would have been dissuaded by this profession of innocence.'").

<sup>129</sup>*Maryland v. Pringle*, 124 S. Ct. 795, 801 (2003) (emphasis added).

innocent explanation. Put simply, the “failure-to-offer-any-information” factor constitutes a win-win situation for the police. A failure to provide information counts against the suspect. But if the suspect does provide an explanation, the police are not required to credit the explanation and can still arrest everyone on the scene.

2. *The “Evidentiary” Basis of Pringle’s “Common Enterprise” Inference*

As Professor LaFave explains in the newest edition of his treatise, the facts of *Pringle* do not provide strong evidence for the chief justice’s “common enterprise” theory. Professor LaFave agrees that the quantity of drugs and money indicate a likelihood of drug dealing, but he points to other contingencies that undermine the inference that *all three* men were involved in a drug conspiracy: “Nothing at all was known about where the vehicle was headed or what the purpose of the journey was, and nothing at all was known about the association of the three individuals except that they happened to be together at the moment the vehicle was stopped by the police officer.”<sup>130</sup> According to LaFave, this lack of information, when combined with the fact that there is no evidence in the record that either the money or drugs were in open view during the trip, demonstrate that “the 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.”<sup>131</sup>

To bolster his conclusion that there was probable cause of a drug conspiracy, the chief justice notes that “‘a car passenger—unlike the unwitting tavern patron in *Ybarra*—will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing.”<sup>132</sup> I share Professor LaFave’s view that the claim that car passengers typically act in concert with the driver “is grounded in nothing more than the Court’s earlier dubious assumption, put forward without any empirical support in *Wyoming v. Houghton*.”<sup>133</sup>

<sup>130</sup>3 LaFave, *supra* note 68, § 7.1(c).

<sup>131</sup>*Id.* (citations omitted).

<sup>132</sup>*Pringle*, 124 S. Ct. at 801 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304–05 (1999)).

<sup>133</sup>3 LaFave, *supra* note 68, § 7.1(c).

It is not surprising that the chief justice's "common enterprise" inference rests on a premise lacking empirical support. The chief justice has recently explained that the probable cause and reasonable suspicion standards need not be based on "empirical studies dealing with inferences drawn from suspicious behavior," and that the Court will not "demand scientific certainty from judges or law enforcement officers where none exists."<sup>134</sup> Rather than rely on empirical data, the chief justice has instructed that "commonsense judgments and inferences about human behavior" must control determinations of probable cause and reasonable suspicion.<sup>135</sup> But neither commonsense nor common experience, dictate the logic employed in *Pringle*.

The chief justice's inference rests on the premise that a car passenger will often be aware of the contents of accessible parts of an automobile, even if those contents are hidden from view. The accuracy of this premise is not obvious. The innocent graduate student who is offered a ride home by a friend or classmate after a late-night party will not search underneath the seat, open the backseat armrest, or examine the glove compartment before accepting the ride home. Likewise, the office worker who offers to drive two colleagues to a weekend beach house late on a Friday night will not demand the right to search the bags of his invitees before starting the trip. As Justice Powell noted,

[T]here are countless situations in which individuals are invited as guests into vehicles the contents of which they know nothing about, much less have control over. Similarly, those who invite others into their automobile do not generally search them to determine what they may have on their person; nor do they insist that any handguns [or drugs] be identified and placed within reach of the occupants of the automobile. Indeed, handguns [and drugs] are particularly susceptible to concealment and therefore are less likely than are other objects to be observed by those in an automobile.<sup>136</sup>

<sup>134</sup>*Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). See also *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (emphasizing that under a totality test, "due weight" must be accorded the factual inferences drawn by law enforcement officers in determining whether reasonable suspicion exists).

<sup>135</sup>*Wardlow*, 528 U.S. at 125.

<sup>136</sup>*County Court of Ulster County v. Allen*, 442 U.S. 140, 174 (1979) (Powell, J., dissenting).



