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CONSTRUCTIVE KNOWLEDGE, PROBABLE CAUSE, AND ADMINISTRATIVE DECISIONMAKING

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INTRODUCTION

The last quarter century has witnessed the quiet and largely unnoticed development of a doctrine that could significantly change the meaning of probable cause. Traditionally, probable cause has been based on the knowledge of someone who had enough information to form a belief about the suspect's guilt, but this new doctrine looks to constructive knowledge, not actual knowledge, so that no one involved in the investigation need actually be capable of forming such a belief. The result is that an officer acting on nothing more than the "inarticulate hunches" disparaged in *Terry v. Ohio*[1] might nevertheless be treated as having enough information to justify a search or arrest.

For example, in *United States v. Gillette*,[2] a recent Eighth Circuit decision, the court relied on this doctrine to validate the search of a pickup truck by an officer who had responded to a call for backup but who had not been given any instruction to search; rather, he "simply arrived on the scene and immediately began to search vehicles."[3] Probable cause for the search of Gillette's pickup was lacking, and he

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1 392 U.S. 1, 22 (1968).

2 245 F.3d 1032, 1034 (8th Cir. 2001), *cert. denied*, 584 U.S. 982 (2001). Thanks to Stephen C. Moss of the Kansas City Federal Defender's Office for providing a copy of the petition for certiorari.

3 *Id.*

had not consented to the search.[4] However, the truck was in the driveway of a house whose inhabitant had consented to a search of *his* vehicle. The court reasoned that the search would have been valid if performed by either of the officers who had obtained the inhabitant's consent, because it would have been based on a reasonable, if erroneous, belief.[5] Because the third officer was answering a call for backup, there had been sufficient "communication between him and the officers on the scene to make him a member of their team and thus to impute to him [their] knowledge,"[6] and so he was entitled to the same assessment of reasonableness for any belief based on that knowledge.

The rule at work in *Gillette* extends—and significantly revises—a well-established and uncontroversial imputation doctrine, the collective-knowledge rule.[7] That rule allows for the imputation of knowledge between officers when one officer, having acquired probable cause, instructs another to conduct a search or arrest and does not explain why. The rule gives constructive knowledge a procedural role, but bases the substantive analysis of probable cause on the actual knowledge of the officer who issued the instruction. The new rule, on the other hand, gives constructive knowledge a substantive role in the evaluation of probable cause. Courts have not differentiated between the two rules, but in what follows, I reserve the term "collective-knowledge rule" for the conventional version and refer to the new variant as the "constructive-knowledge rule."

Both rules have arisen in the context of warrantless police conduct. In the typical constructive-knowledge case, several officers are investigating a crime, none personally has probable cause, one of them conducts a search or arrest anyway, and the court lets in the evidence on the theory that the officers knew enough in the aggregate to support probable cause.[8] *Gillette* is unusual in two respects. First, the acting officer had not personally acquired any incriminating infor-

4 Gillette was convicted of conspiracy to manufacture methamphetamine, and in describing the evidence of his participation, the court pointed to the evidence found in the vehicle and "Mr. Gillette's admission . . . that he knew that the lab was in his truck." *Id.* at 1033. The admission, however, came only after Gillette was arrested ("Mr. Gillette was given his *Miranda* warnings . . . before he made his admission," *id.* at 1034), and so it could not have created probable cause for the search. The court cited nothing else to suggest that the police had any basis for searching Gillette's truck.

5 *Id.* at 1033–34.

6 *Id.* at 1034.

7 *Id.*

8 For a useful overview on both collective- and constructive-knowledge cases, treated under the rubric of "collective knowledge," see 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.5(c) (4th ed. 2004).

mation. Second, there was another officer present who, taken alone, could legally have conducted the search on the basis of his reasonable belief. Thus, *Gillette* does not illustrate the aggregation process that usually occurs in constructive-knowledge cases, when each officer has a little information but none of them has enough. On the other hand, *Gillette* shows that the doctrine may extend even to officers who have no information and who have received no instruction. *Gillette* also helps to show the fuzziness at the limits of the collective-knowledge doctrine, which has usually been cabined to cases in which officers are "working closely together" on an investigation.[9] In *Gillette*, the officers' communication went no further than the backup call—when the third one arrived, he "immediately began to search" instead of talking to his colleagues—and they were not in close physical proximity.[10] If the only requirement is that each officer must somehow be deputed a "member of the team," the rule's implications are far-reaching indeed.

Probable cause requires "a reasonable ground for belief of guilt."[11] If the "reasonable ground" depends on constructive knowledge, that knowledge, in turn, may support a purely constructive belief—a belief that no officer could justifiably have held, because no officer, taken alone, knew enough to arrive at that conclusion. And when knowledge and belief are constructive, those two preconditions may generate probable cause which itself is purely constructive, which is deemed to exist only by virtue of a hindsight perspective that inaccurately gauges the strength of the evidence and misdescribes the conclusions that the officers would have reached if they had conferred in advance.

What goal does the constructive-knowledge rule serve? In the context of corporate criminal liability, courts have said that employees' knowledge may be aggregated to show that a corporation "knew" the sum of that information, even if the employees did not communicate with each other.[12] By treating the corporation as if it had that knowledge, and by imposing criminal liability accordingly, the law creates an incentive for the corporation to establish centralized information structures that will allow the managers to minimize subordinates'

9 *Gillette*, 245 F.3d at 1035 (Alsop, J., dissenting) (quoting United States v. O'Connell, 841 F.2d 1408, 1419 (8th Cir. 1988)). For further discussion of the various ways in which the courts have described the preconditions for applying the constructive-knowledge rule, see *infra* notes 97–104 and accompanying text.

10 *Gillette*, 245 F.3d at 1034 (majority opinion).

11 Maryland v. Pringle, 540 U.S. 366, 371 (2003).

12 *See, e.g.*, Thomas A. Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH. L. REV. 210, 212–17 (1997).

criminal behavior. Belief has little importance in this context. That no single corporate actor has organized the information so as to be aware of any harmful conduct does not mean that none is occurring. It makes sense to force the corporation to take preventive steps, even if the cost of developing a formal coordination mechanism is significant.

Fourth Amendment law is not an area that abounds in formalities. All kinds of searches and arrests can be conducted without a warrant or any other explanation that commits the police in advance to some particular description of the state of their knowledge and the basis for their action. And with good reason—time devoted to recording what an officer believes and why he believes it would be time taken away from the investigation. Further, if the justification had to be formalized in advance, then a hastily recorded detail, entered inaccurately, could jeopardize the whole enterprise when it came to be reviewed in court. The proliferation of exceptions to the warrant requirement might even lead one to conclude that we abhor Fourth Amendment formalities and seek to reduce them. When the officers' knowledge is dispersed and fragmented, however, there are good reasons for requiring enough formality to unify that information. When officers are "working closely together," the time and resources needed to exchange information are insignificant, but the value of that exchange is enormous. A reasonable belief is the requirement that brings probable cause into being. If grounds for probable cause can be assembled after the fact, then on some occasions the police may decide to act first in the hope of finding support later. A formal requirement that the police confer in advance would cement the basis for probable cause, and might also produce additional arrests in cases where no officer believed she had seen enough to justify that step.

More than half of the federal circuits have adopted some version of the constructive-knowledge rule, but they have not agreed about its limits.[13] Moreover, because it appears to have arisen through a misinterpretation of the collective-knowledge rule, and has so far been treated as an instance of that rule, there has been little effort to articulate an independent rationale for this new doctrine. In what follows, I address its origins, status, and implications. Part I discusses the development of the collective-knowledge rule and the rise of its new vari-

13 *See, e.g.*, Burrell v. McIlroy, 423 F.3d 1121 (9th Cir. 2005); United States v. Cook, 277 F.2d 82 (1st Cir. 2002); United States v. Colon, 250 F.3d 130 (2d Cir. 2001); United States v. Sawyer, 224 F.3d 675 (7th Cir. 2000); United States v. Kye Soo Lee, 962 F.2d 430 (5th Cir. 1992); United States v. Kapperman, 764 F.2d 786 (11th Cir. 1985); United States v. Wright, 641 F.2d 602 (8th Cir. 1981).

ant. The constructive-knowledge rule might be taken to depend on an "inevitable discovery" theory as its tacit premise. On that view, when the sum of each separate officer's information is sufficient for probable cause, their knowledge should be aggregated because it would soon have been shared in any case. Part II reviews that argument's merits and limits, and concludes that it does not provide a satisfactory justification for the new rule.

Part III turns to administrative law for another perspective on joint decisionmaking. It might appear that the constructive-knowledge rule raises no novel concerns because imputation is a basic and routine aspect of all probable-cause analysis. "'Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis,'"[14] and so even when an officer acts alone, the court imputes her basis for a search or arrest, asking not what she actually thought but whether "'the circumstances, viewed objectively, justify [her] action.'"[15] What distinguishes the constructive-knowledge rule is that it treats the police as having conferred, and therefore credits them with having engaged in the kind of formal process of information-sharing that corporations are encouraged to conduct. Questions about the need to share information, to deliberate, and to articulate the rationale for an action loom large in judicial review of administrative decisionmaking, and this perspective provides additional reasons for questioning the premises of the constructive-knowledge rule. Finally, I conclude in Part IV by reflecting briefly on the implications of this discussion for the probable-cause calculus.

I. COLLECTIVE KNOWLEDGE AND CONSTRUCTIVE KNOWLEDGE

The collective-knowledge rule, the new rule's precursor, gained currency in the 1960s as an agency theory permitting an officer to instruct another to undertake a search or arrest.[16] The collective-knowledge rule focuses on the facts known by the first officer at the time of the instruction: those facts are imputed to the acting officer, so that one officer's actual knowledge becomes another's constructive knowledge, and probable cause is evaluated accordingly. Since the 1980s, however, the imputation rule has taken on a life of its own, as courts have begun to use the doctrine to permit searches and arrests

14 Ohio v. Robinette, 519 U.S. 33, 38 (1996) (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).

15 *Id.* (quoting *Whren*, 517 U.S. at 813).

16 *See, e.g.*, Williams v. United States, 308 F.2d 326, 327 (D.C. Cir. 1962). In some jurisdictions the rule is known as the fellow-officer rule. *See, e.g.*, Michalik v. Hermann, 422 F.3d 252, 260 n.7 (5th Cir. 2005).

when there is no instruction and no officer has probable cause. Under this new, supercharged version of the rule, which has been adopted in various forms by more than half of the federal circuits, probable cause may be analyzed by considering the aggregate knowledge of all officers "work[ing] together on an investigation."[17]

The traditional collective-knowledge rule is a relatively costless way of increasing a police department's efficiency. The rule allows police departments to delegate functions, deploy personnel, and exploit communications technology fully, instead of engaging in a burdensome duplication of tasks that would impede law enforcement. Once a member of the department has developed probable cause, others are qualified to use the end-product without being required to retrace the process first.

The rule frees up personnel so that the department can devote more time to information-gathering, can issue more directions to arrest at roll calls and via "be on the lookout" (BOLO) broadcasts, and can use the same number of officers to search for more suspects. By enhancing the portability of probable cause as a public good, the collective-knowledge rule decreases the cost of policing and affords the public more protection for the same price—and the rule produces this effect without diminishing the protections afforded by the probable-cause standard itself, because it applies only to instructions that are already supported by probable cause.[18]

The collective-knowledge rule thus conforms to a familiar pattern in Fourth Amendment doctrine. In general, the Supreme Court will approve any measure that allows law enforcement to gather evidence faster and more cheaply if the Court can persuade itself that the shortcut does not erode the probable-cause standard. More precisely, the Court holds law enforcement to the least demanding requirement that would apply to any actor seeking lawfully to perform the same

17 United States v. Terry, 400 F.3d 575, 581 (8th Cir. 2005); *see also* People v. Ramirez, 70 Cal. Rptr. 2d 341, 344 (Cal. Ct. App. 1997) ("[W]hen police officers work together to build 'collective knowledge' . . . *the important question is not what each officer knew . . .* but how valid and reasonable the probable cause was that developed in the officers' collective knowledge."); People v. Hardaway, 718 N.E.2d 682, 691 (Ill. App. Ct. 1999) ("Probable cause may be established by facts within the collective knowledge of police officers working together to investigate a crime even if those facts are not within the personal knowledge of the arresting officer.").

18 *See, e.g.*, State v. Soldahl, 15 P.3d 564, 568 (Or. 2000) ("The collective knowledge doctrine in no way undermines the probable cause requirement. The doctrine merely views law enforcement agencies as a unit. As a unit, officers may direct one another to carry out lawful police activities. However, the state retains the obligation at trial to establish that police action was initiated by an officer who had . . . probable cause.").

action for any reason and (in the case of a governmental actor) trying reasonably to respect the suspect's Fourth Amendment interests. The Court has stated many times that the probable-cause standard does not vary according to the offense, but requires a similar showing of proof in all cases, to help maintain the steady equilibrium produced by the Fourth Amendment's "accommodation of public and private interests."[19] But while the standard may impose a fixed cost on the public regardless of the crime under investigation, the ease or difficulty of meeting the standard varies according to how strictly the law constrains the options available to the police when gathering information to establish probable cause.

The Supreme Court tends to reject rules that would make it easier and cheaper to gather such information (and hence to establish probable cause), if the Court perceives those rules as promoting law enforcement interests at the expense of individual privacy, unsettling the balance struck by the Fourth Amendment. Therefore the courts have (largely) preserved the warrant requirement for searches of homes,[20] and, while permitting suspicionless searches in some limited contexts, have refused to allow the police to undertake such searches for "ordinary crime control."[21]

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19 Illinois v. Gates, 462 U.S. 213, 239 (1983); *see also* ALAN F. WESTIN, PRIVACY AND FREEDOM 67 (1967) ("When the American Republic was founded, the framers established a libertarian equilibrium among the competing values of privacy, disclosure, and surveillance."), *quoted in* Tracey Maclin, Katz, Kyllo, *and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 MISS. L.J. 51, 51 (2002); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869–76 (2001) (discussing the constancy of the probable-cause standard regardless of the offense). *But see* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 100–15 (1992) (discussing perjury by police to fabricate probable cause, thereby disrupting the equilibrium created by the Fourth Amendment).

20 *See, e.g.*, Georgia v. Randolph, 126 S. Ct. 1515, 1528 (2006); Kyllo v. United States, 533 U.S. 27, 31–33 (2001). *But see* New York v. Harris, 495 U.S. 14, 18 (1990).

21 City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000). The Court in *Edmond* noted that the "special needs" exception, allowing for search without probable cause or reasonable suspicion, could not be used to permit vehicle stops at checkpoints to search for narcotics: "[W]e [do] not credit the 'general interest in crime control' as justification for a regime of suspicionless stops," *id.* at 41 (quoting Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979)). Thus, given that "the primary purpose of the . . . checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment." If the police could throw up "roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Id.* at 41–42.

Conversely, when the Court takes the view that a rule would lower the cost of establishing probable cause without giving the police a free hand to regulate the public as they choose, by stopping, searching, and arresting citizens without sufficient cause, the Court has approved that rule. Thus, in addition to approving the collective-knowledge rule, which easily satisfies this requirement, the Court has also held that the police may try to develop probable cause by looking through a suspect's trash,[22] or by stopping suspects on a pretext (so long as there is support for the pretextual justification),[23] and that evidence gathered pursuant to a warrant is admissible in court so long as any lack of probable cause was not completely obvious on the face of the warrant.[24] In all of these instances, the Court has either taken the view that there is no search at all (in the case of trash on the curb)[25] or that the police are acting under constraint, and not according to their own lights, insofar as they are required to meet an objective standard that would justify the decision to stop a suspect[26] or to proceed on a warrant.[27]

But it is not clear that procedural constraints on information-gathering may be relaxed in these ways without affecting the balance between policing and privacy. Many of the disputes over recent changes in Fourth Amendment law have turned on disagreements about procedures that some have supported as lowering the cost of information-gathering, but that others have opposed as destructive of the people's right to be free from invasive searches.[28]

The constructive-knowledge rule raises just this problem. It diminishes the cost of information-gathering (though not significantly), because the rule makes it unnecessary for officers to share

22 California v. Greenwood, 486 U.S. 35, 37–40 (1988).

23 *See* Whren v. United States, 517 U.S. 806, 811–13 (1996); *see also* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) ("[The police officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.").

24 *See* United States v. Leon, 468 U.S. 897, 923 (1984).

25 *See Greenwood*, 486 U.S. at 39–44.

26 *See Whren*, 517 U.S. at 817–18.

27 *See Leon*, 468 U.S. at 923.

