

# The Questionable Objectivity of Fourth Amendment Law

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*The Supreme Court often insists that Fourth Amendment rules must be objective. The doctrine should focus on what police officers do, not what they are thinking when they do it. Recently, however, Fourth Amendment law's objective façade has begun to crack. In a series of cases, the Supreme Court has introduced subjective tests. Fourth Amendment law is now best understood as a complex mix of subjective and objective tests. The Justices have not offered a clear explanation for why they use objective rules in some cases and subjective rules in others. But it should be clear that the Justices are making a choice, and that both subjective and objective approaches are in play.*

*This Article identifies the Supreme Court's recent turn to subjective rules and offers a normative framework for the choice between subjective and objective tests in Fourth Amendment law. It begins by reviewing existing caselaw and showing how it often hinges on an officer's subjective state of mind. The Article then offers a framework for choosing between objective and subjective tests. Subjective approaches can permit courts to craft narrower rules that better distinguish harmful from beneficial police practices. But the benefits of subjectivity depend on whether harms track subjectivity and whether states of mind can be determined reliably. To best achieve the aims of Fourth Amendment law, courts should consider in each context the civil liberties benefit of narrowing doctrine in light of the risk that a subjective test will be misapplied.*

INTRODUCTION.....	448
I. GOVERNMENT SUBJECTIVITY IN EXISTING FOURTH AMENDMENT DOCTRINE.....	451
A. Government Searches and Seizures .....	452
1. Searches.....	452
2. Implied Licenses.....	453
3. Seizures.....	454
4. Government Action .....	455
B. Fourth Amendment Reasonableness.....	456
1. The Special Needs Doctrine .....	456
2. The Inventory Search Exception.....	458
3. The Scope of Terry Frisks .....	459

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4. <i>Probation and Parolee Searches</i> .....	460
C. Fourth Amendment Remedies .....	461
1. <i>The Role of Mens Rea in Herring v. United States</i> .....	462
2. <i>The Fruit of the Poisonous Tree Doctrine</i> .....	463
3. <i>Franks Challenges</i> .....	464
4. <i>Flagrant Disregard of Warrant Limitation</i> .....	465
II. THE NORMATIVE CASE FOR OBJECTIVE VERSUS SUBJECTIVE FOURTH AMENDMENT RULES .....	466
A. The Existing Debate on Objective Versus Subjective Rules .....	467
B. Costs and Benefits in Fourth Amendment Law .....	469
C. The Scope Problem in Weighing Costs and Benefits .....	470
D. Officer Subjectivity as a Tool to Narrow the Scope of Rules .....	474
E. The Difficulty of Determining Government States of Mind .....	475
F. An Example .....	477
III. EXISTING DOCTRINE AND THE NORMATIVE ROLE OF SUBJECTIVITY .....	479
A. Searches and Seizures .....	480
B. Reasonableness .....	482
C. Remedies .....	485
CONCLUSION .....	488

## Introduction

The Supreme Court often insists that Fourth Amendment rules must be objective.<sup>1</sup> What an officer thinks is irrelevant.<sup>2</sup> Instead, the legality of government action depends on what the officer actually does.<sup>3</sup> The best-known example is the Court's blessing of pretextual traffic stops in *Whren v. United States*.<sup>4</sup> As long as an officer has probable cause that a traffic law was violated, *Whren* tells us, stopping the car is constitutionally reasonable. An

1. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (“An action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’” (emphasis in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))).

2. *Id.* (“The officer’s subjective motivation is irrelevant.”); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) (“The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment.”).

3. *Bond*, 529 U.S. at 338 n.2 (“[T]he issue is not his state of mind, but the objective effect of his actions.”).

4. 517 U.S. 806 (1996) (Scalia, J.).

officer's real reason for making the stop must "play no role" in the Fourth Amendment analysis.<sup>5</sup>

*Whren's* directive to ignore officer intent has been repeated in many Supreme Court Fourth Amendment cases.<sup>6</sup> Consider a few examples: To decide if an emergency justified an officer breaking into a house, courts must ask if the objective facts of the emergency justified the entry instead of whether the officer was actually trying to help stop it.<sup>7</sup> When considering whether an officer's inspection of a duffel bag violated the Fourth Amendment, it doesn't matter what the officer was trying to find.<sup>8</sup> With just two limited exceptions, the Court has explained, Fourth Amendment law should not consider an officer's subjective state of mind.<sup>9</sup>

That's what the Supreme Court says. But is it true?