None of this matters, however, to the chief justice. He makes no effort to ground his “common enterprise” theory on empirical data or any other daily experience of motorists. As two commentators have expressed, here, as elsewhere, the chief justice eschews “[r]eliance on evidence about the real world,” which, in turn, permits the Court to avoid disclosing the “normative judgments” and “interpretative choices”<sup>137</sup> that explain the inferences and legal conclusions established in *Pringle*.

3. *Has Pringle Created a New Rule That Will Extend Beyond Car Cases?*

As Justice Powell’s observations suggest, the “common enterprise” inference approved in *Pringle* was not dictated by a “common sense” approach for determining probable cause. But does it follow that *Pringle* translates into a new *per se* rule that permits the arrest of multiple suspects whenever police discover contraband in compact spaces? There is reason to think so. The basis for that concern is twofold: one, *Pringle* adopts the logic of *Wyoming v. Houghton*, which itself creates a *per se* rule for probable cause cases involving automobiles; and two, there is no principled justification for limiting *Pringle*’s logic to cases involving vehicles.

a. *The Parallels Between Pringle and Houghton*

To see how *Pringle* may translate into a new *per se* rule, a closer look at *Houghton* is warranted. *Houghton* held that “police officers with probable cause to search a car may inspect passengers’ belongings found in the car that are capable of concealing the object of the search.”<sup>138</sup> Writing for the majority, Justice Scalia’s opinion in *Houghton* conceded that the search of Houghton’s purse was not based on individualized probable cause that it contained drugs.<sup>139</sup> Justice Scalia also conceded that his assertion that a car passenger “will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing,” will “not always be present” in every case involving

<sup>137</sup> Tracey L. Meares & Bernard E. Harcourt, Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure, 90 J. Crim. L. & Criminology 733, 746, 735, 793 (2000).

<sup>138</sup> *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999).

<sup>139</sup> *Id.* at 302.

multiple occupants of a vehicle.<sup>140</sup> Nevertheless, *Houghton* announced a bright-line rule that a passenger's belongings can always be searched because "the balancing of interests must be conducted with an eye to the generality of cases."<sup>141</sup> The upshot of *Houghton* is that a car passenger's companionship and access to another person suspected of criminal behavior is *always* sufficient to establish probable cause to search the belongings of the passenger left in the car, even where there is no individualized probable cause to justify the search.

*Houghton* undoubtedly changed the rules for *searches* of a car passenger's belongings left in the car. But there was nothing in Justice Scalia's opinion to suggest that *Houghton's per se* rule also governed the *arrest* of a passenger. In fact, Justice Scalia was careful to draw a distinction between a search of property left in a car and a search of the person.<sup>142</sup> Justice Scalia's distinction between searches of property and searches of persons makes good sense, as well as good constitutional law. The reduced expectation of privacy associated with property found in cars derives from the fact that vehicles rarely serve as

<sup>140</sup>*Id.* at 304–05.

<sup>141</sup>*Id.* at 305. Justice Breyer's concurring opinion also acknowledged that *Houghton* created a bright-line rule that authorizes searches of passengers' belongings. *Id.* at 307–08. (Breyer, J., concurring).

<sup>142</sup>Acknowledging the authority of *Di Re* and *Ybarra*, which invalidated personal searches of individuals who were in close proximity to others suspected of crime, *Houghton* specifically distinguishes a search of a passenger's property from a search of the passenger's person. Justice Scalia explains that a search of a passenger's property is reasonable because of the "reduced expectation of privacy" associated with property found in a vehicle. *Houghton*, 526 U.S. at 303. It is unreasonable, however, to search a passenger's person absent individualized probable cause. That is because "the degree of intrusiveness upon personal privacy and indeed even personal dignity," makes the search of the person "differ substantially from the package search at issue" in *Houghton*. *Id.* at 303. If, to use the language of Justice Scalia, the Fourth Amendment affords "significantly heightened protection [ ] against searches of one's person," and the "traumatic consequences" associated with a personal search are not to be visited upon a passenger due to his presence in a car containing contraband, *id.* at 303, it is difficult to understand why the far more traumatic consequences inherent in an arrest may be visited upon a passenger due to his presence in a vehicle containing contraband. In other words, if the analysis employed in *Houghton* would not authorize a search of Pringle's person, certainly permitting Pringle's arrest flies in the face of *Houghton's* reasoning. Cf. 3 Wayne R. LaFare, *Search and Seizure*, § 7.2, at 124 (3d ed. 1996) (Pocket Part 2003) (observing that "*Houghton* actually reaffirms *Di Re*").