28 *Compare, e.g., Greenwood*, 486 U.S. at 40–41 (holding that no search occurred, and hence neither probable cause nor reasonable suspicion was required for police to retrieve suspect's trash, left on the curb, and noting that "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public"), *with id.* at 46 (Brennan, J., dissenting) ("[M]embers of our society will be shocked to learn that the Court, the ultimate guarantor of liberty, deems unreasonable our expectation that the aspects of our private lives that are concealed safely in a trash bag will not become public.").

their information so long as they collectively know enough to satisfy the probable-cause standard. But unlike its precursor, the constructive-knowledge rule alters the Fourth Amendment balance and may weaken the probable-cause standard. Traditional doctrine requires that probable cause must be analyzed from "'the standpoint of an objectively reasonable police officer,'"[29] but as already noted, under the new rule the analysis may hinge on a purely constructive belief; thus the "objectively reasonable" assessment may be one that no officer was actually capable of forming. That alteration is significant because probable cause may depend not only on knowing certain facts about the suspect, but also on understanding why those facts, taken together, are incriminating—particularly when they might not be incriminating if viewed separately.[30] Moreover, because it foils the application of the exclusionary rule, the constructive-knowledge rule creates the risk, at least in some circumstances, that police officers may make an arrest knowing that they lack probable cause, but believing that other officers will likely have information that renders the arrest permissible.

Courts adopting the constructive-knowledge rule have rarely stopped to explain why unshared knowledge may be aggregated. These courts generally purport to be applying the collective-knowledge rule in its traditional form, and even when they acknowledge that they are not merely imputing information by means of an instruction, the courts do not articulate any clear rationale for this extension of the rule. Why this silence? The simplest explanation is that in its traditional form, the collective-knowledge rule uses very broad language which, though applied restrictively, might be misunderstood to permit imputation of knowledge without any communication between officers.

Additionally, though no court has said as much, the rule might in some instances be rationalized by analogy to "inevitable discovery"—another rule that lowers the cost of information-gathering, arguably at

29 Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Ornelas v. United States, 517 U.S. 690, 695 (1996)).

30 *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 9–10 (1989) (noting that detention was permissible even though "[a]ny one of [the relevant] factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel [and] 'innocent behavior will frequently provide the basis for a showing of probable cause'" (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983))); United States v. Woodrum, 202 F.3d 1, 7 (1st Cir. 2000) ("[A] combination of independently innocent behaviors and circumstances . . . can create reasonable suspicion in certain cases.").

the expense of individual privacy.[31] Just as information collected during an illegal search may be admitted into evidence on the ground that it would inevitably have been obtained during a permissible search that the police were going to initiate, a search or arrest on insufficient cause might be regarded as a mere error in timing, under the theory that all of the officers present at the scene would soon have shared their observations, providing sufficient cause for the challenged action. This Part discusses the rise of the collective-knowledge rule and the spin-off of the constructive-knowledge rule. The next Part turns to the question of "inevitable discovery."

A. The Development of the Collective-Knowledge Rule

The collective-knowledge rule was created some forty years ago to serve an agency function. When an officer sends out a message deputizing others to act for him, the recipients are treated as standing in his shoes and sharing his knowledge, and so the validity of the arrest

31 *See* Nix v. Williams, 467 U.S. 431, 444 (1984) ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then . . . the evidence should be received [rather then being suppressed under the exclusionary rule]."). For further discussion, see *infra* Part II.

The collective-knowledge doctrine for corporate criminal liability offers another possible explanation for the courts' transformation of the Fourth Amendment collective-knowledge rule into a constructive-knowledge rule. As discussed at *supra* note 12 and accompanying text, the corporate doctrine aggregates all employees' knowledge, whether or not it was shared with others, to make the corporation criminally liable if it "knew" that it was acting illegally. *See* United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987). The corporate doctrine and its Fourth Amendment counterpart are similar, but the former was created to force corporations to structure communication among employees so that they would be aware of potential illegal conduct and would act to prevent it, whereas the Fourth Amendment rule lacks any such normative justification. *See generally* RICHARD S. GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 4.01 (2006) ("[Collective liability based on aggregate knowledge] will help to ensure that employees in one corporate operation who gain information that is relevant to law compliance by other corporate employees will pass on the information to the employees who can use it to improve corporate law compliance."). Some courts using the constructive-knowledge rule may have relied unwittingly on the corporate rule, at least to the extent of allowing that mode of aggregation to color their understanding of "collective knowledge" in the Fourth Amendment context. *See, e.g.*, United States v. Brown, 322 F. Supp. 2d 101, 105 (D. Mass. 2004) ("In assessing probable cause, a court will be guided by the "collective knowledge" or "fellow officer" rule, under which the aggregate knowledge of all officers involved in the investigation will be imputed to the officer making the arrest.").

turns on whether that knowledge was sufficient for probable cause.[32] While the language of the rule varies from one jurisdiction to another, the courts have settled on a few key terms that reappear, with only minor variations, in each rendition.

One version, for example, says that "[p]robable cause may be established from the collective knowledge of the police rather than solely from the officer who actually made the arrest,"[33] while another says that "[p]robable cause may emanate from the collective knowledge of the police, though the officer who performs the act of arresting or searching may be far less informed."[34] Some courts have gone further, saying that under the collective-knowledge approach, the "*entire* knowledge of the police force is pooled and imputed to the arresting officer for the purpose of determining if sufficient probable cause exist[ed] for an arrest."[35]

These formulations say nothing about what must occur before knowledge may be deemed "collective."[36] But despite this talk about

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32 *See, e.g.*, United States v. Hensley, 469 U.S. 221, 231 (1985) ("[W]hen evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance.").

33 Thacker v. City of Columbus, 328 F.3d 244, 256 (6th Cir. 2003) (quoting Collins v. Nagle, 892 F.2d 489, 496 (6th Cir. 1989)).

34 Milline v. United States, 856 A.2d 616, 620 (D.C. 2004) (quoting United States v. Hawkins, 595 F.2d 751, 752–53 n.2 (D.C. Cir. 1978)); *see also* State v. Johnson, 682 So. 2d 385, 391 (Ala. 1996) (quoting the same language from *Boyd v. State*, 542 So. 2d 1276, 1284 (Ala. 1999)). For other statements of the doctrine, see 2 LAFAVE, *supra* note 8, § 3.5(c), at 289 n.81 (collecting cases). For a sardonic take on the doctrine, see *Albo v. State*, 477 So. 2d 1071, 1074, 1075 n.4 (Fla. Dist. Ct. App. 1985) (interpreting *Hensley* to mean that "just as the police may permissibly act upon their collective knowledge, so they are restrained by their collective ignorance," and therefore citing "what we choose to call the 'collective knowledge-collective ignorance' rule of *Whiteley* and *Hensley*"); *see also* Ott v. State, 600 A.2d 111, 114 (Md. 1992) (using the same term). On *Whiteley*, see *infra* note 49.

35 State v. Riley, 568 N.W.2d 518, 523 (Minn. 1997) (quoting Stalz v. Conaway, 319 N.W.2d 35, 40 (Minn. 1982)); *see also* Pyles v. State, 755 S.W.2d 98, 109 (Tex. Crim. App. 1988) ("[T]he sum of the information known to the cooperating agencies or officers at the time of an arrest or search by any of the officers involved is to be considered in determining whether there was sufficient probable cause."); State v. Orta, 604 N.W.2d 543, 549 (Wis. 2000) (noting that "the collective knowledge doctrine allows officers and their agencies to pool knowledge in determining reasonable suspicion").

36 A few courts have stated the rule more narrowly and precisely. *See, e.g.*, Baker v. State, 556 S.E.2d 892, 905 (Ga. Ct. App. 2001) (Eldridge, J., dissenting) ("The 'collective knowledge' rule is applicable to factual situations where the collective knowl-

collecting all knowledge known to the police, courts have traditionally applied the rule to a collectivity made for two—the officer who issued the instruction and the one who acted on it.[37] Their "collective knowledge" is simply the knowledge of the officer who issued the order.

Cases displaying the agency approach date back to at least the 1920s, but the doctrine did not start to gain traction until the 1960s.[38] The first use of the term "collective knowledge" in this context appeared in *Williams v. United States*,[39] a 1962 D.C. Circuit opinion by Warren Burger, then a circuit judge, whose summation of the rule is still frequently quoted.[40] Convicted of robbery and assault, the defen-

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edge of law enforcement officers *has been relayed to and used by* officers actually making or implementing a detention or seizure." (emphasis added)); State v. Soldahl, 15 P.3d 564, 567 (Or. 2000) ("The [collective-knowledge] doctrine . . . permits a police officer to act *if the officer reasonably relies on instructions* from an officer who has probable cause." (emphasis added)); Staats v. Brown, 991 P.2d 615, 633 (Wash. 2000) (Talmadge, J., concurring in part, dissenting in part) ("[U]nder the fellow officer rule, information *conveyed by one law enforcement officer to another* is sufficient to support probable cause" (emphasis added) (citing Torrey v. City of Tukwik, 882 P.2d 799 (Wash. Ct. App. 1994))).

37 Of course, where the instruction is issued through a bulletin or broadcast, there may be numerous officers on the receiving end—but the "collective knowledge" remains the knowledge of the officer who was the source of the instruction.

38 For example, in *Kratzer v. Matthews*, 206 N.W. 982 (Mich. 1926), the court upheld an arrest conducted in response to a telegram stating only that the sender had a warrant for the arrest of Frank Kratzer and directing the recipient to arrest him. *Id.* at 983. The court held that the arresting officer was not required to know the facts justifying the arrest: "The telegram was received from one whom the defendant knew to be a police officer at South Bend. He had a right to assume that the warrant was legally issued." *Id.* The dissent, pointing to an 1885 precedent, objected that the telegram should have "give[n] information sufficient to constitute reasonable cause to believe a felony had been committed," *id.* at 984, and added:

> It may be said that times have changed and old procedure is not swift enough to meet modern needs. It would seem sufficient answer to this to merely note that constitutional rights remain the same . . . . *It is no hardship to the officer to require him, before making an arrest, to have a reasonable quantum of knowledge of why he is making the arrest.*

Id. at 985 (Wiest, J., dissenting) (emphasis added). This last assertion sets out the view that the collective-knowledge rule rejects. In fact, since the time of *Williams*, courts have found this view so implausible that it is difficult to find any decision stating that the probable-cause standard could ever have been thought to require that an officer acting on another's instructions must know "why he is making the arrest."

39 308 F.2d 326 (1962).

40 *See, e.g.*, United States v. Colon, 250 F.3d 130, 135 (2d Cir. 2001); United States v. Terry, No. 2:02-CR-20135, 2002 WL 1803759, at *6 (W.D. Tenn. July 30, 2002); United States v. Rodriguez, 169 F. Supp. 2d 319, 325 (D. Vt. 2001); Carson v. Lewis, 35 F. Supp. 2d 250, 261 (E.D.N.Y. 1999).

dant in *Williams* argued that his arrest was invalid because the arresting officer "did not have adequate first hand information and was acting on [another officer's] instructions."[41] The court rejected this theory:

> [I]n a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest. The whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first hand knowledge of facts concerning a crime or alleged crime.[42]

While the "complex of swift modern communication" intensifies the dilemma, the concerns addressed here are relevant even for face-to-face communication, and arguably apply even to the "hue and cry" used in medieval times to pursue criminals.[43] In a fast-moving situa-

41 308 F.2d at 327. The court's characterization of Williams's position is potentially misleading. A rule requiring "first hand information" for an arrest would be unworkable, because no police department could operate effectively if arrests had to be based on evidence personally observed by the arresting officer. On appeal, Williams was represented by counsel from Arnold, Fortas & Porter, who presumably argued that the arresting officer lacked *any* information about the reasons for suspecting Williams of the crime.

42 *Id.*

43 The "hue and cry" was the means by which the victim of a crime alerted the neighborhood and sought help in pursuing the felon. *See* 2 Canute, c. 29 (1027), *reprinted in* THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 189 (A.J. Robertson ed. & trans., 1925) ("[I]f anyone comes upon a thief and of his own accord lets him escape without raising the hue and cry, he shall make compensation . . . or clear himself . . . [by stating] that he did not know him to be guilty of any crime. And if anyone hears the hue and cry and neglects it, he shall pay the fine for insubordination to the king . . . ."); Statute of Winchester, 13 Edw. I, c. 1, 4 (1285) ("Cries shall be solemnly made in all Counties, Hundreds, Markets, Fairs, and all other Places where great Resort of People is, so that none shall excuse himself by Ignorance").

To raise the hue and cry, it appears to have been sufficient to describe the suspect and the crime, without having to explain why the suspect was the person being sought. Records of false arrests in England date back to the fourteenth century, and in some of these cases, "the exact cause of the arrest is not specified." Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155, 156 (1982).

Hale states that "[t]he party, that levies [hue and cry], ought to come to the constable of the vill, and give him notice of a felony committed, and give him such reasonable assurance thereof as the nature of the case will bear." 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 100 (1736). It is unclear whether the "reasonable assurance" refers to the details of the felony, the grounds for suspecting the accused, or both. Hale goes on to list the details that the complainant must pro-

tion, the police may be pursuing several suspects at the same time. A requirement that others cannot take up the chase until they receive detailed information about every suspect, so that the pursuers understand why there is probable cause for each arrest, would be counterproductive. It would add an unnecessary barrier to the arrest process, protecting a right that is in no danger of being violated (because the pursuit is already justified by probable cause), and would simply ensure that fewer cases could be dealt with at once and that fleeing suspects would have more time to escape.

After its articulation in *Williams*, the collective-knowledge rule was quickly taken up by other courts,[44] and was eventually endorsed by the Supreme Court in *United States v. Hensley*,[45] which made it clear that the rule applies to reasonable suspicion as well as probable cause. *Hensley* involved a *Terry* stop of a driver identified in a "wanted" flyer. The suspect was indicted on a firearms charge, and he sought to suppress the evidence, arguing that the flyer provided no information that could create reasonable suspicion for the stop.[46] The Court held

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vide, but the list does not include the grounds for suspicion. Instead, Hale says that the complainant must describe the suspect as carefully as possible and that if the circumstances do not allow a description, the constable must "make *hue* and *cry* after such as may be probably suspected as being persons vagrant in the same night . . . ." *Id.* at 100–01. Hale's treatise on criminal law was published sixty years after he died in 1676, and so his work describes seventeenth-century practice.

Hawkins's early eighteenth-century treatise is no clearer about a requirement to spell out the grounds for suspecting the accused. *See* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 75 (Garland Publ'g, Inc. 1978) (1721) ("Hue and Cry is the Pursuit of an Offender from Town to Town till he be taken . . . . In order to rightly raise a Hue and Cry, you ought to go to the Constable of the next Town, and declare the Fact, and describe the Offender, and the Way he is gone . . . . Also every private Person is bound to assist an Officer demanding his Help for the taking of a Felon . . . ."); *see also* WILLIAM BLACKSTONE, 4 COMMENTARIES *291 ("The party raising [hue and cry] must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon"); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 623 n.198 (1999) ("The traditional hue and cry appears to have fallen into disuse in late eighteenth-century America. . . . To the extent that the hue and cry persisted in framing-era America, it may have been used primarily to convey information about wanted felons to adjoining counties, thus avoiding the cumbersome procedure of 'backing' warrants (i.e., having an arrest warrant issued in another county endorsed by a justice of the peace of the local county before it could be executed). Thus, the hue and cry may have been transformed into the nineteenth-century 'wanted' poster.").

44 *See, e.g.*, Lee v. United States, 376 F.2d 98, 100 n.3 (9th Cir. 1967); United States v. Herberg, 35 C.M.A. 253 (1965); State v. Wilson, 212 A.2d 75, 76 (Conn. 1965); Gilmore v. State, 283 A.2d 371, 378–79 (Md. 1971).

45 469 U.S. 221 (1985).

46 *Id.* at 223–26.

that even without that information, the flyer provided a sufficient basis for the stop:

> [W]hen evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance. In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction.[47]

Hensley reiterates *Williams*'s concern with speed and efficiency, now cast in terms of interjurisdictional communication. Notably, *Hensley* did not undertake any balancing analysis to assess the merits of the collective-knowledge rule—because there are no interests that require balancing. If an officer has probable cause to suspect someone of a crime and alerts others to that fact, his failure to relay the underlying details does not invade the suspect's liberty, privacy, or autonomy interests, nor does it encourage conduct that would jeopardize those interests on the part of other citizens.[48] Further, as *Hensley* makes clear, the rule operates symmetrically, upholding the arrest only if there was probable cause for the instruction.[49]

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47 *Id.* at 231.

48 To be sure, the collective-knowledge rule increases the number of arrests without probable cause, because if an officer mistakenly believes that she has probable cause and issues a call to other officers to look out for the suspect, the latter faces a greater likelihood of being apprehended when more officers are looking for him. But that observation merely shows that with the collective-knowledge rule in place, the ratio of invalid arrests remains the same as before: the rule magnifies the capture rate across the board, presumably applying to permissible and impermissible arrests in the same measure. That the rule does not *diminish* the ratio of arrests in the latter category, by comparison with the ratio of such arrests in a world without the rule, does not demonstrate that as a general matter, it increases the incidence of invalid arrests in a way that alters the Fourth Amendment balance between law enforcement interests and the right of the public to be let alone.