This Article's first goal is to show that the objectivity of Fourth Amendment doctrine is weaker than the Court has acknowledged. Reliance on an officer's subjective thoughts is sprinkled throughout Fourth Amendment doctrine.<sup>10</sup> An officer's state of mind matters for what is a search, what is a seizure, state action, several standards for when a search or seizure is reasonable, and Fourth Amendment remedies.<sup>11</sup> Subjective tests have been adopted with particular frequency in the last decade, including in several cases by the author of *Whren*, the late Justice Antonin Scalia.<sup>12</sup> Fourth Amendment law retains its objective façade. The courts repeat it, and law students dutifully learn it. But viewed as a whole, Fourth Amendment law increasingly offers a mix of objective and subjective tests.

The Article's second goal is to offer a normative framework to assess the choice between subjective and objective approaches in Fourth Amendment law.<sup>13</sup> At its best, reliance on subjectivity can further the aims

5. *Id.* at 813, 819.

6. *See, e.g.,* *Ashcroft v. Al-Kidd*, 563 U.S. 731, 737 (2011); *Brigham City*, 547 U.S. at 404; *United States v. Knights*, 534 U.S. 112, 122 (2001); *Bond*, 529 U.S. at 338 n.2.

7. *Brigham City*, 547 U.S. at 405 ("It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers [acted to] gather evidence against them or to assist the injured and prevent further violence.").

8. *Bond*, 529 U.S. at 338 n.2 ("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment.").

9. *Al-Kidd*, 563 U.S. at 736 (Scalia, J.) (citing *Knights*, 534 U.S. at 122) (referring to "[t]wo limited 'exception[s]'" ). The exceptions identified in *Al-Kidd* are the special needs and administrative search doctrines, "where actual motivations do matter." *Id.*

10. *See infra* Part I.

11. *See infra* Part I.

12. *See infra* Part I.

13. This is not a new question in Fourth Amendment scholarship. It has been discussed for decades in what amounts collectively to a significant body of literature. *See, e.g.,* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433–39 (1974) (introducing the pretext problem and discussing several possible solutions to it); Cynthia Barmore,

of Fourth Amendment law by enabling narrower rules that better distinguish harmful from helpful police conduct. What an officer is trying to do often correlates with the interests that the officer's conduct advances. Subjective rules can be useful if they prohibit acts when an officer's state of mind correlates with likely harm.<sup>14</sup> When the relevant government intent can be determined accurately, a test that considers the government's state of mind can avoid overly broad rules that would otherwise permit a great deal of harmful conduct or prohibit government acts that serve the public interest in enforcing the law.

The important caveat is that government states of mind can be difficult to measure.<sup>15</sup> Subjectivity is useful only if it can be measured relatively accurately in the setting of Fourth Amendment litigation. Judges' ability to accurately identify an officer's state of mind depends on the context. Some states of mind can be figured out better than others. But the practical challenges of identifying a government official's mental state can weaken or even subvert the benefits of subjectivity. Whether to use objective or subjective tests calls for a context-sensitive examination of both the benefits of narrower rules and the risks of measurement error for the particular subjective test being considered.<sup>16</sup>

A review of existing doctrine suggests a mixed bag on that score.<sup>17</sup> The Court's adoption of a subjective test for searches and seizures seems appropriate, as does its use of subjective tests for special needs and probation searches. The merits of the objective test in *Whren* are mixed, as the problem pairs particularly strong public interest in distinguishing stops based on intent

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*Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R. & C.L. L. REV. 273, 307 (2016) (arguing that Fourth Amendment doctrine should limit police enforcement undertaken "for reasons of power, money, or dogma"); Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 343 (2006) (rejecting the objective approach); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 111–16 (1982) (same); John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 528 (1984) (arguing for an inquiry into subjective intent to establish pretextual motives); Morgan Cloud, *Judges, "Testifying," and the Constitution*, 69 S. CAL. L. REV. 1341 (1996) (arguing for a two-part test to determine reasonableness with both subjective and objective components); George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 448–58 (2006) (considering different ways that subjective intent could be relevant to Fourth Amendment reasonableness); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 640 (1985) (rejecting another scholar's contention that the Supreme Court "abandoned all efforts to curb pretextual fourth amendment activity"); Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65, 70–72 (2017) (advocating reliance on programmatic purpose); Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1077–78 (2007) (arguing that pretextual searches are problematic because they give the police too much power).