the repository of personal effects; are subject to pervasive governmental regulation; and are exposed to traffic accidents that “render all their contents open to public scrutiny.”<sup>143</sup> None of these justifications for searching property translate into an equivalent lesser expectation of freedom for passengers inside the vehicle. Thus, *Houghton* said nothing to vitiate *Di Re*'s holding that “companionship with an offender at the very time of the latter's criminal conduct is not inevitably sufficient to establish probable cause for arrest of the companion.”<sup>144</sup>

*Houghton*'s *per se* rule that permits searching a passenger's property based solely upon accessibility to others was intended only to apply to the *search* context.<sup>145</sup> Prior to *Pringle*, lower courts have tended to conduct a more nuanced analysis of police power to *arrest* multiple occupants of a vehicle when drugs or contraband were found hidden inside the vehicle. Relying on the analysis of *Di Re*, some lower courts reasoned that the visibility of contraband or other evidence of criminality to third persons is an important factor. When contraband was not in plain view, the lower courts required something more than companionship or access to establish probable cause for arrest. “When the suspected criminal activity [is] such that its existence [is] not evident to others in the vicinity, it is then necessary to give careful consideration to those aspects of the extent and nature of the association which may indicate that the associate is also an accomplice.”<sup>146</sup> These cases supported *Pringle*, because in his case, the criminal conduct at issue—cocaine possession—also was not evident to others on the scene. Officer Snyder was unaware of the drugs until he searched the car. And *Pringle* made no furtive gestures or other suspicious movements. In short, the facts in *Pringle* did not involve any telltale signs of suspicious behavior often observed by the police to support the inference that *Pringle* was an accomplice in criminal behavior.<sup>147</sup>

<sup>143</sup>*Houghton*, 526 U.S. at 303 (citations omitted).

<sup>144</sup>2 LaFave, *supra* note 26, § 3.6(c), at 310.

<sup>145</sup>*Cf.* *Houghton*, 526 U.S. at 308 (Breyer, J., concurring) (“Obviously, the [bright-line] rule applies only to automobile searches . . . . And it does not extend to the search of a person found in that automobile”).

<sup>146</sup>2 LaFave, *supra* note 26, § 3.6(c), at 311 (footnote omitted).

<sup>147</sup>*Id.* at 312 n.108 (listing cases in which suspicious conduct of a person supported an inference that he was involved with the criminality of his traveling companions).

In *Pringle*, however, the chief justice abandoned the nuanced analysis of *Di Re*, and embraced the broad, *per se* reasoning of *Houghton*. For the chief justice, it is inconsequential that the cocaine discovered in *Pringle* was hidden from view. For the chief justice, the fact that the cocaine was “accessible to all three men” was more important.<sup>148</sup> This “accessibility” factor, however—much like *Houghton*’s bright-line rule—is simultaneously over-inclusive and under-inclusive. Purses and briefcases located in the passenger compartment are also accessible to other passengers. If the cocaine was found in a knapsack owned by Smith, the rear seat passenger, would it be reasonable for the police to infer that all three men were engaged in a drug conspiracy because Smith’s knapsack “was accessible to all three men”? On the other hand, accessibility proves very little because *Di Re* already established that a passenger’s presence and accessibility to another involved with crime does not automatically justify the arrest of the passenger. This is especially so, as Professor LaFave has noted, “when, as in *Di Re*, it is very possible for the criminal conduct to be occurring without the knowledge of the companion.”<sup>149</sup>