49 The Court had earlier addressed this aspect of the rule—briefly and without analysis—in *Whiteley v. Warden*, 401 U.S. 560 (1971). In *Whiteley*, the police had obtained an arrest warrant and issued a radio bulletin that led to the suspect's arrest, but the Court held that the arrest was invalid because the warrant was not supported by probable cause. *Id.* at 564–65. The Court simply stated, without reference to *Williams* or any other collective-knowledge decision, that (1) when responding to another officer's call for aid, an officer is "entitled to assume that [the request was

In essence, *Williams* and *Hensley* reasoned that once an officer has devoted time and resources to establishing probable cause, that product should be distributed widely, like any other public good that is relatively costly to produce and relatively cheap to transmit. Moreover, rapid circulation significantly enhances its value in this case: some kinds of information about a suspect may be quick to stale (her clothes, her means of transportation), and the suspect may be up to no good. The faster the information can be distributed, the more likely it is to produce results and to prevent further harm.

Hensley illustrates this point even more clearly than *Williams*, given that the information was circulated in a flyer (allowing it to reach a wider audience than an oral instruction normally would) and was sent to numerous other jurisdictions (not just other officers in the same department). Ensuring that a bulletin properly articulates a sufficient legal basis for apprehending a suspect is potentially costly in terms of time and human resources, and if the validity of the arrest turned on the inclusion of those details, then inevitably some arrests would be rendered illegal merely because of a clerical error on the sender's part.[50] Because the precondition for the rule is that probable cause must already exist, the savings produced by the rule comes from reduced costs in apprehending the suspect, rather than any burden on the general public in the form of diminished privacy. The collective-knowledge rule thus offers an especially pure example of a rule that increases the efficacy of policing without tipping the Fourth Amendment balance.

Rules fitting the same general description, though arguably with less innocuous effects on that balance, have been filling the Fourth Amendment hornbooks ever since the exclusionary rule was adopted.

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based on] information requisite to support . . . probable cause"; and (2) "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.* at 568. For further discussion of *Whiteley*, see 2 LAFAVE, *supra* note 8, § 3.5(b).

50 The situation would be different from the problem of typographical errors in affidavits, which do not normally invalidate warrants. *See, e.g.*, Green v. State, 799 S.W.2d 756, 757–58 (Tex. Crim. App. 1990). *But see* State v. Endo, 924 P.2d 581, 585 (Haw. Ct. App. 1996). That is because probable cause for a warrant is premised on what the affiant knows, and while typographical errors may misstate her knowledge, they do not alter it. Indeed, the usual procedure in such cases is to have the affiant put on testimony to correct the errors and to show that she did have sufficient information for probable cause. But if the acting officer's understanding of the basis for an arrest were a necessary precondition for validating the arrest, and that understanding rested on erroneous details, the suspect might plausibly argue that the arresting officer lacked probable cause.

One line of decisions, following *United States v. Leon*,[51] blocks the application of the exclusionary rule unless it would have a "deterrent effect" in preventing illegal searches.[52] To understand the effect of this reasoning, consider the result that would follow if all invalid warrants, and not just those that are clearly invalid on their face, fell within the exclusionary rule. A department that sought proactively to steer clear of the rule, rather than just plunging ahead and taking its chances, would have the burden of establishing in every instance that the warrant was beyond reproach. The department would have to do the same in cases involving reliance on apparently (but not incontrovertibly) valid statutes,[53] consent to search granted by apparently (but not incontrovertibly) competent persons,[54] entry based on reasonable (but erroneous) belief that the owner of the house had consented,[55] and so on. Perhaps a department that earnestly pursued that course could significantly improve its accuracy for cases in the gray zone. But given that most of the relevant violations appear legitimate at first glance, the gray zone is large.

The cost to the department of such a policy would vastly outweigh its benefits, because it would require verification for many cases that appear to raise no concerns and that prove, on inspection, to raise no concerns. The practical result of the *Leon* analysis, then, is to create yet another context for the Fourth Amendment's requirement of reasonableness: so long as a department's investigatory procedures require a level of care and thoroughness that is reasonably calculated to establish probable cause in the normal case, those procedures are

51 468 U.S. 897 (1984).

52 *See, e.g.*, Arizona v. Evans, 514 U.S. 1 (1995).

53 Illinois v. Krull, 480 U.S. 340 (1987). The Court balanced "the likelihood of . . . deterrence [of future unlawful police conduct] against the costs of withholding reliable information from the truth-seeking process." *Id.* at 347. That cost may be understood to refer not only to the harm suffered by the victim, and future potential victims, because of a failed prosecution in the case at hand, but also more generally to the additional expenses (in time, money, and human resources) borne by the police if they are prohibited from using the challenged means of establishing probable cause during the pre-trial truth-seeking process.

54 United States v. Grap, 403 F.3d 439, 444–45 (2005).

55 Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) ("The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.").

sufficient for probable cause in every case that looks like a normal one to a "reasonably well trained officer."[56]

Rather than having to raise the cost generally of its information-gathering protocols to improve its performance at the margin, the department is permitted, for the price of the usual probable-cause determination, to keep those determinations that appear to meet the standard and that would only have been seen to be wanting at an unreasonable investigatory cost.[57] In short, *Leon* and its progeny effectually create a regime in which the process of establishing probable cause comes at a relatively stable cost, and by adhering to a basic standard of care, the department ensures that whatever that process produces is admissible in court.

Another line of cases, following *Katz v. United States*,[58] holds down investigatory costs by limiting a search to those places and activities in which the suspect has a "reasonable expectation of privacy."[59] In these cases, the Court has reasoned that if third parties might lawfully occupy a vantage point where they could see, hear, or smell the incriminating details that create sufficient cause, then law enforcement officials are not engaged in a search, and therefore need no legal justification, when they position themselves and use perception-enhancing devices to collect the same information.[60]

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56 *Leon*, 468 U.S. at 922 n.23.

57 One might respond that the department is not being asked to undertake costlier investigations; it is simply being told that when it errs, the product is off limits. The pragmatic solution to that message would be to forsake the few false positives rather than curtail other activities for the very marginal benefit of identifying them in advance and finding an alternative means of establishing probable cause in those cases. But *Leon* suggests that when the usual level of care produces generally acceptable results, and the department cannot reasonably work proactively to improve its performance, exclusion achieves nothing that § 1983 liability would not similarly achieve, and thus exclusion would be a windfall just as § 1983 liability would be in such a case. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910–15 (1991).

58 389 U.S. 347 (1967).

59 *Id.* at 360 (Harlan, J., concurring).

60 *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 229 (1986) (flyover photographs "from altitudes of 12,000, 3,000, and 1,200 feet" using "precision aerial mapping camera"); United States v. Place, 462 U.S. 696, 707 (1983) ("canine sniff"); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion) (plain view); *see also supra* notes 22, 28 and accompanying text (discussing the Court's willingness to approve rules that lower investigatory costs without compromising citizens' rights to be free from invasive searches).

While the expense of such tactics may not be negligible,[61] they may still represent significant savings in time and personnel, given that it might take much longer to establish sufficient cause through other channels, if that is even possible at all. At a minimum, the police have a potentially cheaper option to consider when developing an investigatory plan. This line of cases yields a principle that complements the lesson of *Leon* and its progeny: if an ordinary citizen could legally obtain the information, the police are not required to jump through additional bureaucratic hoops for the same thing.[62]

Numerous other holdings have reinforced these basic principles. *Whren v. United States*[63] held that police may legitimately use a minor traffic violation as a reason to stop a vehicle when they suspect the driver of an unrelated offense but have no articulable basis for stopping him on that ground.[64] The result is to lower investigatory costs by allowing the police to use whatever legitimate rationale comes most readily to hand to start developing probable cause, rather than requiring police to wait until they have a justification related to the offense they actually seek to investigate.[65]

Similarly, *Murray v. United States*[66] held that if the police have probable cause for a warrant but conduct a warrantless search that yields additional incriminating evidence, this "tainted" evidence may be "sanitized" if they obtain a warrant (on the basis of the information they already had before the search) and see the same evidence when they return.[67] This holding reduces costs by allowing the police to conduct a search first and then to decide whether to obtain a warrant. That option may not only eliminate bureaucratic hassle, if the search is fruitless, but may also let the police save for another day the information that would have been wastefully disclosed in an affidavit.

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61 *See, e.g.*, *Dow Chem.*, 476 U.S. at 242 n.4 (Powell, J., concurring in part and dissenting in part) ("The camera used 'cost in excess of $22,000.00.'" (quoting Dow Chem. Co. v. United States, 536 F. Supp. 1355, 1357 n.2 (E.D. Mich. 1982))).

62 *See supra* cases cited in note 60.

63 517 U.S. 806 (1996).

64 *Id.* at 813–16.

65 The same thing has long been permitted in the context of prosecutions, without the need for any newly elaborated doctrine to justify it. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 588–99 (2005). Just as these Fourth Amendment rules offer ways to economize on the cost of developing probable cause, a similar analysis may lead the prosecutor to economize on the cost of prosecution by targeting tax evasion instead of racketeering—most saliently because it may be easier to develop probable cause for the former by comparison with the latter.

66 487 U.S. 533 (1988).

67 *Id.* at 541.

These principles also apply to rights under the Fifth and Sixth Amendments related to the information-gathering process. *Miranda v. Arizona*[68] held that during an interrogation of a suspect in custody, the police are required only at the outset to inform the suspect of her rights and to ask her if she understands them.[69] The police are then free to try to induce the suspect to talk by (for example) lying about the availability of incriminating evidence. The price of uttering the *Miranda* formula is sufficient to render admissible any statement the suspect subsequently makes. Again, the determination of whether a suspect made a request for counsel is an "objective inquiry," and so the police are not required to cease questioning "if . . . a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel."[70] This rule spares the police the cost of having to accede to a statement that fails to "meet the requisite level of clarity,"[71] and in effect it evaluates a request to the police as if it were a statement made to some member of the public. Where the latter would not hear clarity, the police are not required to do anything at all to ascertain the suspect's meaning, and may proceed with their questions. But the objective analysis that treats all interlocutors as fungible overlooks the fact that suspects being interrogated often express themselves more deferentially and tentatively than they would to a member of the public, and so the utterance does not have the same meaning in these two hypothetical speech situations.[72]

Like the collective-knowledge rule, these rules reflect an attempt to remove procedural and logistical barriers to searching and information-gathering, so long as the basic balance between the interests of the police and the public remains undisturbed. But whereas the collective-knowledge rule applies only when probable cause has already been established, these rules relate to the means of gathering information and developing probable cause, and so they raise more difficult questions about whether they leave that balance undisturbed. In

68 384 U.S. 436 (1966).

69 *Id.* at 444.

70 Davis v. United States, 512 U.S. 452, 459 (1994).

71 *Id.*; *see also id.* at 461 ("[The objective rule] provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information.").

72 *See id.* at 469–70 (Souter, J., concurring) (noting that some suspects are "sufficiently intimidated by the interrogation process [and] that the ability to speak assertively . . . abandon[s] them"); LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME 54–62 (2005) (discussing *Davis* and the problems it raises in relation to studies on pragmatics by linguists).

that respect, they raise concerns similar to those presented by the constructive-knowledge rule.

B. From Collective Knowledge to Constructive Knowledge

In the 1980s, courts began to apply the conventional collective-knowledge rule in ways that make it possible to validate an arrest even when the acting officer lacks probable cause and has received no instruction. In some instances, another officer has probable cause for the arrest but has issued no instruction. Relatedly, as we saw in *Gillette*, another officer might believe that he has consent to search, and that belief is then imputed to another officer who received no instruction to conduct a search.[73] Other cases feature several officers whose "collective knowledge" amounts to probable cause only when aggregated, because none of them, taken individually, has sufficient information to justify the arrest.[74] The position that such arrests are lawful has gained a significant degree of acceptance in state and federal courts, particularly in the last ten or fifteen years.

While there are important conceptual and normative differences between collective knowledge and constructive knowledge, the cases involving these rules are so fact-specific that in some instances they may be classified under the appropriate rule only after a careful review. Therefore it is not surprising that courts have sometimes claimed to be applying the latter rule when actually applying the former, and vice versa.

The constructive-knowledge rule seems to have received a significant boost from a decision displaying that kind of confusion—*United States v. Bernard*,[75] decided by the Ninth Circuit in 1980. *Bernard* involved an arrest for methamphetamine manufacture after three different DEA agents surveilled the defendant's mobile home at various times. The court painstakingly recited the details about what each agent saw and when,[76] and held that there was probable cause for the

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73 *See supra* notes 2–9 and accompanying text. In fact, the officer who obtained the homeowner's consent to search his vehicle "testified during the suppression hearing that he believed that the truck belonged to the [homeowner], but he also testified that his plan was to ascertain the ownership of each vehicle on the premises before searching that vehicle." United States v. Gillette, 245 F.3d 1032, 1033 (8th Cir. 2001). Thus while he might reasonably have believed that he had consent to search the pickup that turned out to belong to Gillette, according to the officer's testimony he would not have conducted the search that his fellow officer conducted unless Gillette also consented. *See id.*

74 *See infra* notes 80–101 and accompanying text.

75 623 F.2d 551 (9th Cir. 1980).

76 *See id.* at 553–54.

arrest because "'[t]he officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all.'"[77] This broad holding was unnecessary because two of the agents shared their observations and "concluded that the suspects were using the mobile home as a laboratory to produce methamphetamine."[78] One of the pair then reported this conclusion to the third agent, who authorized Bernard's arrest.[79] Although there was no express instruction, the case is essentially the same as the other collective-knowledge cases: the arrest was based on the end-product of an analysis from an officer who had probable cause, and who did not relay the underlying details of the analysis.

Nevertheless, because of the way the court talked about imputing knowledge, *Bernard* helped to promote the constructive-knowledge approach. The decision was quickly cited in *United States v. Wright*,[80] in which the Eighth Circuit held that when a police officer found a firearm hidden in a closet during a protective sweep, it was "immediately apparent"[81] to him that the gun was incriminating, because he was to be credited with an ATF agent's knowledge that the suspect was an ex-felon. The court reasoned that the "*collective* knowledge of the officers on the scene" should be considered because "ATF special agents and local police officers were working closely together during the investigation."[82] The officer who "observ[ed] . . . the shotgun" therefore had probable cause to seize it "as evidence of another crime being committed in the presence of the officers, that is, receipt of a firearm by a convicted felon."[83]

Though "reluctant to impute the knowledge of one law enforcement officer to another" without communication or an order, the *Wright* court justified this move by pointing to "the apparent trend in

77 *Id.* at 561 (quoting Stassi v. United States, 410 F.2d 946, 952 n.7 (5th Cir. 1969)). *Stassi*, in turn, cited *United States v. Romero*, 249 F.2d 371 (2d Cir. 1957). *Romero* said that "[w]here the agents were working together and in cooperation were observing the activities of the various participants *and informing each other of the progress of the conspiracy*, the knowledge of each was the knowledge of all." *Id.* at 374 (emphasis added). While *Stassi* did not include the italicized portion of this sentence, that language in fact applied to the circumstances in *Stassi*—as it also did, to a lesser extent, to the circumstances in *Bernard*. But the result of this circuitously derived partial quotation is that *Bernard* appeared to treat the teamwork of the police as a self-sufficient rationale for imputation, regardless of the degree of communication involved.

78 *Bernard*, 623 F.2d at 554.

79 *Id.*

80 641 F.2d 602 (8th Cir. 1981).

81 *Id.* at 606.

82 *Id.*

83 *Id.* at 607.

the case law."[84] For support, the court cited numerous cases applying the collective-knowledge rule in the conventional fashion;[85] the only case that even raised any question about broadening the rule was *Bernard*.[86] *Wright*, in turn, has helped the Eighth Circuit to develop a particularly robust constructive-knowledge case law,[87] and has encouraged other courts to treat the imputation of unshared knowledge as an uncontroversial application of the collective-knowledge rule. Other courts that have embraced the constructive-knowledge rule include the First,[88] Second,[89] Fifth,[90] Sixth,[91] Seventh,[92] Ninth,[93]

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84 *Id.* at 606 n.4.

85 *Id.* at 606–07.

86 *See id.* at 606.

87 Besides *Gillette*, discussed *supra* notes 2–9 and accompanying text, see *United States v. Twiss*, 127 F.3d 771, 774 (8th Cir. 1997) (applying the constructive-knowledge rule where an officer who arguably lacked probable cause ordered a search that yielded incriminating evidence; another officer working on the investigation had probable cause and his knowledge was imputed to the one who ordered the search) and *United States v. O'Connell*, 841 F.2d 1408, 1418–19 (8th Cir. 1988) (applying the constructive-knowledge rule where an officer conducted a *Terry* stop even though he was not "personally able to identify [the defendant] or aware of the significance of [the defendant's car], because other agents present on the scene had knowledge of both," and their knowledge could be imputed to the acting officer).

