

Scope of 'probable cause' probably will widen

Let's assume the police receive a report that a convenience store has just been robbed. The robber is described as being 6-foot-2, medium build and has a distinctive birthmark on his face. One block from the scene of the crime, police find a person matching the description.

In fact, they find two people matching the description. The two are twins.

Do the police have probable cause to arrest both men? One man? Neither man?

If we look at the dictionary definition of "probable" — "more likely than not," "a 51/49 proposition" — a defense lawyer could contend that the chances of either man being the robber stand in perfect equipoise. Therefore, as to each man it is not "probable" that he is the robber. Therefore, neither man may be arrested, even though it is a near certainty that one must be guilty.

Is this what probable cause means? In a recent article, Professor Craig S. Lerner examines the history of "probable cause" and comes to some surprising conclusions. Craig S. Lerner, "The Reasonableness of Probable Cause," 81 *Texas L.Rev.* 951 (2003).

Lerner contends that the expression "probable cause" did not have a set meaning when James Madison included it in the Fourth Amendment in 1791. In fact, although at the time of the Revolution many states had declarations of rights restricting the practice of general warrants, not a single document included the expression "probable cause." At 979. Rather than "probable cause," most of the colonies authorized warrants based on evidence that was either "reasonable" or "satisfactory."

The first time the U.S. Supreme Court dealt with "probable cause" was in an 1813 case dealing with a federal statute establishing probable cause as the standard for the government to seize goods that it believed had evaded customs duties. *Locke v. U.S.*, 11 U.S. (7 Cranch) 339 (1813). Locke contended that the government should be held to a high standard: probable cause should mean "presumptive evidence."

Chief Justice John Marshall writing for the court disagreed. Marshall stated



Criminal Procedure

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that "probable cause" merely meant "circumstances which warrant suspicion."

Yet 11 years later another U.S. Supreme Court case found probable cause to be a stricter standard. Writing for the court, Justice Joseph Story said probable cause had to be based on "evidence" and not "mere general suspicions." *The Apollon*, 22 U.S. (9 Wheat) 362 (1824).

Lerner writes that "the tension between these two views would be played out in a series of legal contexts in ensuing years." At 984.

The last 50 years in the Supreme Court has seen several pendulum shifts. For example, in *Draper v. U.S.*, 358 U.S. 307 (1959), federal agents arrested Draper based on an informant's tip. Draper's appearance matched the tipster's description, but Draper was engaged in innocuous activity (alighting from a train) when he was arrested. Moreover, there was no evidence as to how the informant had determined that Draper was carrying drugs. Nevertheless, the court found that the arrest was based on probable cause.

But the Warren Court established a much stricter standard for probable cause 10 years later in *Spinelli v. U.S.*, 393 U.S. 410 (1969). Like *Draper*, this case involved an informant's tip that was corroborated to a great extent.

Yet here the court emphasized that all the corroboration involved "innocent-seeming activity." If the informant's tip was necessary to

establish probable cause, the court held that the government needed to establish both the reliability of the informant and the basis for the informant's knowledge.

Predictably, the Burger Court cut back on this standard and established an easier burden for the government in *Illinois v. Gates*, 462 U.S. 213 (1983).

Rejecting the *Spinelli* framework as overly rigid, the *Gates* court returned to a standard more favorable to the prosecution. It referred to probable cause as a "fluid concept" not readily reduced to a neat set of rules. It was properly determined through the totality of the circumstances. The magistrate's job is simply to make a "practical, common-sense decision" whether there is a "fair probability" that contraband or evidence of a crime will be found in a particular place.

An issue that remains unresolved is whether probable cause is one inflexible standard or, on the other hand, a standard that fluctuates based on the object of the police activity.

Justice Robert Jackson alluded to this issue in a dissenting opinion in 1949. He noted that he would strain to find probable cause in a case where the police set up a roadblock to find a kidnapped child but would not do so if the goal were merely to find bootleg liquor. *Brinegar v. U.S.*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

William J. Stuntz has explicitly argued that a lesser showing of evidence should be required to support probable cause to search for evidence in a homicide case while, concomitantly, a greater amount of evidence should be required to establish probable cause to search a house for a minor drug offense. J. Stuntz, "O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment," 114 *Harvard L.Rev.* 842 (2001).

Lerner contends in his law review article that Judge Learned Hand's famous formula for negligence should be adopted for probable cause. Thus, probable cause would exist when the probability of a successful search multiplied by the social value exceeds the social cost of the privacy intrusion. At 1019-1020.

It appears that the U.S. Supreme

Court may be ready to issue a major new case on the nature of probable cause. On March 24, the justices agreed to review *Maryland v. Pringle*, No. 02-809.

Joseph Jermaine Pringle was riding in the front seat of a car being driven by the owner, and a third man was in the back seat. During a lawful stop of the car, police found money in the glove compartment and five glassine bags of cocaine in a rear armrest. When none of the men would provide any information about the drugs and money, the police arrested all three. Pringle later confessed to the police that the cocaine was his. He was convicted of possession with intent to distribute cocaine.

The Court of Appeals of Maryland found his arrest to be illegal and consequently suppressed his confession and reversed his conviction. The court did not find sufficient evidence linking Pringle to the cocaine in the back seat since he neither owned the car nor was sitting in the rear. In reaching this conclusion, the court relied on cases discussing sufficiency of evidence issues in drug possession cases.

The dissent disagreed with this approach, arguing that probable cause existed to arrest *all three* men in the car. It sharply distinguished the issue of probable cause from the issue of sufficiency of the evidence needed for the conviction of each man. It argued that the job of the arresting officer is simply to evaluate probable cause. He should not be concerned with evaluating the state's ability to establish the guilt of each man by proof beyond a reasonable doubt because that is the job of the prosecutor.

The Supreme Court's decision in *Pringle* may shed light on the problem posed at the beginning of the column. For if the court sides with the prosecution — which it usually does in Fourth Amendment cases — it would probably mean that the officer would be justified in arresting the twins even though he was positive one twin was innocent. It would be a further move away from the Warren Court's strict pro-defense definition of "probable cause" in *Spinelli*.