Ultimately, the logic and inferences approved in *Pringle* track the reasoning of *Houghton*. *Houghton* permitted a search based on nothing more than companionship and accessibility to someone who was suspected of criminality. *Pringle* permits an arrest based on the same criteria. Just as *Houghton* eviscerated the individualized probable cause requirement in the search context, so *Pringle* goes a long way toward crippling *Di Re*’s individualized probable cause requirement in the arrest context. As Professor LaFave explains, *Pringle* permits an inference of “probable cause of a joint enterprise without the critical ‘something extra’ that lower courts have typically required in cases of this genre—that the passenger in question had been a co-traveler for a longer time, had fled from the police, or in response to police questioning had been untruthful, evasive or very nervous.”<sup>150</sup>

#### *b. Problems of Containment*

Finally, there is no principled basis for confining *Pringle*’s reasoning to car cases. The “common enterprise” inference is equally

<sup>148</sup> *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003).

<sup>149</sup> 2 LaFave, *supra* note 26, § 3.6 (c), at 310.

<sup>150</sup> 3 LaFave, *supra* note 68, § 7.1(c) (footnote omitted).

appropriate in contexts not involving automobiles. Consider, for example, the following hypothetical: Assume Baltimore police come to A's studio apartment at 3:00 a.m. in response to a noise complaint. A is having a party with two or three of his closest friends. After telling A to lower the music, the police obtain A's consent to search the premises for weapons or drugs. An officer lifts a pillow on the couch and discovers a large amount of money and several baggies of cocaine. After A and his friends refuse to talk about the money or drugs, the police arrest everyone on the premises.

Why shouldn't *Pringle's* logic validate all of the arrests? In the hypothetical case, no less than in *Pringle*, A and his friends were found in a relatively small private apartment, not a public place. The money and drugs were accessible to everyone in the room. "The quantity of drugs and cash [found in the couch] indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."<sup>151</sup> After being questioned, A and his friends "failed to offer any information with respect to the ownership of the cocaine or the money."<sup>152</sup> And there was no "singling out" as to who owned the drugs or money.

Put simply, where drugs and money are discovered in a confined spatial context, there is a sufficient personal nexus between the individuals in that space, and none of the persons provide an explanation or information regarding the ownership of the drugs or money, the logic of *Pringle* provides probable cause to arrest everyone on the scene.

Is there a neutral principle that cabins *Pringle's* holding to cases involving "a relatively small automobile"?<sup>153</sup> I would say no. Although one could plausibly interpret *Pringle* only to apply in contexts involving small vehicles,<sup>154</sup> it is not obvious why *Pringle's*

<sup>151</sup> *Pringle*, 124 S. Ct. at 801.

<sup>152</sup> *Id.* at 800.

<sup>153</sup> *Id.* at 801.

<sup>154</sup> See 3 LaFave, *supra* note 68, § 7.1(c). Professor LaFave appropriately observes that "it is important to note [*Pringle*] did not merely distinguish cars from premises. The Court tells us *Pringle* is not merely a vehicle case, but rather a 'relatively small automobile' case, which suggests that the *Pringle* inference would not apply in the case of a larger vehicle, where it could not as readily be asserted that the place where the drugs were found was 'accessible to all three men.'"

logic should be restricted to cars. “[I]f one accepts the result in *Pringle* then it cannot be said the inference drawn in that case would *never* be appropriate when several people are present in private premises, especially if the premises are small or at least the drugs are found in a particular location where, once again, all those present had ready access.”<sup>155</sup>

All of these considerations suggest that the Court has established a precedent that will extend beyond “automobile” cases. Concededly, the Court has adopted a very narrow view of the protection provided by the Fourth Amendment regarding vehicle *searches* supported by probable cause.<sup>156</sup> The diminished constitutional protection afforded cars and containers found inside cars stems from the unique history of automobile searches.<sup>157</sup> *Pringle*, however, is not a car *search* case; it is a probable cause *arrest* case. If a factual scenario comparable to *Pringle* arose in a hotel room or back street alley, then there is no principled basis for not applying *Pringle*’s “common enterprise” inference to justify the arrest of multiple persons on the scene.