88 United States v. Cook, 277 F.3d 82, 86 (1st Cir. 2002) ("Officers who jointly make . . . [investigative] stops rarely will have an opportunity to confer during the course of the stop. Basing the legitimacy of . . . [a] stop solely on what the officer who first approaches the suspect knows, rather than on the collective knowledge of all of the officers who participate directly in carrying out the stop, thus makes little sense from a practical standpoint. . . . [W]hile . . . a broad rendition of the collective knowledge principle could promote illegal searches, . . . a far more limited application of the principle, one which takes into account only the knowledge of officers present at the scene and directly involved in effectuating a stop, is unlikely to encourage illegal police activity.").

89 United States v. Colon, 250 F.3d 130, 136 (2d Cir. 2001) ("[A]pplication of the imputed knowledge doctrine requires that at some point along the line, some law enforcement official—or perhaps some agglomeration of such officials—involved must possess sufficient information to permit the conclusion that a search or arrest is justified.").

90 United States v. Kye Soo Lee, 962 F.2d 430, 435 (5th Cir. 1992) ("It is not necessary that the arresting officer himself have personal knowledge of all of the facts. . . . '[P]robable cause can rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest, when there is "some degree of communication between the two."'" (quoting United States v. Ashley, 569 F.2d 975, 983 (5th Cir. 1978))).

91 Collins v. Nagle, 892 F.2d 489, 495 (6th Cir. 1989) (explaining that even where facts relevant to the determination of probable cause were not shared, knowledge of investigators working together on the scene is "mutually imputed").

92 United States v. Sawyer, 224 F.3d 675, 680 (7th Cir. 2000) ("When law enforcement officers are in communication regarding a suspect, the knowledge of one officer

and Eleventh[94] Circuits, district courts in the Fourth and Tenth Circuits,[95] and several state courts.[96]

Courts adopting the rule generally limit its application by attaching the proviso that officers must be "working closely together,"[97]

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can be imputed to the other officers under the collective knowledge doctrine."); *see also* United States v. Nafzger, 974 F.2d 906, 911 (7th Cir. 1992) ("[W]hen officers are in communication with each other while working together at a scene, their knowledge may be mutually imputed even when there is no express testimony that the specific or detailed information creating the justification for a stop was conveyed . . . ."); United States v. Edwards, 885 F.2d 377, 383 (7th Cir. 1989) (imputing knowledge of one arresting officer to another because officers "made the arrest together").

93 Burrell v. McIlroy, 423 F.3d 1121, 1124 & n.2 (9th Cir. 2005) (officer who was asked only to watch suspect's apartment, and who observed no suspicious conduct, had probable cause to arrest; "[b]ecause the detectives were working in close concert, a court may consider the collective knowledge of these detectives in considering their beliefs concerning probable cause or reasonable suspicion").

94 United States v. Kapperman, 764 F.2d 786, 791 n.5 (11th Cir. 1985) (looking to collective knowledge of officers where there was "minimal" communication between officers).

95 United States v. Flowers, No. 02-40108-01-SAC, 2003 WL 356057, at *6 (D. Kan. Jan. 13, 2003) ("[T]he court will aggregate . . . [the investigating officers'] knowledge as this is a situation where two officers are working closely together . . . ." (quoting United States v. Shareef, 100 F.3d 1491, 1504 n.6 (10th Cir. 1996))); United States v. Hagerman, No. 1:02 CV 00106, 2003 WL 21135702, at *5 (W.D. Va. May 13, 2003).

96 *See, e.g.*, Smith v. State, 719 So. 2d 1018, 1022 (Fla. Dist. Ct. App. 1998); State v. Conley, 616 S.E.2d 174, 175 n.1 (Ga. Ct. App. 2005) ("Under . . . [the collective knowledge] doctrine, probable cause 'can rest upon the collective knowledge of the police when there is some degree of communication between them, instead of the arresting officer alone.'" (quoting Burgeson v. State, 475 S.E.2d 580, 583–84 (Ga. 1996))); State v. Landry, 729 So. 2d 1019, 1022 (La. 1999) (instructing trial court on remand that "the court may consider all of the information known collectively to the law enforcement personnel involved in the investigation" and that "'[p]robable cause can . . . be demonstrated through the collective knowledge of police officers involved in an investigation, even if some of the information known to other officers is not communicated to the arresting officer'" (quoting United States v. Butler, 74 F.3d 916, 921 (9th Cir. 1996))); People v. Davis, 660 N.W.2d 67, 70–71 (Mich. 2003) ("[N]o evidence existed that . . . [two officers] communicated to each other the information that they acquired from interviewing witnesses at the scene. Such a communication was not required. Under the collective-knowledge theory, the trial court properly considered the information that both officers possessed and found that the information, in its totality, constituted probable cause for defendant's arrest."); State v. Harper, No. 95-0380-CR, 1995 WL 490694, at *2 (Wis. Ct. App. July 5, 1995).

97 *See, e.g.*, *Flowers*, 2003 WL 356057, at *6 ("[T]he court will aggregate [the investigating officers'] knowledge as this is a situation where two officers are working closely together . . . ." (citing *Shareef*, 100 F.3d at 1504 n.6)); *Hagerman*, 2003 WL 21135702, at *5 ("Under the doctrine of collective knowledge, a defendant's consent to search is deemed known to other officers working closely together at the scene of an investigation, regardless of whether that fact is specifically communicated to all officers." (citing United States v. Gillette, 245 F.3d 1032, 1034 (8th Cir. 2001))).

"cooperating in an investigation,"[98] or working in "close time-space proximity."[99] The courts disagree about whether unshared knowledge may be imputed if there was no communication among the officers. Some courts have specified that there must be proof of "at least minimal communication" but no proof about what was actually said,[100] while others have said that no communication is required.[101]

There has been some disagreement about what is required to show that officers were working closely together. *See, e.g.*, *Gillette*, 245 F.3d at 1034 (concluding that officers were "work[ing] together on an investigation" when one officer was "searching the house" and another arrived in response to a call for backup and immediately "began to search [the] vehicles" in the driveway); *id.* at 1035–36 (Alsop, J., dissenting) (arguing that officers could not have been "working closely together" under those circumstances).

98 *See, e.g.*, Savino v. City of New York, 331 F.3d 63, 69 (2d Cir. 2003) (invoking collective-knowledge rule and stating that "'where law enforcement authorities are cooperating in an investigation . . . the knowledge of one is presumed shared by all'" (quoting Illinois v. Andreas, 463 U.S. 765, 772 n.5 (1983))); United States v. Igbara, No. 95-0380-CR, 2002 WL 31779812, at *2 (N.D. Ill. Dec. 9, 2002).

99 *See, e.g.*, *In re* M.E.B., 638 A.2d 1123, 1136 n.3 (D.C. 1993). The "time-space proximity" rationale appears to come from the first edition of LaFave's treatise cited *supra* note 8; *Smith*, 719 So. 2d at 1022–23; *Harper*, 1995 WL 490694, at *2 (unpublished decision); *see* 2 LAFAVE, *supra* note 8, § 3.5(c). LaFave, however, simply noted that a search is not "inevitably" impermissible when one officer makes an arrest that can be justified by the facts known to another officer who is "at hand." *Id.* § 3.5(c), at 288. LaFave did not state, as *Smith*, *Harper*, and *M.E.B.* do, that the knowledge of such a cooperating officer may always be imputed to the acting officer.

100 *See, e.g.*, United States v. Waldrop, 404 F.3d 365, 370 (5th Cir. 2005) ("some general communication" (citations omitted)); United States v. Terry, 400 F.3d 575, 581 (8th Cir. 2005) ("'some degree of communication'" (citations omitted)); United States v. Nafzger, 974 F.2d 906, 914 (7th Cir. 1992) (officers "were part of a coordinated investigation, and all were in close communication with the same command post"); United States v. Kye Soo Lee, 962 F.2d 430, 435 (5th Cir. 1992) ("'some degree of communication'" (citation omitted)); United States v. Wilson, 894 F.2d 1245, 1254 (11th Cir. 1990) ("at least minimal communication"); Collins v. Nagle, 892 F.2d 489, 495 (6th Cir. 1989) (same); Johnson v. State, 660 So. 2d 648, 654 (Fla. 1995) ("Under the fellow-officer rule, information shared by officers investigating a crime is imputed to any one of their number, even those from different agencies working together.").

101 *See, e.g.*, United States v. Terry-Crespo, 356 F.3d 1170, 1177 (9th Cir. 2004) ("[T]here is room in our precedent to conclude that the collective knowledge of law enforcement can support reasonable suspicion, even if the information known to others is not communicated to the detaining officer prior to a *Terry* stop."); *Gillette*, 245 F.3d at 1035–36 (Alsop, J., dissenting) ("A small number of cases have relaxed the communication requirement when the officers involved were "working closely together" during the execution of a search warrant."); United States v. Lata, No. CRIM. 03-224-01-JD, 2004 WL 783080, at *5 n.3 (D.N.H. Apr. 8, 2004) ("[K]nowledge is imputed . . . under the 'fellow officer rule' whether it was communicated to [the acting officer] or not." (citing United States v. Meade, 110 F.3d 190, 193–94 (1st Cir.

The reasoning behind the "minimal communication" rule appears to be that if a search or arrest occurs when officers are working together and exchanging information, it may be assumed that they shared any knowledge necessary to justify the action. For example, in *United States v. Nafzger*,[102] the Seventh Circuit explained that when officers, stationed in separate places, "were part of a coordinated investigation, and . . . were in close communication with the same command post," a *Terry* stop by one officer could be justified on the ground that another officer's suspicions were "presumably relayed [to] the command post," and then to the officer who conducted the stop.[103] The rule thus depends on the inference that if there was any communication at all, the relevant information was communicated. The inference may be rebuttable, but it is not clear how a defendant could rebut it. Further, if the police can prove that they were communicating, it is not clear why they should not also be required, at the same time, to put on evidence about what they communicated.[104]

The "no communication" rule appears to reflect a different premise—namely, that officers working together are acting as a "single organism."[105] Rather than presupposing a steady stream of communication among all participants, this characterization treats each individual as a component of a larger entity. On that view, it is appropriate to impute unshared information because the team shares a single goal and the members are working jointly to achieve it. Any action should be ascribed to the team as a whole and should be analyzed from that perspective. *Bernard*'s statement that " 'the knowledge of one of them

1997))); *Smith*, 719 So. 2d at 1023 ("[T]here was no request or directive to pat down [the suspect]" but "when [another] officer . . . possess[es] . . . probable cause [and] is in a close time-space proximity, evidence of a direct communications link between the officers is not . . . required.").

102 974 F.2d at 914.

103 *Id.*; *see also* United States v. O'Connell, 841 F.2d 1408, 1419 (8th Cir. 1988) ("[W]e presume the officers have shared relevant knowledge which informs the decision to seize evidence or to detain a particular person, even if the acting officer is unable to completely and correctly articulate the grounds for his suspicion at the time of the search.").

104 Of course, such a requirement might simply tempt the other officers to lie about what they said. A general concern about the constructive-knowledge rule is that it creates incentives for the police to perjure themselves. *See infra* note 133.

105 *See, e.g.*, United States v. Shareef, 100 F.3d 1491, 1504 n.6 (10th Cir. 1996); United States v. Flowers, No. 02-40108-01-SAC, 2003 WL 356057, at *6 (D. Kan. Jan. 13, 2003).

was the knowledge of all'"[106] aptly describes the essential premise of this analysis.

The introduction of the proviso that the officers must be working closely together might seem to signal the courts' awareness that the new rule goes beyond the traditional collective-knowledge rule, and requires additional justification. Courts have failed to offer any new rationale, however, and even in decisions with split panels, the majority simply avoids responding to the dissenter who demands a rationale.[107] Instead, the courts proceed as if they are simply following a well-established rule.

However, the efficiency justifications for the collective-knowledge rule have little to offer in support of the constructive-knowledge rule. The benefits flowing from the new rule occur by chance and cannot be integrated into a departmental protocol for conducting searches and arrests. The rule does not enhance the portability of probable cause generally, so that police departments may improve their search and communications procedures; instead, the rule simply treats a particular officer, *ex post*, as having had probable cause when it would otherwise have been lacking. The rule does not help police departments to plan their deployment of personnel, because the rule's very premise is that the acting officer did not know what the others knew, and therefore could not have known in advance whether his action would prove to have been permissible.

Hensley, *Leon*, *Katz*, and *Whren* all suggest ways that the department can conserve costs when developing procedures to establish probable cause,[108] but the constructive-knowledge rule offers no such

106 United States v. Bernard, 623 F.2d 551, 561 (9th Cir. 1980) (quoting Stassi v. United States, 410 F.2d 946, 952 n.7 (5th Cir. 1969)); *see also* State v. Soldahl, 15 P.3d 564, 568 (Or. 2000) (characterizing law-enforcement team as a "unit"); *supra* note 77 and accompanying text (discussing the imputation of knowledge in both *Stassi* and *Bernard*).

107 *See, e.g.*, United States v. Gillette, 245 F.3d 1032, 1035 (8th Cir. 2001) (Alsop, J., dissenting) ("Collective action involves the exchange of information and instructions, and in most instances the collective knowledge theory simply allows one officer to accept facts or directives communicated by another officer at face value and to take appropriate action based on that communication."); Woodward v. State, 668 S.W.2d 337, 355 (Tex. Crim. App. 1982) (Teague, J., dissenting) ("[W]e might as well rip out of our law the provisions of the Fourth Amendment to the Federal Constitution and Art. I, Section 9, of the Texas Constitution, as well as cease using in our legal vocabulary the phrase 'probable cause.'"); White v. Commonwealth, 481 S.E.2d 486, 491 (Va. Cir. Ct. 1997) (Elder, J., dissenting) ("Fourth Amendment cases dealing with the 'collective knowledge' of police officers require that police officers actually communicate with each other *before* knowledge will be imputed from one to another."). In each instance, the majority chose not to engage these objections.

108 *See supra* notes 51–64 and accompanying text.

advantages. To be sure, when the rule applies, it spares the officers the effort of sharing their observations, and it gives them the benefit of the doubt by assuming that if they had conferred, they would have analyzed the facts correctly. But the rule cannot generate a means of generally lowering those costs, which in any case are usually trivial compared to most other investigatory costs, such as interviewing witnesses, gathering and analyzing evidence, and getting a warrant.

Moreover, the constructive-knowledge rule subtly but significantly changes the meaning of "probable cause." The question of whether the "'facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause"[109] has long been taken to mean that the court should look to a reasonable officer, standing in the place of the one who took the disputed action and knowing the same facts.[110] Courts have only occasionally felt obliged to explain that probable cause must be focalized[111] through the perspective of the acting officer,[112] but the principle may be gleaned from nearly every formulation of the probable-cause standard.

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109 Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)). For earlier formulations, see, for example, *Carroll v. United States*, 267 U.S. 132, 161 (1925) ("'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient [for probable cause].'" (quoting Stacey v. Emery, 97 U.S. 642, 645 (1878))) and *Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 545 (1860) ("Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.").

110 Whren v. United States, 517 U.S. 806, 815 (1996) ("While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable–an exercise that might be called virtual subjectivity.").

111 Focalization is a term used in narratology to refer to the presentation of a scene through the subjective perception of a character. *See* GERALD PRINCE, A DICTIONARY OF NARRATOLOGY 31–32 (rev. ed. 2003).

112 For opinions stating explicitly that probable cause must be analyzed from the perspective of the actor who made the arrest, see, for example, Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) ("This Court repeatedly has explained that 'probable cause' to justify an arrest means facts and circumstances *within the officer's knowledge* that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." (emphasis added)); *Carroll*, 267 U.S. at 161–62 ("'[G]ood faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable.'" (quoting Director General v. Kastenbaum, 263 U.S. 25, 28 (1923))); United States v. Parra, 402 F.3d 752, 763–64 (7th Cir. 2005) ("[C]ourts evaluate probable cause 'not on the facts as an omniscient

The Supreme Court has recently repeated that "'[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'"[113] A "belief" is a mental act or condition, and hence it requires a mind capable of entertaining the thought.[114] While there may be a place for thoughts without a thinker in the Buddhist ecology of mind,[115] Fourth Amendment law has not traditionally depended on the view that an opinion or belief can exist without a specifiable agent whose reasonableness may be assessed.[116] Thus it would seem that if the facts creating probable cause were not apparent to any particular observer, no reasonable officer can be posited who could reach a conclusion based on those facts, and so probable cause is lacking.