14. See generally *infra* subpart II(D).

15. See generally *infra* subpart II(E).

16. See generally *infra* Part II.

17. See generally Part III.

with a very high risk of measurement error. On the other hand, the Court's reliance on subjective concerns in the exclusionary rule setting is problematic.<sup>18</sup>

This Article proceeds in three parts. Part I surveys existing Fourth Amendment doctrines that rely on an officer's state of mind. Part II develops the normative framework. Part III reviews existing doctrines and offers tentative judgments on existing law's choices between objective and subjective tests.

### I. Government Subjectivity in Existing Fourth Amendment Doctrine

This section is descriptive. It shows that an officer's subjective state of mind is often relevant to existing Fourth Amendment doctrine. Officer subjectivity plays a significant doctrinal role at each of the three stages of Fourth Amendment doctrine.<sup>19</sup> A subjective element is required at the first stage, on what is a search or seizure; it often arises at the second stage when courts figure out if a search or seizure was unreasonable and therefore unconstitutional; and it plays a major role in determining the scope of Fourth Amendment remedies.

Before I get started, let me clarify a definition. When I refer to doctrines that rely on "government subjectivity," I mean any legal test, rule, or standard that incorporates a government official's actual state of mind.<sup>20</sup> That would mean, in Model Penal Code terms, a test that looks to the intent, awareness, or conscious disregard of a risk of some fact or belief about the world.<sup>21</sup> Put in more colloquial terms, my focus is on legal tests that consider what government agents were thinking rather than focus exclusively on objective facts like what an officer was doing.

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18. *See id.*

19. My doctrinal overview in this section has some similarities with prior efforts to assess the subjectivity of Fourth Amendment doctrine. *See* Sekhon, *supra* note 13, at 82–90 (summarizing cases that rely on subjective tests in Fourth Amendment law); *see also* Dix, *supra* note 13, at 377–78, 410–15, 418–20 (summarizing cases that rely on subjective tests in Fourth Amendment law, interspersed with discussion of cases that rely on objective tests).

20. Importantly, this Article concerns *government* subjectivity in Fourth Amendment doctrine. Although this may ring a bell with readers familiar with the subjective and objective expectation of privacy test under *Katz v. United States*, 389 U.S. 347 (1967), that test has no relevance here. The *Katz* test at most considers the expectations of privacy of individual suspects and society at large. It does not consider the *mens rea* of government agents, which is my focus here. For more on the role of a suspect's expectations in Fourth Amendment law, see generally Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 (2015).

21. *See* MODEL PENAL CODE § 2.02 (AM. LAW. INST. 1985) (defining mental states of purposely, knowingly, and recklessly).

A. *Government Searches and Seizures*

Let's begin with the threshold question in Fourth Amendment law: What is a government search or seizure? Existing doctrine, much of it quite recent, imposes a subjective requirement at this stage. We'll run through the major cases to see this, starting with what is a search, next considering what is a seizure, and then concluding with the state action requirement.

*I. Searches.*—The Fourth Amendment search doctrine includes a government intent requirement that was first announced in 2012 in *United States v. Jones*,<sup>22</sup> an opinion by Justice Antonin Scalia. According to *Jones*, government action is only a Fourth Amendment search when conducted “to obtain information.”<sup>23</sup> “[A]n attempt to find something or to obtain information” is required for a search to occur.<sup>24</sup>

A quick review of *Jones* explains how this requirement arose. Investigators installed a GPS device on a suspect's car and used it to track the suspect's location for 28 days.<sup>25</sup> The Court held that installation with intent to use the GPS device was a Fourth Amendment search.<sup>26</sup> The intent requirement was added in a footnote in response to Justice Alito's concurrence, which disagreed with the Court's conclusion that installing the device was a search.<sup>27</sup> Justice Alito reasoned that installing a device should not be a search because the Court's precedents indicated that no search likely would occur if the government had broken the installation into two stages.<sup>28</sup> Mere installation of the GPS device without its use would not be a search, Justice Alito argued, and mere use without its installation would not be a search either. Putting the pieces together, Justice Alito reasoned, installing the device and then using it should not be a search.<sup>29</sup>

The *Jones* majority introduced the intent requirement of Fourth Amendment searches in a footnote that responded to Justice Alito. Justice Scalia explained that “[a] trespass on ‘houses’ or ‘effects,’ or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information.”<sup>30</sup> Combining installation and use triggered the search doctrine because it

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22. 565 U.S. 400 (2012).