#### V. Final Thoughts: No Alternative to “Investigative” Arrests?

This article has attempted to demonstrate that the logic and result in *Pringle* not only conflicts with some of the Court’s probable cause cases, particularly *Di Re* and *Ybarra*, but also—more basically—goes a long way toward weakening the concept of individualized probable cause. On the other hand, a unanimous Court disagrees with my thesis. *Pringle* both acknowledges that probable cause requires a belief of guilt that is “particularized with respect to the person to be searched or seized,”<sup>158</sup> and insists that its holding is consistent with the Court’s earlier probable cause precedents.

I suspect, however, that a few of the justices joined the chief justice’s opinion not because they believed that his analysis was

<sup>155</sup> *Id.*

<sup>156</sup> See generally David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 *Geo. Wash. L. Rev.* 556, 556-57 (1998) (observing that “it is no exaggeration to say that in cases involving cars, the Fourth Amendment is all but dead . . . Put simply, the Court has conferred upon the police nearly complete control over almost every car on the road and the people in it.”).

<sup>157</sup> See generally *Wyoming v. Houghton*, 526 U.S. 295, 300-01 (1999).

<sup>158</sup> *Maryland v. Pringle*, 124 S. Ct. 795, 800 (2003) (citation omitted).

consistent with precedent or the individualized probable cause requirement. The unanimity behind *Pringle* may be explained by other factors. Perhaps, all of the justices joined the chief justice's opinion because they "could discern no other, workable rule"<sup>159</sup> or because they all agree that the probable cause standard is sufficiently elastic to allow for "investigative" arrests.<sup>160</sup>

On the first point, the thrust of Pringle's argument was that his arrest was not supported by individualized probable cause. That meant that the officer should have done one of two things: only arrest the driver or arrest none of the men. Obviously, the latter option was not going to garner any votes. But the justices were also unimpressed with Pringle's argument that law enforcement interests were adequately served by arresting the driver only. That argument was raised in Pringle's brief and surfaced once during the oral argument,<sup>161</sup> but it did not attract the support of any of the justices as a viable alternative to arresting all of the men.

A "driver only" arrest rule certainly has its disadvantages from a law enforcement perspective. First, the driver may not be the guilty party, which means that if the passengers are not simultaneously arrested with the driver, it may be difficult to find them if the police subsequently obtain evidence proving the driver's innocence. Second, assuming that the driver and passengers are engaged in a drug conspiracy, a "driver only" arrest rule may undermine law enforcement interests because the driver may, even after sufficient inducements are offered by the police or prosecutor, be unwilling to implicate his conspirators.

<sup>159</sup> *Maryland v. Wilson*, 519 U.S. 408, 423 (1997) (Kennedy, J., dissenting).

<sup>160</sup> Professor LaFave has suggested a third explanation for the result in *Pringle*. That is, collectively the justices may have believed that there was probable cause to arrest *Pringle* "simply because there was a nearly-100% probability that one of the three occupants of the car was the guilty party and the subsequent investigation had not produced any basis for picking one over the others." E-mail message from Professor Wayne R. LaFave, David C. Baum Professor of Law Emeritus, University of Illinois College of Law, to Tracey Maclin, Professor, Boston University School of Law (July 13, 2004) (on file with author). Although this way of looking at *Pringle* was implicit in several of the questions asked during oral argument, as Professor LaFave recognizes, "not one word on this point appears in the Court's opinion." *Id.*

<sup>161</sup> Brief of Respondent at 37–38, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809); Oral Argument Transcript at 37–38.