Finally, it is not even clear what limit is entailed by the requirement that officers must be "working closely together" or "cooperating." As with the collective-knowledge rule before its transmutation, these provisos have generally been applied more narrowly than their

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observer would perceive them but on the facts as they would have appeared to a reasonable person *in the position of the arresting officer*—seeing what he saw, hearing what he heard.'" (quoting Mahoney v. Kesery, 976 F.2d 1054, 1057 (7th Cir. 1992))); United States v. Rivera, 370 F.3d 730, 733 (8th Cir. 2004) ("We evaluate probable cause not from the perspective of an omniscient observer, but on the facts as they would have appeared to a reasonable person in the position of the arresting officer."); Earles v. Perkins, 788 N.E.2d 1260, 1265 (Ind. Ct. App. 2003) (citing the same language from *Marshall v. Teske*, 284 F.3d 765, 770 (7th Cir. 2002)).

113 *Pringle*, 540 U.S. at 371 (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949), in turn quoting *Carroll*, 267 U.S. at 161, in turn quoting McCarthy v. De Armit, 99 Pa. 63 (Pa. 1881)).

114 *See, e.g.*, BLACK'S LAW DICTIONARY 164 (8th ed. 2004) (defining "belief" as "[a] state of mind that regards the existence of something as likely or relatively certain"); A COMPANION TO THE PHILOSOPHY OF MIND 15 (Samuel Guttenplan ed., 2001) ("[F]or particular items of consciousness or attitudes, it is simply impossible to have an action without an agent. . . . [W]e cannot conceive of . . . a subjectless belief."); DICTIONARY OF COGNITIVE SCIENCES 37 (Olivier Houdé ed., 2004) ("In everyday usage, a *belief* is a certain psychological state that leads the subject to assent to a given representation whose epistemic status is unsure or doubtful.").

115 *See, e.g.*, MARK EPSTEIN, THOUGHTS WITHOUT A THINKER (1995); W.S. Waldron, *Buddhist Steps to an Ecology of Mind: Thinking about 'Thoughts Without a Thinker,'* 34 EASTERN BUDDHIST 1 (2002); *cf.* KARL POPPER, OBJECTIVE KNOWLEDGE 108–09 (1979) ("Knowledge in the objective sense is *knowledge without a knower*: it is knowledge without a knowing subject.").

116 *See, e.g.*, United States v. Gillette, 245 F.3d 1032, 1035 (8th Cir. 2001) (Alsop, J., dissenting) ("Although . . . [we] often refer to the 'collective knowledge' of the officers, the term 'collective knowledge' is misleading because as a practical matter individual officers cannot know anything collectively. Individual officers, on the other hand, can *act* collectively, and the real issue in our collective knowledge cases is whether a particular search or seizure is reasonable within the meaning of the Fourth Amendment in light of any collective action in which two or more officers were engaging.").

potentially broad language might seem to permit. In most cases, the officers are within each other's line of vision, or in communication, or both. But again, as with the collective-knowledge rule, some courts have attended to the language rather than the traditional application. We saw at the outset that in *Gillette*, the court validated a search by an officer who had no basis for believing it was permissible and who was not in proximity to his colleagues.[117] The court even went so far as to say that the officers were "work[ing] together"[118] (in this case dropping the word "closely" from the requirement). Another court upheld several officers' seizure of a suspect on the ground that another officer, who though absent was "working in a joint assignment" with them, turned up shortly afterwards to supply his evidence.[119] These examples show what the future of the constructive-knowledge rule will look like if the current restrictions evaporate. Once the requirement is simply that the officers must be working towards a shared goal, the opportunities for imputation expand dramatically. Information gathered remotely could be deemed available to other officers, making the team something like *Star Trek*'s Borg Collective, whose group consciousness allows all members, no matter how widely separated, to share their perceptions and thus to adapt almost instantaneously to new conditions.

Gillette is also instructive because it shows how the constructive-knowledge rule interacts with other Fourth Amendment rules. The court attributed to one officer the knowledge that would have supported a "reasonable mistake" by one of the others.[120] If constructive knowledge may be used to impute the basis for a reasonable mistake about a place to be searched, the same doctrine might justify other reasonable mistakes—about a suspect's identity, or a person's authority, competency, or willingness to consent to a search, for example. The relevant question would be whether the team, in the aggregate, had observed details that would justify the acting officer's mistake. What is true for probable cause is usually also true for reasonable suspicion, and so constructive knowledge might justify a *Terry* stop as readily as a full-scale search. Thus under *Whren*, even if only one

117 *See id.* at 1033–34 (majority opinion).

118 *Id.* at 1034.

119 People v. Starr, 634 N.Y.S.2d 132, 134 (N.Y. App. Div. 1995). In this case, one officer observed suspicious conduct, others seized the suspect without any knowledge of what their colleague had seen, and "minutes later" the first officer arrived and described his own suspicions. *Id.* at 133. Arguably, the officers who seized the suspect had their own grounds for acting. But the court did not take that view, and instead justified the seizure on the basis of the first officer's knowledge. *Id.* at 133–34.

120 *Gillette*, 245 F.3d at 1034.

officer in the team knew of a valid pretext for a *Terry* stop, his knowledge could support a stop by any of the others. Of course, courts might reject these applications, though it is not clear on what ground. The constructive-knowledge rule is most likely to be invoked when the acting officer knew something, but not quite enough; otherwise the officer might not have acted in the first place. In light of these potential applications, the rule might achieve in the warrantless context what *Leon* does for search warrants—namely, the broadening of the scope of "reasonableness." Where an officer's belief (about probable cause or the basis for an exception to probable cause) is almost reasonable, he could be imputed with knowledge that would make it reasonable.

II. CONSTRUCTIVE KNOWLEDGE AND INEVITABLE DISCOVERY

A pragmatic—but ultimately incomplete—solution to the problem of constructive knowledge may be found in the "inevitable discovery" rule, which like the collective-knowledge rule, was percolating in the state and federal courts for some twenty years before it was endorsed by the Supreme Court in the mid-1980s.[121] Just as prosecutors may avoid the suppression of illegally acquired evidence by showing that the evidence would likely have been discovered through legal means, it might be argued that when officers are working together on an investigation, and are searching for evidence of criminal conduct, they will inevitably share all of the incriminating evidence before they leave the scene of the crime. On that view, it is a triviality that an officer made an arrest before finding out what the others learned—in any case he would have found out at a time when he could still have arrested the suspect.

So far, no court has defended the constructive-knowledge rule by analogy to inevitable discovery. However, the requirement that officers must be in close contact, or must be cooperating in an investigation, arguably could ensure that the rule applies only when the police would have conferred before leaving the scene.[122] This

121 Nix v. Williams, 467 U.S. 431, 448–50 (1984). On courts' treatment of the rule over the previous twenty years, see *id.* at 440 n.2.

122 The First Circuit appears to have followed this logic when it adopted a version of the constructive-knowledge rule. The court initially rejected what it regarded as an overbroad form of the rule, noting that "the collective-knowledge corollary of the fellow officer rule would seem to require, or at least presuppose, the flow of information from the officers with knowledge of facts tending to establish probable cause to those lacking that knowledge (or, at least, to the directing or arresting officer)." United States v. Meade, 110 F.3d 190, 194 (1st Cir. 1997). Five years later, the court endorsed a more constrained version of the rule, stating that "a broad rendition of

approach, however, does not fully resolve the constructive-knowledge problem. First, some cases are poor candidates for this analysis, because the relevant information was not shared after the event, nor was it likely to be. Second, the imputation of unshared information in this context raises especially acute problems of hindsight bias and confirmation bias. Even in the cases that might appear to be good candidates, the facts may receive poor analysis under this approach.

As to the "inevitable communication" premise, if courts do not require that the officers must be close to each other or must be in communication when the action occurs, the "inevitability" of information-sharing diminishes appreciably. Moreover, even a physical presence requirement is not a good proxy for information-sharing, because the rule imputes all information, regardless of whether it likely *would* have been shared. That may help to explain why courts that decline to adopt the rule do not then turn to "inevitable discovery" for help. Quite the reverse: in some cases, the government unsuccessfully argues for constructive knowledge and then moves on to "inevitable discovery," only to have that argument rejected as well.[123]

There are two reasons for questioning the inevitability of a probable-cause determination in these cases. First, as noted earlier, the constructive-knowledge rule imputes both the unshared information and the analysis that translates that information into a belief about the suspect's criminal conduct.[124] Courts have acknowledged that having sufficient information for probable cause does not necessarily translate into a proper determination on the issue. So far, however, this recognition has been limited to the problem of the 911 operator who has not been trained in the analysis of probable cause and therefore is not qualified to issue an instruction that could impute the underlying information.[125] The insight might be extended: the fact that an officer

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the collective knowledge principle could promote illegal searches, . . . [but] a far more limited application of the principle, one which takes into account *only the knowledge of officers present at the scene and directly involved in effectuating a stop*, is unlikely to encourage illegal police activity." United States v. Cook, 277 F.3d 82, 86 (1st Cir. 2002) (emphasis added).

123 *See, e.g.*, State v. Friday, 412 N.W.2d 540, 545–46 (Wis. Ct. App. 1987), *rev'd*, 434 N.W.2d 85 (Wis. 1989); Damato v. State, 64 P.3d 700, 707 (Wyo. 2003).

124 *See supra* notes 29–30 and accompanying text.

125 *See, e.g.*, United States v. Colon, 250 F.3d 130, 137 (2d Cir. 2001) (refusing to impute information from a 911 operator who lacked "training and ability to make the determination that there was probable cause"); *see also* United States v. Jegede, 294 F. Supp. 2d 704, 707 (D. Md. 2003) (stating that "any information other than that which was actually disseminated to the . . . officers [by the dispatcher] must be disregarded"). *But see* State v. Carr, 844 P.2d 1377, 1380 (Idaho Ct. App. 1992) ("[T]he

has been trained to assess probable cause does not necessarily mean that she will always make the appropriate assessment.

Second, some of the constructive-knowledge cases do not involve joint information-gathering expeditions, while in others the court amasses all of the details and then uses all of the available expertise to evaluate them, even though certain facts would likely have been meaningless to the officer who actually discovered them. Because an officer's training and experience determines which "points of salience"[126] will register as indicators of criminal activity, officers sharing similar backgrounds are likely to notice and analyze similar details, but an ATF agent, for example, is relatively unlikely (at least without any advance directive) to pick out the details that would be salient to one who specializes in financial crime.

Inevitability is a questionable proposition in any case, and there is significant disagreement about how to apply the "inevitable discovery" rule itself. As Professor LaFave has stressed, "courts are not always as cautious . . . as they should be" to prevent a discovery from being labeled "inevitable" simply on the basis of a "hunch or speculation as to what otherwise might have occurred."[127] Some circuits specify that the rule applies only when the police have already begun a lawful search that would have led to the discovery of the challenged evidence, while others instead require a showing by clear and convincing evidence that a lawful search would have been undertaken, and yet others require only proof by a preponderance of the evidence.[128]

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collective knowledge of police officers involved in the investigation—including dispatch personnel—may support a finding of probable cause."). Notably, in refusing to impute the 911 operator's knowledge, *Colon* articulated a principle that might be thought to question the validity of the constructive-knowledge rule more generally: "In the absence of any showing that *any* NYPD employee with the training, responsibility or authority to make a determination of reasonable suspicion ever had sufficient information on which to effect or instigate the stop and search of Colon, this Court cannot find that the *Terry* stop was reasonable." *Colon*, 250 F.3d at 137 (emphasis added).

126 Judith Mehta et al., *The Nature of Salience: An Experimental Investigation of Pure Coordination Games*, 84 AM. ECON. REV. 658, 661 (1994).

127 6 LAFAVE, *supra* note 8, § 11.4(a), at 275–76. LaFave adds, "'It is not enough to show that the evidence "might" or "could" have been otherwise obtained. . . . [The] evidence is inadmissible unless the prosecution . . . show[s] that it *would* have acquired the evidence in any event.'" *Id.* at 276 (quoting Robert F. Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. CRIM. L., CRIMINOLOGY, & POLICE SCIENCE 307, 315 (1964)).

128 *See* Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 329 (2004); Stephen E. Hessler, Note, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99

Moreover, it is doubtful that a finding of "inevitable communication" in a given jurisdiction should simply rely on the applicable standard for "inevitable discovery." In theory, a suspect could receive compensation under § 1983 for an illegal search, even if the fruits are admissible as the product of "inevitable discovery," because that doctrine neutralizes the exclusionary rule but does not validate the search.[129] The constructive-knowledge rule, on the other hand, helps to establish probable cause and therefore bars any claim that the suspect's civil rights were violated. Given this result, it may be appropriate to require a higher standard for "inevitable communication" than for "inevitable discovery."

That difference also helps to identify a concern with the "inevitable discovery" rule, a concern that raises even graver questions about the constructive-knowledge rule. The Fourth Amendment is essentially concerned with foreseeability.[130] If the police have strong enough reasons for expecting to find evidence relating to an offense, they are entitled to a search warrant. If their reasons are weaker, but not negligible, the police can conduct a *Terry* stop.

How far the police can search is a function of how well they can predict the outcome. Under a foreseeability rationale, "inevitable discovery" is a plausible barrier to exclusion when the police act with foreknowledge of the inevitable result. If they know they will lawfully obtain the evidence later, they can act now, unlawfully, to seize it, at the cost of possible sanctions under § 1983.[131] That explanation

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MICH. L. REV. 238, 243–47 (2000). For a broader critique of the "inevitable discovery" rule, see Peter Brooks, *"Inevitable Discovery"—Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71 (2003).

129 *See, e.g.*, Heck v. Humphrey 512 U.S. 477, 487 n.7 (1994) ("Because of doctrines like . . . inevitable discovery," a party may be convicted on the basis of illegally obtained evidence and may nevertheless sue for damages; to prevail, "the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury. . . ."); Chatman v. Slagle, 107 F.3d 380, 382 (6th Cir. 1997) ("[T]he inevitable discovery doctrine is no bar to a § 1983 suit when there has been no prior state trial.").

130 *See, e.g.*, United States v. Grubbs, 126 S. Ct. 1494, 1499 (2006) ("Because the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, 'anticipatory.'").

131 LaFave notes that

> the "inevitable discovery" rule should be applied only when it is clear that "the police officers have not acted in bad faith to accelerate the discovery" of the evidence in question. But in *Nix v. Williams*, the Supreme Court rejected the court of appeals' limitation that the prosecution must prove the absence of bad faith, explaining that it "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity" and "would put the

shows how the "inevitable discovery" rule fits in with the other shortcuts in evidence-gathering discussed earlier.[132] On this view, "inevitable discovery" is not a windfall to the prosecution; instead it is an instrument that the police may use anticipatorily, and may integrate into their general search protocols. The rule would then serve, like *Whren*, as an actively exploitable tool in the investigatory kit, and not just as a convenient excuse that may be conjured up after the fact when it can be made to sound plausible.

That reasoning, however, does not apply to the constructive-knowledge rule. It is one thing to say that an officer can confidently anticipate that his colleagues will soon conduct a lawful search, and quite another to say that an officer knows his colleagues have as-yet-unshared information that in the aggregate is sufficient for probable cause. Where the latter outcome is predictable, the constructive-knowledge rule would indeed fit the foreseeability model. But even if it is inevitable that the officers will share their information, it is hardly inevitable that the acting officer can predict that they will have enough for probable cause, and therefore can act with that foreknowledge. At best, the officer may guess that his colleagues have found something helpful, and may act in the hope that their information will provide the needed supplement.

Thus, on the one hand, constructive knowledge applies primarily as an afterthought and largely resists the kind of integration and routinization that inevitable discovery permits, while on the other hand a constructive-knowledge justification eliminates the § 1983 sanctions that remain possible if exclusion is barred on inevitable-discovery grounds. In short, the constructive-knowledge rule lacks a foreseeability component and merely applies after the action to cleanse it of any illegality.

Imputing unshared knowledge in this context also raises problems of hindsight bias and confirmation bias—cognitive effects that conspire in this instance to select the facts that ratify the officer's decision, even if those facts probably would not, and should not, have

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police in a *worse* position than they would have been in if no unlawful conduct had transpired."

LAFAVE, *supra* note 8, § 11.4(a), at 276 (quoting Mark Paul Schnapp, Note, 5 HOFSTRA L. REV. 137, 160 (1976)). LaFave concludes that "[d]espite *Nix*, it is still true . . . that the 'inevitable discovery' rule simply is inapplicable in those situations where its use would, as a practical matter, operate to nullify important Fourth Amendment safeguards," but he adds that "[t]he point is sometimes missed." *Id.* at 271–72 (citing People v. Stevens, 597 N.W.2d 53 (Mich. 1999)).

132 *See supra* notes 52–67 and accompanying text.

governed his decision without the court's aid.[133] Hindsight bias has traditionally been an important concern in Fourth Amendment law,[134] and it constitutes one of the primary motives for the warrant requirement.

