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See Also

Comment on Max Minzner, *Putting Probability Back Into Probable Cause*

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When police officers talk about “PC,” it is not political correctness that they have in mind. The acronym refers to probable cause, enshrined in the Fourth Amendment as the evidentiary standard required to obtain a search warrant. Although it is perhaps the most important evidentiary standard in American police work, its precise meaning is elusive. Courts have held that probable cause is more than “mere suspicion,”¹ but less than a preponderance of the evidence.² One can thus safely assume that it is a probability nestled somewhere between .1% and 50%, although precisely where courts have not condescended to specify. Equally nettlesome is the fact that it is unclear what data is admissible in the probable cause determination. For trials, there are elaborate rules of evidence, but this is not the case for probable cause.

Consider two examples. Can one take into account race or ethnicity? Sometimes yes,³ sometimes no.⁴ Can one consider that a suspect refused to give consent to a search? Sometimes yes,⁵ sometimes no.⁶

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1. *See, e.g.*, *United States v. Smither*, No. 09-3-KSF, 2009 WL 585803, at *1 (E.D. Ky. Mar. 6, 2009) (“Probable cause is defined to be reasonable grounds for a belief, supported by less than *prima facie* proof but more than mere suspicion.”).

2. *See, e.g.*, *Baldwin v. State*, No. PD-1630-07, 2009 WL 605368, at *2 (Tex. Crim. App. Mar. 11, 2009) (“Probable cause is a relatively high level of suspicion, though it falls far short of a preponderance of the evidence standard.”).

3. *See, e.g.*, *United States v. Weaver*, 966 F.2d 391, 394 n.2 (8th Cir. 1992) (“[Officer] Hicks had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors Hicks relied upon, was a factor in the decision to approach and ultimately detain Weaver.”).

4. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 (9th Cir. 2000) (holding that the fact that defendant was Hispanic could not be considered).

In *Putting Probability Back Into Probable Cause*,⁷ Professor Minzner's central claim is that valuable information is systematically excluded from the probable cause determination—namely the past success of the particular officer claiming, either in a warrant application before the fact or in a suppression hearing after the fact, that probable cause exists or existed to conduct a search. Professor Minzner's basic idea is that if two officers cite the same pieces of evidence, but Officer 1 has a historical hit rate of 60% and Officer 2 has a hit rate of 90%, then Officer 2 is more likely to be right in this instance. The intuition behind this claim is inescapable: If one baseball player has a batting average of .150 against a particular pitcher and another has a batting average of .500, the latter is more likely to get a hit. If magistrates and judges incorporate historical hit-rate data generated by individual officers, Professor Minzner claims, "the probable-cause decision can become far more accurate."⁸

Having myself argued something similar with respect to the reasonable-suspicion determination (to authorize a *Terry* stop),⁹ I am estopped from denying the wisdom and perceptiveness of Professor Minzner's article. Having said this, let me offer a few comments.

First, the title. "Putting . . . back" suggests that Professor Minzner proposes to recover an earlier period's approach to probable cause. But an officer's historical hit rate has never been explicitly incorporated into the probable cause calculus, at least in the way he recommends. It could be argued, however, that this sort of information is already part of the probable cause calculation—that is, judges *do* seem to give weight to an officer's "experience."¹⁰ Seniority is a weak proxy for skill, but it is likely that police officers who prove unsuccessful again and again in conducting searches either quit the field entirely or burrow themselves into a bureaucratic job.

5. See *United States v. Hyppolite*, 65 F.3d 1151, 1154 (4th Cir. 1995) (finding "loud and aggressive" refusal of consent to be suspicious); *United States v. Williams*, 271 F.3d 1262, 1269 (10th Cir. 2001) (finding "nervous" refusal of consent to be suspicious).

6. See, e.g., *State v. McGovern*, 45 P.3d 624, 627 n.18 (Wash. Ct. App. 2002) ("King had the right to refuse consent, and his exercise of that right may not be used to establish probable cause."). See generally Kenneth J. Melilli, *The Consequences of Refusing Consent To a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue*, 75 S. CAL. L. REV. 901 (2002).

7. Max Minzner, *Putting Probability Back Into Probable Cause*, 87 TEXAS L. REV. 913 (2009).

8. *Id.* at 921.

9. Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2006).