For similar reasons, permitting the police to conduct a *Terry*-type investigation without arrest is equally unattractive from a law enforcement perspective.<sup>162</sup> Officer Snyder initially pursued that option without success; detaining and interrogating all three men did not identify the owner of the drugs and money. When that strategy failed, the officer decided to arrest everyone. On the other hand, a “driver only” arrest rule does have one advantage under the facts in *Pringle*. “One would think that if an inference of sole possession was to be drawn, it would most logically be drawn as to [the driver], who was both the driver and owner of the vehicle.”<sup>163</sup>

The second factor working against *Pringle* was that the justices apparently see no tension between investigative arrests and the probable cause standard. The “dead body” hypothetical will help to clarify my point. If *Pringle*’s arrest was illegal due to a lack of individualized suspicion when drugs were discovered hidden in the back seat armrest, then his arrest would also be illegal if a dead body were found in the trunk. True, a dead body in the trunk, like drugs in the trunk, is not accessible to the passengers. Few criminal defense lawyers, however, want to argue that police cannot arrest a passenger traveling in a car that contains a dead body. That’s why the prosecutor for Maryland was quick to raise the hypothetical during oral argument.<sup>164</sup> Nonetheless, the “dead body” hypothetical

<sup>162</sup>See 2 LaFave, *supra* note 26, § 3.2(e), at 67 (discussing the pros and cons of a rule that does not permit the arrest of multiple suspects when the police cannot satisfy a more-probable-than-not standard for arresting anyone).

<sup>163</sup>LaFave, *supra* note 68, § 7.1(c), citing *Leavell v. Commonwealth*, 737 S.W.2d 695, 697 (Ky. 1987) (explaining that the “person who owns or exercises dominion and control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband”).

<sup>164</sup>QUESTION: How about the trunk?

MR. BAIR: I think the trunk changes things a little bit, but of course you have to look at the totality of the circumstances, Justice Ginsburg.

QUESTION: Why a little bit? I thought this whole case was predicated—your whole case was predicated on those drugs between the armrest and the backseat were accessible to all three people in that car.

MR. BAIR: That’s—

QUESTION: Now, if you have something in a locked trunk, it truly is not accessible to the passengers.

MR. BAIR: It certainly is not as accessible, and of course it’s not as immediately accessible, but, for instance, if there had been a large quantity of drugs in the trunk or if there had been a dead body in the trunk, I think then there is a—the calculus changes in terms of totality of the circumstances, and I think if it were that situation, even though that particular evidence was in the trunk, I think there’s still a—*strong inference that could be drawn that everyone in the car knew about it, because who would*



should be irrelevant to the analysis, if we are to take seriously the Court's unwillingness to modify probable cause based on the seriousness of the crime.<sup>165</sup>

While the "dead body" scenario certainly challenges the justices' willingness to adhere to the particularized probable cause rule, the result in *Pringle* demonstrates that it did not require a provocative fact pattern for the Court to give short shrift to the concept of individualized probable cause. Indeed, if there had been five or six men in the car, I suspect a majority of the Court would have still upheld arresting everyone, even though arresting such a large number of persons would transform the probable cause test into a meaningless measure of suspicion.<sup>166</sup>

*Pringle* indicates that the justices view the probable cause test as being sufficiently flexible to serve multiple purposes. Probable cause serves the traditional function of setting the standard for identifying which persons should be arrested in order to initiate the process of prosecution. In this sense, probable cause is the standard used to apprehend the guilty and those who should be charged with an offense. *Pringle* did not involve this traditional function of probable cause. Rather, *Pringle* involved a different aspect of probable cause. *Pringle* demonstrates that the justices also view probable cause as a standard, sufficiently elastic, to allow police to arrest and interrogate in order to decide which persons to charge. Yet, on this view,

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*take the chance in terms of taking along innocent passengers—*

QUESTION: Well, let's stick to the five—these five bags that were stuck in a Ziploc bag. The Ziploc bag is in the trunk, not a dead body.

MR. BAIR: I understand. I think in that case there would be a much closer case, it would be a much more difficult case vis-à-vis all three occupants of the car.

Oral Argument Transcript at 8–9 (emphasis added).

<sup>165</sup>See 2 LaFave, *supra* note 26, §3.2(a), at 28–29.