23. *Id.* at 408 n.5.

24. *Id.* Note that this test does not require an investigatory purpose, but merely a goal to obtain some kind of information. *Cf. Jane Doe I v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1212–13 (11th Cir. 2016) (holding that invasive ultrasounds conducted for instructional reasons are Fourth Amendment searches, and that no “investigative or administrative purpose” is required).

25. *Jones*, 565 U.S. at 402–03.

26. *See id.* at 413.

27. *See id.* at 408 n.5.

28. *See id.* at 420 (Alito, J., concurring in the judgment) (“If these two procedures are analyzed separately, it is not at all clear from the Court's opinion why either should be regarded as a search.”).

29. *Id.*

30. *Id.* at 408 n.5 (majority opinion).

combined the act of installation with the appropriate future intent to use it: “Trespass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information.”<sup>31</sup> To trigger the Fourth Amendment search doctrine, the government must act with an intent to obtain information.

2. *Implied Licenses.*—The Court also adopted a subjective intent test in its 2012 decision in *Florida v. Jardines*,<sup>32</sup> another opinion by Justice Scalia. *Jardines* was an implied license search case used to interpret the trespass test of *Jones*.<sup>33</sup> *Jardines* considered whether a Fourth Amendment search occurs when an officer walks up to the front door of a private home with a drug-sniffing dog to see if the dog will alert to the smell of drugs inside.<sup>34</sup> *Jardines* made two rulings that are relevant here. First, it ruled that an officer’s approach to the front door of the home could be a search because it entered the curtilage of the home, an outside space around the home that is treated as the home for Fourth Amendment purposes.<sup>35</sup> Second, the Court ruled that approaching the door with a drug-sniffing dog was outside the implied license to enter the curtilage that homeowners extended to home visitors.<sup>36</sup>

According to Justice Scalia, the scope of the implied license was determined by the officer’s subjective intent when he approached the front door.<sup>37</sup> Residents implicitly permitted anyone “to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”<sup>38</sup> But the same license did not extend to an officer who approached the home with a “specific purpose” to conduct a search.<sup>39</sup> According to Justice Scalia, officers approaching the door with the intent to gather evidence from inside are outside the license: “to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police.”<sup>40</sup>

*Jardines* explicitly rejected the state’s contention its subjective approach was inconsistent with objective cases like *Whren*. According to the Court, the objective cases stood “merely” for a narrow point that improper

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31. *Id.*

32. 569 U.S. 1 (2013).

33. *See id.* at 11 (discussing the *Jones* test).

34. *Id.* at 3–5.

35. *Id.* at 6–7.

36. *Id.* at 9.

37. *Id.* at 10.

38. *Id.* at 8.

39. *Id.* at 9 (“The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose.”).

40. *Id.*

motive did not normally render an otherwise-lawful search or seizure in violation of the Fourth Amendment.<sup>41</sup> It was proper to rest the implied license on officer intent, in contrast, because the question before the Court was identifying “whether the officer’s conduct was an objectively reasonable search” in the first place.<sup>42</sup>

3. *Seizures*.—The doctrine of seizures also includes a subjective element that was introduced by *Brower v. County of Inyo*,<sup>43</sup> yet another opinion by Justice Scalia. *Brower* held that a seizure requires “an intentional acquisition of physical control.”<sup>44</sup> “[G]overnmental termination of freedom of movement” is a seizure, the Court held, only “through means intentionally applied.”<sup>45</sup>