The thought is that a more accurate determination will occur if the police must obtain it in advance from a neutral magistrate, who will assess probable cause on the basis of a prediction, rather than being influenced by the knowledge that the search was successful. Moreover, the warrant commits the police to a certain state of knowledge so that they may not amplify it later by recalling additional details.[135] Therefore we encourage officers to obtain warrants, and

133 The rule also increases opportunities for police perjury. To validate an arrest, police officers may be tempted to perjure themselves by claiming to have known about details they did not observe until after the arrest. William Stuntz has noted that critics of the evolving Fourth Amendment framework have been concerned about both police perjury and hindsight bias, whereas the crafters of that framework have been primarily concerned with the latter. Stuntz, *supra* note 57, at 914–15. The emphasis on the risk of cognitive bias rather than deliberate misconduct may reflect different assumptions about law enforcement officials, but this emphasis can also have doctrinal effects. If a court's hindsight bias makes a just-barely-impermissible search appear justified, the precedent may help to marginally lower the probable-cause standard in future cases. By contrast, if a police officer perjures himself, he will probably invent details that do not skate near the lower border but instead clearly satisfy the standard. Insofar as Fourth Amendment doctrine takes seriously the problem of hindsight bias but gives less attention to the problem of perjury, then, the probable-cause standard, as reflected in case law, remains relatively stable. For further discussion of perjury, see Orfield, *supra* note 19, at 100–14.

134 *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 96 (1964) ("[A]fter-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."); *see also* Stuntz, *supra* note 57, at 884, 912 n.68 (noting that some studies support the existence of hindsight bias among jurors in deciding whether police behaved illegally). For a useful overview of the problem of hindsight bias, see Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgment of Past Events After the Outcomes are Known*, 107 PSYCHIATRIC BULL. 311 (1990). For a recent study suggesting that hindsight bias does not significantly influence judges' probable-cause determinations, see Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1313–22 (2005).

135 *See* 2 LAFAVE, *supra* note 8, § 3.2(d), at 47 ("[H]indsight may not be employed in determining whether a prior arrest or search was made upon probable cause. . . . [I]f [the action] was pursuant to a warrant, then the information to be considered is that which was made available to the issuing magistrate before the warrant was issued."); Stuntz, *supra* note 57, at 917 ("[T]he [warrant] application process . . . records the police officer's account of what he knows prior to the search. In a warrant system concerned chiefly with police perjury, the best approach might be to force the officer to give his account *before* the fact in a warrant affidavit, but then allow full adversary litigation of the probable cause issue *after* the fact in a suppression hearing."); *see also* 2 LAFAVE, *supra* note 8, §§ 3.1, 4.3 (noting that the Fourth Amendment

courts give more deference to warrants than to warrantless determinations. It has also been suggested that "inevitable discovery" cases raise particularly serious concerns about hindsight bias.[136]

Confirmation bias, on the other hand, has rarely been addressed as a significant problem in Fourth Amendment law.[137] Confirmation bias leads people to accentuate the positive thrust of evidence that accords with their expectations or desires, and to minimize the thrust of evidence to the contrary.[138] The implications for the issue of probable cause are obvious: in any search for evidence to verify the hypothesis that a particular suspect is guilty, officers are likely to focus on evidence that confirms the hypothesis and to discount evidence that undermines it.

At its most serious, such bias results in strained interpretations of the available evidence and failure to take note of evidence that erodes belief in the suspect's guilt, incriminates someone else, or is simply unaccountable under the preferred explanation. Identity-based prejudices, particularly racial bias, often trigger confirmation bias, and their implications for Fourth Amendment law have been widely discussed.[139] Where those considerations are not relevant, however,

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requires an "Oath or affirmation" to support a warrant); John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. KAN. L. REV. 155, 219-22 (2005) (explaining the significance of an oath and affirmation in obtaining a warrant). On a related point, the Supreme Court recently held that even if "[a warrant] *application* adequately describe[s] the 'things to be seized,'" that will not save "[a] *warrant* from its facial invalidity," Groh v. Ramirez, 540 U.S. 551, 557 (2004). Otherwise, the Court noted, the warrant's lack of particularity could "'permit[ ] officers to expand the scope of the warrant by oral statements [that] would broaden the area of dispute between the parties in subsequent litigation.'" *Id.* at 556 (quoting Ramirez v. Butte-Silver Bow County, 298 F.3d 1022, 1027 (9th Cir. 2002)).

136 Brooks, *supra* note 128, at 123.

137 One of the few discussions of the issue appears in Lee Epstein, et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 51–62 (2005). The problem is addressed more often in the context of jury deliberations. *See, e.g.*, Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1248 (2001).

138 For a useful overview, see Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

139 *See, e.g.*, *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472 (1988); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 387 (1998); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Randall S. Susskind, *Race, Reasonable Articulable Suspicion and Seizure*, 31 AM. CRIM. L. REV. 327 (1994); Lisa Walter, *Eradicating Racial Stereotyping from* Terry *Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255 (2000); Lu-In Wang, *Race as Proxy: Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013 (2004).

there is no easy way to tell how seriously the problem of confirmation bias affects criminal investigations.

The warrant requirement, in any case, does little to prevent confirmation bias, because selective use of the evidence and even selective interpretation of the evidence are unlikely to register on the magistrate.[140] That result is not necessarily undesirable. Perhaps confirmation bias plays a positive role on the whole, by sparing the police the losses that might result from second-guessing themselves.[141] Further, again putting aside the question of identity-based bias, it is not clear that confirmation bias in criminal investigations can be reduced without commensurately reducing the capture rate. Hindsight bias may well play a role in the application of the "inevitable discovery" rule, but confirmation bias raises less concern in that context, given that the rule applies only when a search has already been completed and the incriminating details have been identified.[142]

The constructive-knowledge rule raises concerns about both forms of cognitive bias, which converge in this situation to create an especially difficult problem. Once an officer has made an arrest or begun a search, hindsight bias increases the likelihood that other officers will attach suspicious meanings to the evidence they saw, and confirmation bias makes it likely that they will simply forget about any evidence that vitiates probable cause or that erodes the significance they now attach to the evidence.

Anyone familiar with the *Brady* problem will immediately recognize the difficulty: just as officers may honestly forget that they have acquired exculpatory information that must be turned over to the

140 If vitiating evidence was available and the police did not disclose that when they sought a warrant, and if the defense gets that information, it may be relevant to a *Brady* claim, but again confirmation bias often reflects attitudes that are not fully conscious. That does not mean that all of its effects will be reasonable, and so it may lead to *Brady* violations and may justify exclusion and even § 1983 liability, but those results are not very likely.

141 *See, e.g.*, GERD GIGERENZER & PETER M. TODD, SIMPLE HEURISTICS THAT MAKE US SMART 3–5 (1999) (discussing "fast and frugal heuristics"). For an application of this research in the Fourth Amendment context, see Craig S. Lerner, *Reasonable Suspicion and Mere Hunches* (George Mason Univ. Sch. of Law, Law & Economics, Working Paper No. 05–209, 2005) *available at* http://ssrn.com/abstract=840258.

142 There still remains some room for confirmation bias: as to the hypothetical lawful search that would "inevitably" have occurred later, the question is whether it would have had the same scope as the illegal search. There must be a persuasive argument not only that the lawful search would have taken place, but also that it would have uncovered the evidence seized during the unlawful search. Both hindsight and confirmation bias may influence that determination.

defense,[143] here similarly the incriminating information is likely to occupy their attention, and the facts that tend in the other direction may be overlooked. Thus the event of the arrest itself may invest the probable-cause determination with the force of a duly formulated decision, thus increasing the likelihood that the police will recall their various observations only with an eye to the details that support probable cause.

But the point of a criminal investigation is not simply to develop probable cause, as if more were better, but rather to use probable cause as a step towards convicting guilty persons. Whereas the collective-knowledge rule takes a probable-cause determination that has already been fashioned on the basis of an officer's full awareness of the facts, the constructive-knowledge rule may aid in the manufacture of probable cause, creating constructive probable cause when, absent the operation of these cognitive biases, objective probable cause is lacking.

This problem has only been exacerbated by the limited case law addressing the issue. The Second Circuit—the only court to weigh in thus far—has held that the imputation rule covers inculpatory information but not exculpatory information. In *Savino v. City of New York*,[144] a § 1983 suit in which a former city employee alleged false arrest, the court stated that "the [collective-knowledge] doctrine has traditionally been used to *assist* officers in establishing probable cause—not to impute bad faith to one member of an enforcement team on the basis of another member's knowledge."[145]

The court added that "this doctrine *cannot* be used to impute to an officer 'facts known to some [other] members of the police force which exonerate an arrestee.'"[146] The holding of *Savino* may be

143 *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 438 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know," but the prosecution is nevertheless "held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor.").

144 331 F.3d 63 (2d Cir. 2003).

145 *Id.* at 74 (emphasis added); *see also* Urbanique Prod. v. City of Montgomery, 428 F. Supp. 2d 1193, 1216 (M.D. Ala. 2006) (dismissing plaintiff's § 1983 claim alleging false arrest; even though arresting officer lacked incriminating information about suspect, another officer had such information, and the two officers "were working in 'close concert' on the investigation. . . . [T]hus, [the second officer's] knowledge is imputed to [the arresting officer], regardless of whether at the time of the arrest [the latter] had actual knowledge of all the facts.").

146 *Savino*, 331 F.3d at 74 (quoting United States v. Valez, 796 F.2d 24, 28 (2d Cir. 1986)). *Savino* purports to summarize the holding of *Valez*, but in fact misrepresents that decision. In *Valez*, the defendant was mistakenly arrested on the instruction of an officer who gave a vague description of the suspect; within minutes after Valez was

appropriate in the context of a § 1983 suit, because liability under that statute does not allow for imputation but looks only to the knowledge and conduct of the individual defendant.[147] But *Savino* expresses that conclusion in language that pronounces on the imputation rule generally.

As regards the ordinary suppression case (rather than a § 1983 case), *Savino*'s analysis is inconsistent with the premise of the constructive-knowledge rule. The rule treats a number of individuals as if they were simply a communal body—and in that case, their communal mind should take account of the same details that an individual would consider, including the details that support belief of guilt and those that undermine it.

The "inevitable discovery" premise reflects a view of police work that might be illustrated heuristically by imagining a probable-cause machine, a portable computer with audiovisual capabilities that can methodically detect, record, catalogue, and cross-reference all relevant information and that issues an alert when that information amounts to probable cause.[148] With this machine, information transfer is frictionless and practically free.[149] To say that the constructive-knowledge cases ultimately depend on such a vision is to show why the "inevitable discovery" rule has so much explanatory force in this context. Information transfer is relatively costless when officers are working jointly on an investigation. After all, one of the main reasons for assigning a team of officers to work together on a search or arrest is to make it easier and faster to collect information.

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mistakenly arrested (and was found to possess contraband), the officer who issued the instruction found and arrested the person he was seeking. *Valez*, 796 F.2d at 25–26. Valez argued that that officer's knowledge should have been imputed to the one who arrested him, rendering his arrest illegal. *Id.* at 27. The court rejected the argument that "facts known to some members of the police force which exonerate an arrestee are *ipso facto* imputed to the arresting officer. Rather, the issue is whether the *failure* to communicate those facts to the arresting officer rendered the mistaken arrest *unreasonable*." *Id.* at 28 (emphasis added). Rather than generally barring the imputation of any "facts known to . . . members of the police force which exonerate an arrestee," as *Savino* would have it, *Valez* merely held that under the circumstances of that case, the exculpatory information could not be imputed. *Id.*

147 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–95 (1978).

148 For a variant on this image, see Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393 (2001). Solove's concerns about privacy are relevant here because the probable-cause machine would have to be linked to various other databanks so that information registered at the investigation scene could be cross-checked.

149 Except, of course, for the cost of the machine itself and periodic upgrades.

But it does not follow that information transfer will always occur efficiently, or that it will even occur at all. In some cases there will be a communications failure, and in others an officer will simply fail to grasp the significance of some vital detail, and so will fail to pass her observations along to anyone else. Moreover, in some law enforcement situations, information transfer is difficult, friction-laden, and expensive. Finally, the image of the computer lends an air of precision and infallibility to the analysis of the data, whereas human analysis involves the risks of cognitive bias discussed above. "Inevitable discovery" may help to justify some of the constructive-knowledge cases, but it cannot justify them all.

Even if it were possible to identify the cases in which the police would have conferred, and even if the imputation rule could reproduce the result of that conference without any cognitive error, some cases would remain that could not be explained by resort to "inevitable communication." If an officer conducts a search or arrest when probable cause is neither present nor imminent, he is in the same position as an officer acting by himself. Consider the case of an officer who conducts an illegal detention and, while it is under way, acquires probable cause to search from another source—for example, by running a warrant check. This newly acquired information cannot be used to legitimate the search.[150] That the officer actually obtained incriminating information does not convert an invalid detention into a valid one.

Rather than resort to imputation in these cases, courts have said that "[t]he search was either good or bad at its inception. It does not change character by fortuitous events which occur while the search is underway."[151] Analogously, in the constructive-knowledge context, if communication among officers is not "inevitable," imputation cannot be justified by positing a hypothetical event which, had it occurred at all, would have been merely fortuitous. However, while that answer may identify the problem with the officer's action, it fails to address what is noteworthy about the role of the collectivity in the construc-

150 *See, e.g.*, Moreno v. Baca, 431 F.3d 633, 641 (9th Cir. 2005) (finding that detention on insufficient cause was not legitimated by the discovery that the suspect was a parolee in violation of the terms of his release, because "police officers cannot retroactively justify a suspicionless search and arrest on the basis of an after-the-fact discovery of an arrest warrant or a parole condition"); United States v. DiCesare, 765 F.2d 890, 899 (9th Cir. 1985) ("[T]he acquisition of probable cause during an unlawful seizure does not cure the illegality and does not constitute an independent source of probable cause.").

151 State v. Carter, 267 N.W.2d 385, 387 (Iowa 1978).

tive-knowledge analysis—an issue that touches on questions involving administrative law. I now turn to that subject.

III. PROBABLE-CAUSE ANALYSIS AND ADMINISTRATIVE DECISIONMAKING

Like police departments, administrative agencies often reach decisions collectively. The value of an agency's analysis may be premised on the agents' collective expertise, and the more formally the agency presents the opinions of its experts and the bases for their conclusions, the more likely the agency will prevail if its regulations are challenged. Far from excusing agencies from failing to pool information, we require them to do so if they hope to receive deference for their decisions.

Agency regulations also bear some similarity to probable-cause determinations. In endorsing the collective-knowledge rule in the 1960s, the courts promoted the same values that are often at stake in judicial review of administrative decisionmaking. We have seen that courts do not require more process, more bureaucratic review, if the less formal procedure is deemed to reflect sufficient sensitivity to the Fourth Amendment balance.[152] In the administrative context, we find a similar trade-off between procedure and results.

As to results, courts are averse to administrative regulations that either impose heavier costs on the regulated entities than the authorizing legislation reasonably permits, or that fail to constrain those entities as contemplated in the authorizing legislation.[153] As to process, courts are averse both to administrative procedural laxity that delivers regulations without sufficient formality,[154] and to excessively fastidious

152 *See supra* notes 37–45 and accompanying text.

153 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 467 (2001) (holding that the EPA could not consider implementation costs when setting air quality standards).

154 *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (reviewing court must be satisfied that agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action"); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (stating that the reviewing court must conduct a "searching and careful" inquiry to determine "whether the [agency's] decision was based on a consideration of the relevant factors"); *see also* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257, 279 (1987) (discussing judicial review of the National Highway Traffic Safety Administration's regulations); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992) (arguing that agency rulemaking has lost its efficiency advantages due to tougher procedural standards of judicial review); Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 477 (1986) (discussing the additional rules imposed by courts on agencies in the 1960s and 1970s to require more comprehensive fact records for stricter

procedural requirements that would make it too costly for administrative agencies to craft appropriate regulations.[155] In short, judicial review of administrative decisionmaking strives for a balance with respect to the extent of the regulations and also the amount of process required to produce them.

Viewed through the lens of administrative law, probable-cause determinations may be likened to agency decisions, and the general public may be likened to the regulated entity. Like the Food and Drug Administration and the Department of Health and Human Services, law enforcement departments are executive branch agencies. But whereas those other agencies are delegated the authority to interpret legislation and to promulgate regulations accordingly, neither local police departments nor federal law enforcement agencies are normally regarded as having the authority to issue interpretations of the Fourth Amendment.[156]

Nevertheless, police departments have to instruct officers on what constitutes probable cause, and individual officers have to apply those instructions on a daily basis. These guidelines must necessarily offer interpretations of the probable-cause standard that will be applied during encounters with members of the public, at least until a court rejects that interpretation.