10. The Supreme Court seemed to lend weight to an officer's "training" and "experience" in *United States v. Cortez*, 449 U.S. 411 (1977), and many courts have followed the suggestion. Indeed, almost any judicial opinion that takes the time in its recitation of the facts to note that the officer is "experienced" means a suppression motion is about to be denied. See, e.g., *People v. Smith*, 874 N.Y.S.2d 117 (N.Y. App. Div. 2009) ("The court properly denied defendant's suppression motion. Late at night, in a desolate, drug-prone alleyway, an *experienced narcotics officer* saw defendant take an unidentified object from his boot or sock and give it to another person in return for what appeared to be money. This provided probable cause for defendant's arrest.") (emphasis added).

Thus, a cop on the beat in his tenth year is more likely to uncover criminal activity than a rookie, and courts do seem to credit this fact. In *Terry v. Ohio*,¹¹ Chief Justice Warren made much of Officer McFadden's decades of experience, suggesting that his observations were entitled to more deference as a consequence.¹² Of course, one might wonder whether this is little more than window dressing and that courts in fact give little weight to an officer's seniority. Perhaps judges find it useful to rhetorically gesture to an officer's experience, all the while giving this datum little weight.¹³

Professor Minzner claims that incorporating historical hit-rate data will make the probable cause determination "more accurate," but it is unclear what he intends by this because his take on the meaning of "probable cause" is never fully developed. He seems to embrace the *Illinois v. Gates*¹⁴ "totality of the circumstances" understanding of probable cause, and he even indicates support for the suggestion, made by Professor Stuntz and others,¹⁵ that probable cause is a less demanding evidentiary standard for more socially harmful crimes. Professor Minzner at times suggests that what he means by "more accurate" probable cause determinations is higher hit rates, but this is problematic. To take an easy example, if police have narrowed down the list of possible suspects of a series of murders to two Craig Lerner's, my view would be that they have probable cause to search both our homes for the proverbial bloody knife, even though the hit rate will be only 50%. The fact that a search does not, ex post, reveal evidence of crime does not mean that, ex ante, there was not probable cause to conduct a search. (In other words, accurate probable cause determinations can lead to no evidence

11. 392 U.S. 1 (1968).

12. *Id.* at 5 ("[McFadden] testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for . . . 30 years.")

13. The Montana Supreme Court recently considered the claim that the observations of a rookie police officer should be afforded less deference from courts. *Brown v. State*, 203 P.3d 842, at 847 (Mont. 2009). The court rejected the claim, noting that "the test for particularized suspicion simply requires that the information available to the investigating officer—whether a rookie or a veteran—be sufficient to allow a hypothetical 'experienced' officer to have either particularized suspicion for a stop, or probable cause for an arrest." *Id.* at 846. Nonetheless, the court went on to suggest that it was open to the argument, at least in some circumstances, that experienced and trained officers are entitled to more deference than their more junior colleagues: "[A] rookie peace officer on his or her first patrol may well be entitled to make an investigatory stop of a vehicle at 2:00 a.m. that is driving slowly, without lights, and is weaving across the center line and fog lines. That same peace officer, however, might not be entitled to make reasonable inferences resulting in particularized suspicion or reasonable grounds to stop under circumstances which are demonstrably beyond his or her training or experience. The courts will look to the facts and to the totality of the circumstances of each case." *Id.* at 847.

14. 462 U.S. 213 (1983).

15. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001). I have also made this point. See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEXAS L. REV. 951 (2002). Although, on this point, all the credit is due to Joseph D. Grano. See Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465 (1984).

of crime.) Furthermore, it is not clear how much higher hit rates we are likely to see for warranted searches even if Professor Minzner's suggestion is embraced. He cites recent studies that find hit rates for such searches somewhere between 84% and 97%.¹⁶ How much higher can we go? This is an awfully thin margin on which to be operating. My view would be that if hit rates reached 100% that would mean, almost by definition, that lots of searches where probable cause is present are not being conducted.

As Professor Minzner notes, warrantless searches achieve much lower hit rates (somewhere between 12% and 38%)¹⁷ than warranted ones. There is a lurking truth in this discrepancy that the article does not focus on: for the most part, warranted searches are searches of the home and warrantless searches are searches of automobiles.¹⁸ Why are these hit rates so different? I doubt this has much to do with the skill or veracity of the officers conducting these searches. My suggestion would be that probable cause is calibrated not only to the gravity of the investigated offense but also to the degree of the privacy intrusion. Although courts regularly parrot the line that probable cause is an unbending evidentiary standard,¹⁹ the reality on the ground suggests otherwise.²⁰ Probable cause entails a balancing of the social benefit associated with the prevention or detection of a particular crime and the social cost (or privacy intrusion) resulting from a particular kind of search. Accordingly, car searches do and should generate far lower hit rates than home searches because the privacy intrusion caused by a car search pales in comparison to that of a home search.