<sup>166</sup>As noted above, in recent years the Court has emphasized that the probable cause test does not require a more-likely-than-not demonstration of guilt, and can neither be quantified nor precisely defined. See *Illinois v. Gates*, 462 U.S. 213, 235 (1983); *Ornelas v. United States*, 517 U.S. 690, 695 (1996). However, if under the *Pringle* facts, only one person was guilty of the offense, arresting five or six persons to facilitate the identification of that person means that probable cause tolerates a twenty or seventeen percent chance, respectively, of apprehending the correct person. Similarly, where five or six persons are found in a car that contains hidden narcotics and money, resting an inference of conspiracy on the accessibility of the drugs seems a rather thin reed to support the arrest of such a larger number of persons.

probable cause is broad enough to tolerate arrests that serve an investigative function.<sup>167</sup>

Although it is not surprising that the Rehnquist Court would perceive the probable cause standard as a tool to *facilitate*, rather than hinder, police apprehension of multiple persons for purposes of interrogation, *Pringle* illustrates just how far the Rehnquist Court has separated itself from its predecessors on this point. In *Mallory v. United States*,<sup>168</sup> the Court took a very different view. In that case, police suspected that one of three men had committed a rape. All three were arrested and interrogated at the police station. Mallory eventually confessed to the crime and was convicted. The Supreme Court reversed the conviction because Mallory had not been promptly taken to a federal magistrate for arraignment between the time of his arrest and confession. According to the *Mallory* Court, the failure to promptly arraign Mallory was not excused by the fact two other men were suspected by the police. Speaking for a unanimous Court, Justice Frankfurter observed: "Presumably, whomever the police arrest they must arrest on 'probable cause.' It is not the function of the police to arrest, as it were, at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'"<sup>169</sup>

<sup>167</sup> This, essentially, was the argument made by the prosecutors in *Pringle*. See Brief of Petitioner at 25, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) ("By arresting all three, the officer more precisely could determine criminal culpability. Pringle confessed, and the other two were set free."); Brief of the United States as Amicus Curiae Supporting Petitioner at 30, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809) (conceding that innocent persons may be arrested, but insisting that arresting all the vehicle's occupants "will facilitate *further investigation* that enables the officer to conclude in short order that a particular person should be released") (emphasis added). Cf. 3 LaFave, *supra* note 68, § 7.1(c) (recognizing the validity of the position that "views the probable cause test as something less than more-probable-than-not and views arrests as sometimes serving an investigative function").

<sup>168</sup> 354 U.S. 449 (1957).

<sup>169</sup> *Id.* at 456.

Although *Mallory's* dicta on probable cause was not greeted with universal approval,<sup>170</sup> some viewed *Mallory* as requiring "evidence sufficient to charge one and only one person prior to arrest."<sup>171</sup> Whatever the precedential weight of *Mallory's* dicta, *Di Re* and *Ybarra*

<sup>170</sup>Shortly after *Mallory* was decided, Judge Alexander Holtzoff disagreed with the Court's conclusion on probable cause. "In [*Mallory*] there were three suspects. There was reasonable ground to arrest every one of them. After an interrogation of each of the three, two were cleared within a few hours and the third was held." Statement of the Honorable Alexander Holtzoff, U.S. District Judge for the District of Columbia, in Hearings on Confessions and Police Detention before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. 4–5 (1958), quoted in LaFave, *Arrest*, *supra* note 26, at 261 n.73.