*Brower* involved a fatal crash following a high-speed chase by an escaping driver who crashed his car into a police roadblock.<sup>46</sup> The driver’s heirs brought a Fourth Amendment civil suit against the officers who set up the roadblock alleging excessive force. In their view, the roadblock had “seized” the driver unreasonably when he crashed into it.<sup>47</sup> The Court of Appeals held that the escaping driver was not seized because he was trying to evade the police, not be stopped by them.<sup>48</sup>

The Supreme Court disagreed in another opinion by Justice Scalia.<sup>49</sup> The government had seized the driver when he crashed into the roadblock, the Court held, because he was stopped “by the very instrumentality set in motion or put in place in order to achieve that result.”<sup>50</sup> Intent to stop was crucial, as a Fourth Amendment seizure “requires an intentional acquisition of physical control.” The case would be different, Justice Scalia reasoned, if the stopping were an accident: “if a parked and unoccupied police car slips its brake and pins a passerby against a wall,” no Fourth Amendment seizure has occurred.<sup>51</sup> Because the driver “was meant to be stopped by the physical obstacle of the roadblock,” and was so stopped, the officers had seized him.<sup>52</sup>

*Brower*’s subjective requirement for seizures resembles *Jones*’s subjective requirement for searches. In both cases, officers need an intent to

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41. *Id.* at 10.

42. *Id.*

43. 489 U.S. 593 (1989).

44. *Id.* at 596.

45. *Id.* at 597.

46. *Id.* at 594.

47. *See id.* (claiming the respondents used unreasonable force in establishing the roadblock, thus effecting an unreasonable seizure of *Brower*).

48. *Brower v. Cty. of Inyo*, 817 F.2d 540, 546 (9th Cir. 1987).

49. *Brower*, 489 U.S. at 599.

50. *Id.*

51. *Id.* at 596.

52. *Id.* at 599.

achieve the natural result of their acts. To conduct a search, an officer needs intent to obtain information. And to conduct a seizure, an officer needs intent to take possessory control of property.

4. *Government Action*.—Government subjectivity also plays a role in the doctrine of Fourth Amendment state action. When a private party conducts a search or seizure, the Fourth Amendment applies “if the private party act[s] as an instrument or agent of the Government”<sup>53</sup> by acting “at their direction.”<sup>54</sup> Under the cases, the government officials’ intent about the private party action is important to whether the private party is deemed a Fourth Amendment state actor.

*Coolidge v. New Hampshire*<sup>55</sup> provides an example. The police suspected that Mr. Coolidge committed a brutal murder, and they went to the Coolidge home and spoke to Mrs. Coolidge when Mr. Coolidge was away.<sup>56</sup> The police asked Mrs. Coolidge if her husband owned any guns, and she volunteered to bring them to the police.<sup>57</sup> Two officers accompanied Mrs. Coolidge to the bedroom where the guns were located. “If you would like them,” she told the police, “you may take them.”<sup>58</sup> The officers took the guns away, one of which the prosecution believed was the murder weapon.<sup>59</sup> Mr. Coolidge argued that his wife had been acting as a state actor when she went to the bedroom and that, therefore, a warrant was required to enter their home.<sup>60</sup>

The Supreme Court disagreed. According to the Court, whether Mrs. Coolidge was acting as a state actor under the Fourth Amendment depended on whether the officers were attempting to control or direct her conduct.<sup>61</sup> In this case, the impetus for entering the home to obtain guns and clothes was Mrs. Coolidge, not the police: she was acting on her own accord in an effort to prove her husband innocent.<sup>62</sup> “There is not the slightest implication of an attempt on [the officers’] part to coerce or dominate her,” the Court wrote, “or, for that matter, to direct her actions by the more subtle

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53. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 614 (1989).

54. *Id.*

55. 403 U.S. 443 (1971).

56. *Id.* at 446.

57. *Id.* at 486.

58. *Id.*

59. *See id.* at 448 (stating the prosecution’s claim that one of the guns taken from the Coolidge home by the police was the murder weapon).

60. *See id.* at 487 (articulating the petitioner’s argument that he was the victim of a search and seizure because Mrs. Coolidge was acting as an instrument of the officials by complying with a demand made by them).

61. *See id.* at 487–89 (stating and applying the test as a question of whether an actor is acting as an “instrument” of the state through the coercion or dominance of the police).

62. *Id.* at 489.

techniques of suggestion that are available to officials in circumstances like these.”<sup>63</sup> A subjective government effort to control the private party was needed to make that private party a government actor.