Professor Minzner claims that his proposal will mitigate the problem of what some have called police "testilying."²¹ His solution focuses on the warrant application process. An officer who regularly fabricates evidence in his application for a warrant will tend to have lower hit rates, and magistrates considering his applications in the future will scrutinize them more closely. This makes sense, and no doubt some officers engage in what might delicately be called "puffery" in warrant applications,²² but there is perhaps

16. Minzner, *supra* note 7, at 923.

17. *Id.* at 923.

18. A large percentage of warrantless searches are also those in which police claim "exigent circumstances." Those are often challenged after the fact in a suppression hearing, but the principal claim is typically not that there was no probable cause, but that there were no exigent circumstances or that the police unnecessarily precipitated the crisis. *See, e.g.,* United States v. MacDonald, 916 F.2d 766 (2nd Cir. 1990).

19. *See, e.g.,* Dunaway v. New York, 442 U.S. 200, 208 (1979) (rejecting the notion that privacy and governmental interests must be balanced on a case-by-case basis).

20. *See, e.g.,* Cardwell v. Lewis, 417 U.S. 583, 589-90 (1974) (discussing the distinction between making the probable cause determination in the context of a car or home).

21. There is a vast literature on this point. *See, e.g.,* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041 (1996).

22. *See* Bill Rankin, *Atlanta Police Look to Restore Trust After Drug Raid Killing*, ATLANTA J.-CONST., Feb. 23, 2009, available at

an even more important context for police testilying: suppression hearings. Here, the officer has uncovered evidence of crime, but the issue is what he observed prior to the arrest or search. Testilying in this context means reverse-engineering what the officer saw before the successful search. (In fairness to the officer, one might say that he or she is shading or packaging the testimony to make it more palatable to the judge. In that respect, it is not clear how different a police officer's testimony is from that of any well-coached witness.) For example, the officer claims that the defendant reached for his pocket, began to run away, made a threatening gesture, or the like, which all makes sense once one knows that the defendant had a gun or a vial of crack in his pocket. It is unclear how Professor Minzner's proposal would mitigate the problem of testilying in suppression hearings.

Finally, one of the most interesting facts uncovered by the article is that the vast majority of searches are conducted by a small minority of officers.²³ This is consistent with the facts of life in virtually any context: a small percentage of people do a large percentage of the heavy lifting—for good and bad. In light of this reality, what would be the consequence of rigorously tracking and meticulously reporting hit-rate data for every search for every officer? As it is, officers on the beat today are already required to keep data along dozens of matrices.²⁴ Imagine that we now require officers to record and file away the results of every search, even those conducted without a warrant. Professor Minzner identifies some of the benefits, which may well be substantial, but what of the costs? One might well imagine that the more energetic police officers suffer by comparison to their more lethargic peers, who attain higher hit rates by doing less. Thus, recording and emphasizing this sort of data may spur excessive risk aversion in police. More generally, adding to the record-keeping burdens may cement the idea among police officers that life is like some Dilbert cartoon, where the micromanaging bosses do not trust them. Not being trusted, police officers become less

http://www.ajc.com/metro/content/metro/atlanta/stories/2009/02/23/johnston_sentencing.html (describing how police officers lied in a warrant application and killed an innocent citizen when executing the search).

23. See Minzner, *supra* note 7, at 937.

24. Consider, for example, the website produced by the Tulsa, Oklahoma Police Department, which over the five-year period when it was subject to a federal consent decree, reported arrest, citation, and complaint data for every single officer. For every single arrest, not only were the charge and location noted, but the age, race, and gender of the suspect was also recorded. See Tulsa Police Dep't, Tulsa Police Consent Decree Database, <http://www.tpdd.org/>.

trustworthy.²⁵ Oddly, a reform instituted in part to encourage police integrity may whipsaw and have exactly the opposite consequence.²⁶

25. See generally Larry E. Ribstein, *Law v. Trust*, 81 B.U.L. REV. 553 (2001).

26. In his 2006 novel, *Hollywood Station*, Joseph Wambaugh recounts how LAPD officers were forced by a federal consent decree to file elaborate Field Data Reports proving that they were stopping whites as well as blacks and Hispanics. JOSEPH WAMBAUGH, *HOLLYWOOD STATION* (2006). The problem was that “nobody had ever seen a white guy walking around the ’hood at night.” *Id.* at 66. Police solved the problem by fabricating stops. “This was the federal consent decree’s version of ‘don’t ask, don’t tell’: We won’t ask where you got all those white male names on the FDRs if you don’t tell us. . . . So it seemed that Department of Justice, instead of promoting police integrity, had done just the opposite, by making liars out of LAPD street cops who had to live under the consent decree” *Id.*