Similarly, police departments often address local law-enforcement concerns by crafting and implementing large-scale programs that incorporate the department's understanding of what is permissible under the Fourth Amendment.[157] Such a program's architecture,

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judicial review); Matthew C. Stephenson, *A Costly Signaling Theory of Hard Look Review* (John M. Olin Ctr. for Law, Econ. & Bus., Harvard Law Sch., Discussion Paper No. 539, 2006), *available at* http://papers.ssrn.com/abstract=921421 (proposing that courts impose explanation requirements on agency action to alleviate the differences in expertise between regulators and the judges reviewing their action).

155 *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 525 (1978) (rejecting procedural requirements imposed by the D.C. Circuit and explaining that the Court of Appeals had "engraft[ed] [its] own notions of proper procedures upon agencies entrusted with substantive functions by Congress").

156 *See, e.g.*, Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1021 (2004) (doubting that "we [would] really feel secure giving police officers the power to define what is a constitutionally appropriate search with only the security of knowing that their actions may someday be reviewed by a police chief who may someday be called to task by a mayor who was elected by the people").

157 *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41, 48 (1999) (holding unconstitutional the City of Chicago's Gang Congregation Ordinance where limitations on the discretion police had to enforce the ordinance were left to police policy rather than placing such limitations in the ordinance itself).

including the specification as to what suffices to justify a stop, frisk, or pat-down, and what investigatory options are available absent any basis for suspicion, does not reflect the assessment of a particular officer, formed as events are unfolding during an investigation. Instead, like the rest of the plan, the decision about whom to stop and on what cause is formulated and specified in advance. For example, the suspicionless traffic stops in *Indianapolis v. Edmond*[158]—ultimately declared unconstitutional by the Supreme Court—involved roadblocks at which the police followed a routine set out in "written directives issued by the chief of police."[159] Under these procedures, the officers would "stop a predetermined number of vehicles," approach each vehicle to tell the driver "that he or she [was] being stopped briefly at a drug checkpoint, . . . ask[ ] the driver to produce a license and registration," and "look[ ] for signs of impairment and conduct[ ] an open-view examination of the vehicle from the outside."[160] The instructions required the officers to "conduct each stop in the same manner until particularized suspicion develop[ed]," and gave the police "no discretion to stop any vehicle out of sequence."[161] "[C]heckpoint locations [were] selected weeks in advance based on such considerations as area crime statistics and traffic flow."[162]

As this detailed protocol shows, the plan was devised with the expectation that it would not offend equal protection or Fourth Amendment principles because it required officers to treat all drivers alike. The plan reflects a policy presumably applying a departmentally shared view of Fourth Amendment requirements.[163]

Thus, it would be misleading to say that the police may not create policies based on interpretations of the Fourth Amendment; the police department must issue such rules all the time. But in so doing, the department is not filling in gaps pursuant to a legislative mandate, or acting under a delegated power. The police department has no authority to devise interpretations of the probable-cause standard or to issue directives telling the public how to conform to Fourth Amend-

158 531 U.S. 32 (2000).

159 *Id.* at 35.

160 *Id.*

161 *Id.*

162 *Id.*

163 For another example, see Lynn Sweet, *Clinton Unveils Tailored 7-Point Sweeps Policy*, CHI. SUN-TIMES, Apr. 17, 1994, at A3 (describing a program developed jointly by the Chicago Police Department and the residents in a Chicago public housing project, under which the police would engage in warrantless searches to stop violent crime in the area; the program was declared unconstitutional by Judge Wayne Anderson).

ment requirements; instead, the police apply rulings that come from the courts. The interpretive work that the department performs involves translating a judicial pronouncement into its practical application, implementing the legal standard and thereby testing its boundaries.[164]

Whatever deference an officer's probable-cause determination merits, then, it cannot be analogous to *Chevron* deference, which applies only "[i]f Congress has explicitly left a gap for the agency to fill, [so that] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."[165] In *United States v. Mead Corporation*,[166] the Supreme Court discussed the bases for giving deference to more mundane administrative decisions, involving the implementation of regulations rather than their issuance under legislative authority. *Mead* considered the Treasury Department's issuance of ruling letters specifying tariffs on imported merchandise.[167] Such determinations, authorized under a customs regulation that in turn was promulgated under statutory authority, at that time were not governed by the notice-and-comment requirements of section 553 of the Administrative Procedure Act, and did not carry the force of law in the sense of constituting an official policy announcement that specifies the rights and obligations of parties other than the letter's recipient.[168]

A ruling letter articulates "the official position of the Customs Service with respect to the particular transaction or issue described therein,"[169] and thus, like a decision to search or arrest (or to send out a bulletin instructing officers to take such action), it represents an agency official's decision about how to apply the law in a specific case. As with probable-cause determinations, large numbers of ruling letters are produced annually—"46 different Customs offices issue 10,000 to 15,000 of them each year."[170] Like probable-cause determinations, then, such decisions must be produced quickly and repeatedly, and while experience may make the agency officials proficient in

164 *See, e.g.*, Michael S. Ariens, *Constitutional Law and the Myth of the Great Judge*, 25 ST. MARY'S L.J. 303, 311 (1993) ("The value of . . . the Fourth Amendment's requirement of the existence of probable cause before engaging in a search or seizure, depends upon the police officers who implement [this] constitutional rule[ ].").

165 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

166 533 U.S. 218 (2001).

167 *Id.* at 221–24.

168 *See id.* at 226.

169 *Id.* at 222 (quoting 19 CFR § 177.9 (2000)).

170 *Id.* at 233.

applying the legal standards, the rapid-fire pace of the process may in some instances produce inconsistent and even unacceptable outcomes.

In considering what level of deference to accord a ruling letter, the Court observed that "whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices," which may merit some deference given the agency's "body of experience and informed judgment."[171] The Court thus recognized that the practical application of a statute, like the gap-filling activity of clarifying a broad statutory mandate, requires interpretation, and that those interpretive decisions may be entitled to some deference. *Mead* added that relevant concerns in such a case include "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[172]

Taken together, these factors emphasize two basic considerations: the experience of the decisionmakers and the value of the deliberative process. Consistency and expertness may be products of experience alone (a well-seasoned bureaucrat may be familiar enough with the regulations to apply them quickly, evenly, and proficiently), but care and formality seem to speak to the agency's procedural virtues, its ability to review an array of alternatives and to consider the merits of each before reaching a decision. Persuasiveness, understood as embracing rationality and attentiveness to context, is not so much a separate category as an attribute of the other two considerations.[173]

Mead enumerated these considerations in the context of an agency's "administ[ration of] its own statute," but they might also apply to an agency's application of a standard developed by another authority.[174] Notably, the treatment of experience and deliberation as proper bases for deference is already well established in Fourth Amendment law.

In judicial review of probable-cause determinations, as in administrative law, deference is doled out according to a two-tier hierarchy,

171 *Id.* at 227 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).

172 *Id.* at 228 (footnotes omitted).

173 *See, e.g.*, United States v. E.I. Dupont de Nemours & Co., 432 F.3d 161, 177 n.17 (3d Cir. 2005) ("[T]he persuasiveness of the government's position rests on the 'specialized experience' the EPA brings to bear on the issue of CERCLA enforcement." (citing *Mead*, 533 U.S. at 235)); Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 316 F.3d 913, 922 (9th Cir. 2003) (approving appellee's decision "because of its persuasiveness. The Service has considered the issue thoroughly. Its reasoning is not unsound. The Service had adequate information . . . .").

174 *Mead*, 533 U.S. at 228.

defined by the degree of formality in the decisionmaking process. On the one hand, if the police have filed an affidavit and have been given a warrant, the magistrate's imprimatur is afforded "great deference,"[175] akin to the "substantial deference"[176] due under *Chevron*.[177] Indeed, until the Supreme Court explained in the 1960s that a warrant is entitled to "substantial deference," some courts regarded the probable-cause determination underlying a warrant as virtually unreviewable.[178]

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175 Ornelas v. United States, 517 U.S. 690, 698 (1996); United States v. Leon, 468 U.S. 897, 914 (1984) (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)); *see also* United States v. Riccardi, 405 F.3d 852, 860 (10th Cir. 2005) ("Where the search or seizure was pursuant to a warrant, our review of the issuing magistrate's finding of probable cause is very deferential . . . ."); United States v. Ribeiro, 397 F.3d 43, 48 (1st Cir. 2005) ("In reviewing the affidavit supporting an application for a search warrant, we give significant deference to the magistrate judge's initial evaluation . . . .").

176 Gonzales v. Oregon, 126 S. Ct. 904, 914 (2006).

177 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

178 Early decisions on the degree of deference accorded to a warrant generally characterize the finding of probable cause as "conclusive" and either unappealable or appealable only if completely unsupportable. *See, e.g.*, Rettich v. United States, 84 F.2d 118, 121 (1st Cir. 1936) ("[T]he commissioner's findings as to probable cause are conclusive, unless it is shown to the contrary." (citation omitted)); Gracie v. United States, 15 F.2d 644, 646 (1st Cir. 1926) (holding that the commissioner's finding is "conclusive" unless authority to issue warrant was "arbitrarily exercised"); State v. Friend, 220 N.W. 59, 61 (Iowa 1928) ("[The magistrate's] finding is conclusive"); Commonwealth v. Leddy, 105 Mass. 381, 383 (1870) (holding that the magistrate's decision "is not subject to appeal, and must be regarded as conclusive, unless it appears to be utterly groundless"); *see also* United States v. Greene, 108 F. 816, 819 (S.D.N.Y. 1901) ("[As to] the existence of probable cause to believe that an offense has been committed, ... the question upon review never is whether the proof was such as would be required to convict the accused upon a trial by jury; but only as to the existence of *any* legal evidence before the commissioner upon which he might find that there was reasonable cause to believe that the crime has been committed." (emphasis added)); William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1041 n.154 (1994) ("Although early interpretations of the Fourth Amendment may have been scant, interpretations of the state constitutions and state practice under the common law lend . . . support to the view that the existence of a warrant was the primary criterion in determining whether a search was reasonable." (citing Commonwealth v. Dana, 2 Mass. (2 Met.) 329, 336 (1841); Bell v. Clapp, 10 Johns. 263, 264 (N.Y. 1813); Wakely v. Hart, 6 Binn. 315, 318 (Pa. 1814))); Steven M. Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 830 (1971) ("[S]ome courts still adhere to the view that the magistrate's or commissioner's ruling on probable cause is final . . . ." (footnote omitted)). The cases cited by Greenhalgh and Yost speak to the importance of obtaining a warrant, but do not address the standard for challenging a warrant for lack of probable cause.

Arguably, the warrant—sometimes required and otherwise preferred—is the analogue in criminal procedure to the notice-and-comment process that triggers *Chevron* deference. The Supreme Court has explained that "the detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"[179] The magistrate's review ensures that the evidence will receive "serious and independent consideration."[180]

To be sure, such a procedure hardly approximates one that publicizes the proposal, solicits an array of views from all sides, and weighs their respective merits before arriving at a conclusion. As with a grand jury proceeding, the most interested adverse party has no opportunity to participate. But a warrant does require the police to list facts and to explain their significance in a way that will persuade a disinterested observer. To that extent, the requirement of a formal justification for a search or arrest serves the same goal as an administrative procedure "designed to assure due deliberation."[181] If the hurried and potentially self-serving judgment of the police is unreliable, the magistrate's deliberation may be more objective.

Moreover, the notice-and-comment process reflects some of the same concerns underlying the warrant requirement, albeit not with the same emphasis. As noted earlier, the use of a warrant protects against hindsight bias and the risk of police perjury, but does little to prevent confirmation bias.[182] These same concerns figure in administrative law, but in the opposite order. Soliciting public comments helps to combat confirmation bias, which might otherwise pose serious problems for bureaucrats issuing regulations that have significant effects on markets and affect even more people indirectly.[183] These problems may be even more severe in cases of excessive interest-group influence or agency capture, which are generally not regarded as significant problems in criminal law enforcement.[184]

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179 United States v. Chadwick, 433 U.S. 1, 9 (1977) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

180 McCommon v. Mississippi, 474 U.S. 984, 987 (1985) (Brennan, J., dissenting) (noting his objection to denial of *certiorari*).

181 Smiley v. Citibank (South Dakota), 517 U.S. 735, 741 (1996).

182 *See supra* notes 133–42 and accompanying text.

183 On problems of confirmation bias in administrative law, see, for example, Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1058–59 (2005), and Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 504–05 (2002).

184 *See, e.g.*, Rachel E. Berkow, *Administering Crime*, 52 UCLA L. REV. 715, 725–26 (2005) (noting that criminals—the group most directly affected by sentencing regula-

As to perjury, the analogous problem in administrative law involves "post hoc rationalizations"[185] invented in the course of litigation to repair an agency's failure to defend its decision earlier. To the extent that the agency articulates a rationale to accompany its decision, after having reviewed the public comments, that rationale provides a contemporaneous justification and thereby forestalls the objection that the agency has acted first and then cast about for an explanation.

Finally, by contrast with the Fourth Amendment context, hindsight bias is not a significant concern in judicial review of administrative decisions. The fact that a search yielded contraband may unduly influence a court to view the search as permissible, but courts regard themselves as entirely capable of evaluating an administrative regulation ex ante, as of course they review most actions. While the justifications for the notice-and-comment process are treated in a tellingly different fashion from those for the warrant requirement, the degree of procedural formality is similar.

On the other hand, if there has been no formal preclearance process, the determination of probable cause receives comparatively little deference, as in *Mead*.[186] Even under *Mead*, however, as noted above, an agency's determination may be entitled to some deference if the

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tions—are "in a poor position to mobilize to fight" and "cannot easily self-identify in advance").

185 *See, e.g.*, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212–13 (1988) ("'The courts may not accept appellate counsel's *post hoc* rationalizations for agency [orders,]' [particularly where counsel's] current interpretation . . . is contrary to the . . . view of [the same] provision advocated in past cases . . . . Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))); *cf.* Auer v. Robbins, 519 U.S. 452, 462 (1997) (noting that agency's position was "in no sense a '*post hoc* rationalizatio[n]'" and therefore was not "unworthy of deference," where it was advanced for the first time in a brief but did not contradict any previous position taken by the agency and stating "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question").

186 United States v. Mead Corp., 533 U.S. 218, 229–31 (2001). Arguably, all probable-cause determinations, including those supported by a warrant, should be analogized to ruling letters of the sort addressed in *Mead*. The Court observed that some ruling letters are accompanied by the agency's own explanation of its rationale, and accordingly deserve more deference: "Most ruling letters contain little or no reasoning, but simply describe goods and state the appropriate category and tariff. A few letters, like the . . . ruling at issue here, set out a rationale in some detail." *Id.* at 224. However, as discussed in Part II, a magistrate's approval makes a warrant into more than just a decision accompanied by the agency's explanation: it makes the warrant into a decision that has been certified by a neutral decisionmaker outside of the agency seeking approval for its action.

decision involves technical or complex issues about which the agency has expertise. Analogously, in a court's analysis of probable cause, an officer's "experience and expertise" may merit some deference.[187]

In the ordinary case, then, review of a warrantless search or arrest finds a counterpart in *Mead*'s consideration of the decisionmaker's proficiency, but not in *Mead*'s concern with care and formality. This makes perfectly good sense, because in the ordinary case, the conditions giving rise to a warrantless arrest (e.g., exigent circumstances, automobile searches, searches incident to arrest) leave little room for care and formality.[188]

Such quintessentially bureaucratic virtues play an important role in review of administrative decisionmaking, whereas making determinations of probable cause is not a bureaucratic exercise but more often a decision that must be made quickly, under pressure, and with a risk of personal danger. This is not to say that caution and thoroughness have no place when an officer pursues a suspect after seeing a possible criminal act or receiving a call for backup; it is only to say that when courts evaluate probable cause, they take those circumstances into consideration and give the officer some room for error.[189]

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187 *See, e.g.*, City of Chi. v. Morales, 527 U.S. 41, 109–10 (1999) (Thomas, J., dissenting) ("[W]e trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as 'probable cause' and 'reasonable suspicion . . . .'"); Ornelas v. United States, 517 U.S. 690, 700 (1996) ("[A] police officer may draw inferences based on his own experience in deciding whether probable cause exists."); United States v. Barth, 288 F. Supp. 2d 1021, 1031 (D.N.D. 2003) ("Courts are to give deference to the experience and expertise of law enforcement officers in determining whether certain conduct is suspicious." (citing *Ornelas*, 517 U.S. at 700)); United States v. Rogers, 53 F.2d 874, 876 (D.N.J. 1931) ("In determining probable cause, . . . the experience and skill of the officers . . . must be taken into account.").

188 In the case of consent, on the other hand, the police often answer the need for formality by obtaining a signature on a consent form. *See, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 379 (1998); Cleary v. Bolger, 371 U.S. 392, 393 (1963); *In re* Fried, 161 F.2d 453, 454–55 (2d Cir. 1947).