### B. *Fourth Amendment Reasonableness*

After identifying a government search or seizure, courts next ask whether the search or seizure is constitutionally reasonable and therefore lawful.<sup>64</sup> The reasonableness of a search or seizure generally hinges on its justification. In general, a search or seizure is permitted when conducted to satisfy a significant government interest that outweighs the invasion of privacy or security.<sup>65</sup> Once again, the government’s subjective intent plays an important role in making that assessment.

This section surveys the reasonableness doctrines that rely on government subjectivity. It starts with the special needs doctrine, turns to the inventory search doctrine, covers the scope of *Terry* frisks, and concludes with probation and parolee searches.<sup>66</sup> At each stage, the doctrine looks to an officer’s subjective state of mind.

*1. The Special Needs Doctrine.*—The starting point for understanding the role of officer subjectivity in reasonableness doctrine is the so-called “special needs” doctrine.<sup>67</sup> Under the special needs doctrine, government searches or seizures can be permitted without a warrant or probable cause when they are conducted in a reasonable way to advance important government interests

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63. *Id.*

64. *See, e.g.,* United States v. Jones, 565 U.S. 400, 413 (2012) (addressing the government’s argument of reasonableness after determining that the government’s actions constituted a search under the Fourth Amendment).

65. *See* Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 618–24 (2016) (characterizing the reasonableness standard under the Fourth Amendment as a form of cost–benefit analysis that balances the intrusion upon an individual’s privacy against the degree in which the search is necessary to further a legitimate governmental interest).

66. There are additional individual cases from the circuits that have applied subjective tests but that have not been reviewed by the Supreme Court. *See, e.g.,* Perez Cruz v. Barr, 926 F.3d 1128, 1140–43 (9th Cir. 2019) (adopting a subjective test for the application of the rule of *Michigan v. Summers*); United States v. Mohamud, 843 F.3d 420, 441–44 (9th Cir. 2016) (appearing to adopt a subjective test to Fourth Amendment analysis of who is targeted in a communication between an individual who lacks Fourth Amendment rights and an individual who has Fourth Amendment rights); United States v. Carey, 172 F.3d 1268, 1273 (10th Cir. 1999) (adopting a subjective test for applying the plain-view doctrine to digital evidence). I have opted not to discuss them as examples of the subjective approach because they are individual lower court decisions and are not firmly established in the caselaw.

67. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10 (6th ed. 2020) (analyzing the application of the special needs doctrine by the courts in different contexts).

other than ordinary law enforcement.<sup>68</sup> The doctrine exists because modern governments wear many hats. In addition to enforcing criminal laws, government officials are tasked with administering government workplaces, running public schools, protecting the public from drunk drivers, and performing countless other nonlaw-enforcement tasks. The special needs doctrine provides a doctrinal framework for balancing these government interests with privacy rights outside traditional law enforcement.<sup>69</sup>

Applying the special needs doctrine often requires considering government intent.<sup>70</sup> In particular, courts often examine the governmental purpose of the search or seizure to determine if it was undertaken for a special need outside ordinary law enforcement.<sup>71</sup> Importantly, this question is typically posed at a programmatic level rather than an individual one. Courts scrutinize the purpose of the program, not what a particular officer was thinking.<sup>72</sup> But the legality of the search nonetheless hinges on government intent.

We can helpfully frame the dynamic by contrasting two cases: *Michigan Department of State Police v. Sitz*<sup>73</sup> and *City of Indianapolis v. Edmond*.<sup>74</sup> In *Sitz*, the Court held that a drunk driving checkpoint was constitutional. The checkpoint program was “aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways.”<sup>75</sup> This nonlaw-enforcement public safety purpose permitted the government to stop the cars so long as the stop was generally reasonable: The usual requirement of probable cause or reasonable suspicion did not apply. The seizures in *Sitz* were reasonable, the Court concluded, because “the State’s interest in preventing drunken driving” and “the extent to which this system can reasonably be said to advance that interest” outweighed “the degree of intrusion upon individual motorists who are briefly stopped.”<sup>76</sup>

In contrast, the Supreme Court invalidated a narcotics checkpoint in *Edmond*. The city of Indianapolis set up a checkpoint on a highway entering the city to search cars for drugs.<sup>77</sup> The “primary purpose” of the checkpoint was “the discovery and interdiction of illegal narcotics,” the Court noted,

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68. See generally *id.* (describing the way in which the courts have characterized the special needs doctrine).