Modern commentators continue to question *Mallory's* implication that probable cause does not permit multiple arrests to facilitate a police investigation where only one person is suspected as the perpetrator. See, e.g., Joseph D. Grano, Probable Cause and Common Sense: A Reply to the Critics of *Illinois v. Gates*, 17 U. Mich. J.L. Ref. 465, 479 (1984) (arguing that under the common law "an arrest prompted further investigation; it did not reflect an already formed decision to charge the person with a crime"). The Model Code of Pre-Arrestment Procedure permits arrests without proof that satisfies a more-probable-than-not standard. See Model Code of Pre-Arrestment Procedure 14 (1975). Other commentators have relied on the famous hypothetical from the Restatement (Second) of Torts § 119, comment I (1965) that says there is probable cause to arrest two persons found bending over a dead body, where each accuses the other of the crime, both to question the wisdom of a more-probable-than-not standard for probable cause and to justify investigative arrests. See, e.g., 2 LaFave, *supra* note 26, § 3.2(e), at 64–65 ("If the function of arrest were merely to produce persons in court for purposes of their prosecution, then a more-probable-than-not test would have considerable appeal. But there is also an investigative function which is served by the making of arrests.") (footnote omitted). Finally, the prosecutor in *Pringle* proffered the hypothetical of four persons sitting at a card table with a "smoking gun" in the middle of table and one of the persons slumped over the table (apparently dead or shot) as an illustration of the havoc that would be wrought if multiple arrests were not permitted under the facts in *Pringle*. Brief of Petitioner at 28, *Maryland v. Pringle*, 124 S. Ct. 795 (2003) (No. 02-809).

The prosecution's hypothetical is not comparable to the facts in *Pringle*. The contraband discovered in *Pringle* was *not* in plain view of the occupants or the police. In the prosecutor's hypothetical, the gun and dead body are obviously in plain sight of the other persons sitting at the table. The other arguments against the more-probable-than-not standard of probable cause and in favor of investigative arrests are not so easily rebutted. To be sure, under a more-probable-than-not standard of probable cause, police will have less authority to make arrests. But that concession does not prove (or disprove) that investigative arrests are valid under the Fourth Amendment. Cf. *Henry v. United States*, 361 U.S. 98, 104 (1959) ("Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."). The problem with the way that the Rehnquist Court defines probable cause—that is, as a "fluid concept . . . not readily, or even usefully, reduced

clearly established the constitutional norm of individualized probable cause for most searches and seizures, and forbade arrests based on the arrestee's mere proximity to others suspected of criminality. *Pringle* pays lip service to the principle of individualized probable cause, but that constitutional rule cannot coexist very long with a view of probable cause that allows the arrest of multiple persons to facilitate the government's ability to identify which particular individual to charge as an offender.

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to a neat set of legal rules," *Illinois v. Gates*, 462 U.S. 213, 232 (1983), which requires only a "fair probability" or "substantial chance" of criminality, *id.* at 238, 243 n.13—is that it provides too much discretion to the police. Put simply, the definition of probable cause embraced in *Gates* (and *Pringle*) is the equivalent of a general reasonableness test. See Wasserstrom, *supra* note 2, at 340 (noting that under *Gates*, "the probable cause requirement is effectively subsumed under a test of general reasonableness"). I share Professor Wasserstrom's view that under this definition of probable cause, the chance that a suspect is innocent of the charge is only one "factor [ ] in assessing the reasonableness of the officer's actions. The officer is only required to have *some reason* to think that the . . . suspect committed the crime." *Id.* (emphasis added). This is certainly not the Framers' view of probable cause, see Davies, *supra* note 71, at 578, nor is it consistent with the Framers' understanding of an officer's authority to make warrantless arrests. See *id.* at 627–34. For better or worse, I tend to favor the more-probable-than-not test for measuring an officer's arrest authority. (Whether a more-probable-than-not test is appropriate for *searches* is a different question. "Clearly, the more-likely-than not interpretation of probable cause has certain problems when applied to searches, which do not arise when applied to arrests." *Id.* at 306 n.240.) While a more-probable-than-not test may have the drawback of a fixed standard, the advantage of this standard is that it informs the officer that "unless he thinks that the suspect *has*, not *might have*, committed the offense, he must investigate further before he can" arrest. *Id.* at 307.

<sup>171</sup> LaFave, *Arrest*, *supra* note 26, at 261 n.71. Cf. 2 LaFave, *supra* note 26, § 3.2(d), at 61 (listing *Mallory* as one of three Supreme Court cases that "suggests that probable cause to arrest does not exist unless the information at hand singles out one individual").