189 *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("'Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision.'" (quoting Illinois v. Gates, 462 U.S. 213, 235 (1983))); Illinois v. Rodriguez, 497 U.S. 177, 196 (1990) (Marshall, J., dissenting) ("[P]robable cause [is] not absolute certainty . . . . [T]he possibility of factual error is built into the probable cause standard, and such a standard, by its very definition, will in some cases result in the arrest of a suspect who has not actually committed a crime. . . . [A] search is reasonable under the Fourth Amendment whenever that standard is met, notwithstanding the possibility of 'mistakes' on the part of police." (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949))).

The Court's list of factors potentially justifying deference in *Mead*, then, points to a relatively high threshold for deference in that context, whereas the Court has not felt compelled to produce a checklist of factors guiding the degree of deference for warrantless searches and arrests, but instead has said that the evaluation depends on the totality of the circumstances and has been content to treat the officer's expertise as one of the factors.[190] Practically, the deference due just for an officer's expertise may go a long way towards validating a search,[191] whereas deference based on "expertise" alone, without the other factors, might well be insufficient to justify upholding an administrative determination.[192] Even if the considerations are similar in both contexts, the level of deference is not the same, because the threshold for upholding a search or arrest is lower.

Nevertheless, some probable-cause determinations do occur in more bureaucratic settings. Most obviously, when preparing an affidavit to accompany a warrant request, an officer will review her notes to ensure that she has described the evidence properly and has included enough to satisfy the probable-cause requirement—and if she is part of an investigative team, she will also review information collected by her colleagues. In an ongoing investigation, as evidence comes in, those assigned to the case will confer periodically to evaluate the state of the evidence and to agree on whether they have enough to proceed.

Though perhaps far from the typical collective-knowledge case, these scenarios are not far from the typical constructive-knowledge case. By imputing unshared information in those cases, the courts treat the police as if they had conferred and agreed on a decision—perhaps not with the same care and formality that *Mead* describes, but at least with more care and formality than can be attributed to the officer who acts alone under pressure.

The rule bestows the status of a decision on a conclusion that never had the benefit of the decisionmaking process. If a discussion

190 *See supra* note 187 and accompanying text.

191 *See, e.g.*, United States v. Santos, 403 F.3d 1120, 1124–25 (10th Cir. 2005) (noting that although "appellate review of whether an officer had reasonable suspicion [is conducted] 'de novo,'" the evidence must be in viewed in the light most favorable to the determination of the district court and with consideration of the officer's experience and training, so that "[i]n practice, this looks more like deference—indeed, double deference—than *de novo* review").

192 Indeed, in *Mead*, on remand, the Federal Circuit rejected Customs' analysis, 283 F.3d 1342 (Fed. Cir. 2002), even though the Supreme Court had noted that the ruling letter in question "set out a rationale in some detail," unlike the typical ruling letter, which "contain[s] little or no reasoning," 533 U.S. 218, 224 (2001).

among the officers was imminent in any case, the rule in effect backdates that event to upgrade the degree of formality associated with the acting officer's decision—and so if that condition is lacking, the rule creates formality where none would have existed.

That the constructive-knowledge rule thus diminishes the need for deliberation is paradoxical because the rule's very premise has been that the police operate like an administrative agency in these cases. Characterizing a police team as a "single unit" or "corporate body," as some courts have done,[193] emphasizes that the police are working jointly on a shared problem with the benefits that such joint action creates, such as information-pooling and the improved accuracy that results from peer review.

There is a large body of research suggesting that organizations "think" differently from individuals, developing special routines for transmitting, analyzing, and acting on new information.[194] But those models involve actual exchange of information, and do not suggest that unshared knowledge or analysis may be imputed among team members.

Thus the constructive-knowledge rule does not, as a general matter, lower information-gathering costs while leaving the Fourth Amendment equilibrium intact. The cost of formal deliberative procedures in the administrative context may be relatively high, and so it makes sense that when the authorizing legislation does not expressly require such deliberation, courts allow agencies to decide how to allocate time and personnel to make their production of regulations more efficient. If the agency has taken care, in advance, to register

193 *See, e.g.*, State v. Stark, 179 N.W.2d 597, 600 (Minn. 1970) ("The test is whether the law-enforcement agency as a corporate body possessed sufficient information to establish probable cause."); State v. Dowdell, No. CA 9334, 1985 WL 4767, at *2 (Ohio Ct. App. Dec. 20, 1985) (noting that police department "operates as a single unit").

194 *See, e.g.*, ERNEST R. ALEXANDER, HOW ORGANIZATIONS ACT TOGETHER 77-22 (1995); MARY DOUGLAS, HOW INSTITUTIONS THINK 111–28 (1986); GARETH MORGAN, IMAGES OF ORGANIZATION 73–214 (2d ed. 1997); Daniel M. Wegner, *Transactive Memory: A Contemporary Analysis of the Group Mind*, *in* THEORIES OF GROUP BEHAVIOR 185, 186–99 (Brian Mullen & George R. Goethals eds., 1987); Sasha A. Barab & Jonathan A. Plucker, *Smart People or Smart Contexts? Cognition, Ability, and Talent Development in an Age of Situated Approaches to Knowledge and Learning*, 37 EDUC. PSYCHOLOGIST 165, 173–78 (2002); Daniel M. Wegner, *A Computer Network Model of Human Transactive Memory*, 13 SOC. COGNITION 1 (1995); Karl E. Weick & Karlene H. Roberts, *Collective Mind in Organizations: Heedful Interrelating on Flight Decks*, 38 ADMIN. SCI. Q. 357, 358–68 (1993). For another approach to this problem, concerned not with joint decisionmaking but with how group decisions may not be reducible to the decisions of individual members, see Philip Pettit, *Groups with Minds of Their Own*, *in* SOCIALIZING METAPHYSICS 167 (Frederick Schmitt ed., 2003); Philip Pettit, *Responsibility Incorporated* (manuscript on file with the author).

opposing views, and to provide a rationale for its action, it has already sacrificed time and effort that might have been spent on other regulations, and this decision reflects the agency's judgment that such caution is warranted.

In the constructive-knowledge context, on the other hand, the cost of deliberation is low, and eliminating this requirement does not facilitate the information-gathering process; instead, it randomly validates probable-cause determinations in some instances. If probable cause itself were a public good, that result might be defensible. But probable cause is only an instrumental public good, a means towards the goal of achieving convictions of guilty persons. Probable cause requires only a solid basis for suspicion, for pressing further.[195] A rule that simply facilitates the development of more probable cause, then, is only marginally helpful at best if that result is riddled with the problems of cognitive bias discussed earlier.

Ultimately, the constructive-knowledge rule serves none of the goals achieved by other Fourth Amendment shortcuts. It does little to help the police develop a quicker or more effective investigatory strategy, it does not systematically minimize the procedural prerequisites for establishing probable cause, and the procedural requirements it eliminates do not even impose significant burdens on the police. At the same time, to the extent that the rule dispenses with those requirements, it imposes a potentially heavy cost on the accuracy of probable-cause determinations.

IV. THE PROBABLE-CAUSE CALCULUS

In questioning the premises of the constructive-knowledge rule, this discussion has emphasized the role of foreseeability in Fourth Amendment analysis, the use of criminal procedural shortcuts as tools that the police can rely on when planning investigations, and the significance of collaborative deliberation in administrative decisionmaking. This Part briefly returns to the question of the fixed probable-cause standard in light of these issues.

The conclusion of Part III might be paraphrased with the aid of *Mathews v. Eldridge*.[196] Enumerating the factors to be considered before the government may terminate a benefit, *Mathews* specified

195 *See, e.g.*, Tracey Maclin, *The* Pringle *Case's New Notion of Probable Cause: An Assault on* Di Re *and the Fourth Amendment*, 2004 CATO SUP. CT. REV. 395, 435 (explaining that under the analysis in *Pringle v. Maryland*, 540 U.S. 366 (2003), "probable cause [is] sufficiently elastic to allow police to arrest and interrogate in order to decide which persons to charge.").

196 424 U.S. 319 (1976).

that the court should take into account the government's interest, the private party's interest, and "the risk of an erroneous deprivation of . . . [the private party's] interest through the procedures used."[197]

In the usual Fourth Amendment case, all three considerations are already settled: the balance between policing and privacy is built into the probable-cause standard, which also accepts that there is some limited risk of erroneous deprivation (i.e., infringement of an innocent suspect's privacy interest) in any predictive claim about the outcome of a search.[198] No *Mathews*-type analysis is necessary, because the requisite degree of cause remains fixed regardless of the offense.

But the requirement that a home cannot be searched without a warrant points to a change in the equation. Because of the homeowner's heightened privacy interest,[199] we require more formal advance justification, with a magistrate's review, to lower the risk of erroneous deprivation. The alternative solution would be to allow for warrantless searches of homes when the governmental interest is correspondingly stronger, but the Supreme Court has rejected this balancing approach.[200]

If probable cause is the product of a group decision, the risk of erroneous deprivation rises when the court aggregates the facts ex post and attributes to the acting officer a decision based on those facts. In the constructive-knowledge cases—involving warrantless searches—the courts have not acknowledged this heightened risk. Again, the problem might be solved by applying the constructive-knowledge rule only when the government has a heightened interest (or when the suspect's privacy interest is slight), but that would require balancing. Allowing for constructive knowledge only during *Terry* stops will not work, because there, too, the equilibrium between invasiveness and privacy is already fixed, and would be disrupted by an alteration that increases the risk of error.

Finally, there is no question of introducing a warrant requirement, as in the home searches. If a warrant were a practical possibility, imputation would be completely unnecessary. This analysis suggests once again that unless the acting officer can predict the result of his colleagues' search—so that the risk of error diminishes—the unshared knowledge should not be imputed.

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197 *Id.* at 335.

198 *See supra* note 189.

199 *See* Georgia v. Randolph, 126 S. Ct. 1515, 1523–24 (2006); Kyllo v. United States, 533 U.S. 27, 34–35 (2001); United States v. Karo, 468 U.S. 705, 714 (1984); United States v. Knotts, 460 U.S. 276, 282 (1983).

200 *See* Dunaway v. New York, 442 U.S. 200, 213–16 (1979).

This way of representing the probable-cause calculus also helps to explain the imprecision of the probable-cause standard itself. Cast as an equation with the help of *Mathews*, the probable-cause calculus has very few moving parts and therefore offers little opportunity for adjustment in a given case. The play in the joints, then, depends for the most part on flexibility in accommodating the variety of justifications and kinds of knowledge that the police may rely on to show that they have a persuasive basis for undertaking a search or arrest in the first place. Indeed, without the Supreme Court's repeated emphasis on a "practical," "commonsense," "nontechnical" understanding of probable cause, it is hardly likely that the idea of a fixed standard could find support.

The breadth of probable cause also makes it a flexible tool from an administrative point of view. Depending on the department's priorities, resources may be allocated according to different probable-cause thresholds for different offenses. Thus even with an unvarying standard, the department remains free to vary what it demands of its officers, either to control the caseload by focusing attention on certain categories of offenses, or to control criminal conduct by striving to develop particularly strong cases against certain types of offenders.

This way of allocating resources may have a dynamic effect on probable-cause analysis as applied in court. The more resources the police direct at certain kinds of crimes, the more expert the officers become in the habits and strategies of the criminals who engage in that conduct. And because "expertise" is a relevant consideration in the court's evaluation of probable cause, a department with more experts in various areas of crime may in turn find it easier to develop probable cause in each of those categories.

At the same time, because the flexibility occurs primarily in the means of establishing probable cause, rather than in adapting the various factors in the equation, Fourth Amendment doctrine is ridden with on/off switches—exceptions, and exceptions to exceptions, relating to the warrant requirement, the exclusionary rule, and the need for any cause at all.[201] Such all-or-nothing reasoning is prevalent

201 *See, e.g.*, Akil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 802 (1994) ("Because the seriousness of a crime matters, the Court in *Welsh v. Wisconsin* in effect proclaimed that there should be a 'minor offense' (*Welsh*) exception to the 'exigent circumstances' (*Warden*) exception to the 'home arrest' (*Payton*) exception to the usual 'arrest' (*Watson*) exception to the so-called 'warrant requirement' (*Johnson*)."); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 374–75 (1974) (observing that the wild proliferation of exceptions to the warrant requirement might be likened to the growth of different kinds of easements, as described by an apocryphal writer whose treatise first described fourteen kinds,

because aside from the factors constituting probable cause itself, warrants and exclusion are virtually the only options available as a means of modifying the solution to a Fourth Amendment problem.

This crazy quilt of exceptions, in turn, has helped to promote a view of Fourth Amendment law as a bureaucratic, rule-governed enterprise. Indeed, numerous decisions reflect a mentality that treats this body of law not as a set of norms but as a collection of technical rules on a checklist, to be consulted and applied individually.[202]

Freed from their normative moorings, the rules may begin to display a kind of doctrinal mutation.[203] That tendency may explain how the collective-knowledge rule, originally crafted to treat an instruction as a means of imputing information, could find itself applied even when there has been no instruction at all.

One piece of support for that view comes from the cases insisting that probable cause must be analyzed "not on the facts as an omniscient observer would observe them, but on the facts as they would have appeared to a reasonable person *in the position of the arresting officer*—seeing what he saw, hearing what he heard."[204] That observation typically appears not in suppression cases, but as a response to § 1983 plaintiffs.[205] In other words, the courts feel most compelled to reject the idea of omniscience when there is a risk that imputing information to the acting officer would make the officer liable for a civil rights violation. Imputation under § 1983 would be inappropriate in any case, but rather than framing their decision in those terms, the

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then reported on thirty-nine kinds in the next edition, and finally concluded, in a posthumous edition that "[i]t is impossible to say how many kinds of easements are recognized by the law").

202 For useful discussions of Fourth Amendment jurisprudence as bureaucratic, see, for example, Amar, *supra* note 201, at 800. *See generally* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1482–83 (1985) (discussing nine search and seizure cases from the 1982–83 term of the Supreme Court); Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171 (1983); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 787–88 (1999) (stating that each new Fourth Amendment doctrine "is more duct tape on the Amendment's frame and a step closer to the junkyard").

203 Such mutation is perhaps the converse of the memetic proliferation that J.M. Balkin has discussed. *See* J.M. BALKIN, CULTURAL SOFTWARE 43 (1998) (discussing Richard Dawkins's coinage of "memes" in *The Selfish Gene* and explaining that "memes are spread from person to person by observation and social learning").

204 Mahoney v. Kesery, 976 F.2d 1054, 1057 (7th Cir. 1992).

205 *See id.*; *see also, e.g.*, Miller v. Lewis, 381 F. Supp. 2d 773, 781 (N.D. Ill. 2005); Flynn v. Mills, 361 F. Supp. 2d 866, 873 (S.D. Ind. 2005); Crowe v. County of San Diego, 303 F. Supp. 2d 1050, 1071 (S.D. Cal. 2004).

courts raising this issue have insisted that omniscience has no place in the analysis of probable cause.

Yet the courts have not reconciled this principle from the § 1983 cases with their probable-cause jurisprudence, seemingly because of their emphasis on a flexible probable-cause standard, coupled with a rule-oriented mentality that focuses on individual doctrinal items rather than considering the uniformity of probable-cause jurisprudence across contexts. The result is that even in suppression cases, a court may recite this view of omniscience as part of the catalogue of truisms about probable cause—and may then apply the constructive-knowledge rule anyway.[206]

CONCLUSION

Practically, the mutation of collective knowledge into constructive knowledge has depended on a string of misinterpretations and unacknowledged expansions.[207] The courts' failure to specify an "inevitable discovery" restriction has created the opportunity for a relatively surreptitious rule to proliferate unchecked. As noted earlier, the requirement that the police officers must be working closely together does not seem likely to restrain the rule's application, and may itself give way through the same process of expansion that has allowed the constructive-knowledge rule to flourish.

There are good reasons for skepticism about the "inevitable discovery" rationale in this context. When information is assembled after the fact to support probable cause, the evidence probably will not accurately reflect the universe of information available to the police at the time of the challenged action. Thus it would make sense for courts to refuse the invitation to rely on that evidence when evaluating probable cause. The "inevitable discovery" rule is sufficiently well entrenched, however, that courts are unlikely to close the door to the notion of "inevitable communication." At a minimum, making this premise explicit would allow the courts to distinguish between the cases where it applies and those where it has no purchase, and would make it clear that imputation is appropriate only if the government can meet a burden of proof at least as demanding as the one required for "inevitable discovery." Given that the constructive-knowledge rule

206 *See, e.g.*, United States v. Parra, 402 F.3d 752, 764–65 (7th Cir. 2005) (quoting *Mahoney*, 976 F.2d at 1057, and then explaining the procedure for aggregating unshared information when "'officers are in communication with each other while working together at a scene.'" (quoting United States v. Nafzger, 974 F.2d 906, 911 (7th Cir. 1992))).

207 *See supra* notes 75–87, 144–47, and accompanying text.

has passed under the radar so far, this first step could make a significant difference in controlling the rule's further development.