69. See Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 276 (2011) (describing the characteristics of the special needs test as laid out by the Supreme Court).

70. See *infra* notes 73–82.

71. See *id.*

72. See *id.*

73. 496 U.S. 444 (1990).

74. 531 U.S. 32 (2000).

75. *Edmond*, 531 U.S. at 39 (describing the checkpoint in *Sitz*).

76. *Sitz*, 496 U.S. at 455.

77. *Edmond*, 531 U.S. at 34–36.

which was a traditional law enforcement goal.<sup>78</sup> This purpose meant that the special needs doctrine from *Sitz* could not apply. “Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing,” the Court held, “the program contravenes the Fourth Amendment.”<sup>79</sup> A purpose to enforce criminal law requires satisfying traditional cause-based legal standards as in *Edmond*, while a purpose to advance other governmental goals, such as public safety, permits the program if it satisfies a general balance of interests as in *Sitz*.

*Edmond* stressed that it was the “programmatically purpose,” not the individual officer’s intent, that mattered.<sup>80</sup> Although the *Whren* line of cases rejected reliance on a particular officer’s intent, “programmatically purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.”<sup>81</sup> The basic idea appears to be that special needs searches and seizures reflect a broader nonlaw-enforcement interest and are permitted when reasonable to advance that interest. Courts measure whether a search or seizure reflects and advances that interest by first determining whether its motivation matches its legal justification.<sup>82</sup>

2. *The Inventory Search Exception.*—The Supreme Court has also considered subjective intent in applying the inventory search exception. The inventory search exception permits the police to search property taken into police custody to create a record of its contents in the event that claims are later made that property was not returned or was damaged.<sup>83</sup> The Court has suggested that the inventory search exception applies only if the impounding of property is not a pretext for general law-enforcement concerns. As the Court stated in *Florida v. Wells*,<sup>84</sup> “an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.”<sup>85</sup> Under the doctrine, “[t]he individual police officer must not be allowed so much latitude that inventory searches are turned into a ‘purposeful and general means of discovering evidence of crime.’”<sup>86</sup> As applied in the lower courts,

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78. See *id.* at 34, 40–41 (agreeing with lower courts that the city’s proximate goal was to apprehend drug offenders).

79. *Id.* at 41–42.

80. *Id.* at 46.

81. *Id.* at 45–46.

82. See *id.* at 37–40 (examining law-enforcement motivations in cases where suspicionless searches have been upheld or overturned).

83. See generally LAFAYE, *supra* note 67, at § 7.4(a) (discussing inventory search doctrine).

84. 495 U.S. 1 (1990).

85. *Id.* at 4.

86. *Id.* See also *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976), allowing an inventory search and stressing that “there is no suggestion whatever” that the inventory search “was a pretext concealing an investigatory police motive.”

this means that courts routinely scrutinize inventory searches to determine if they were conducted “as a pretext for criminal investigation.”<sup>87</sup>

The Supreme Court reconciled the role of subjective intent for inventory searches with its usual opposition to such a role in *Whren*. According to *Whren*, the inventory search cases did not “endors[e] the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred.”<sup>88</sup> The key was that searches “for the purpose of inventory or administrative regulation” did not require probable cause.<sup>89</sup> Only when probable cause was not required did subjective intent matter. Thus, “outside the context of inventory search or administrative inspection,” an officer’s motive could not invalidate “objectively justifiable behavior under the Fourth Amendment.”<sup>90</sup>

3. *The Scope of Terry Frisks*.—The Supreme Court has also relied on subjective intent, albeit less than fully explicitly, in determining the permitted scope of frisks for weapons. *Terry v. Ohio*<sup>91</sup> permits officers to pat down a suspect for guns, knives, or other threats to the officer when the officer has reasonable suspicion that the suspect is armed and dangerous.<sup>92</sup> In *Minnesota v. Dickerson*,<sup>93</sup> the Court imposed an important limit on the type of frisk that appears to hinge on the officer’s state of mind.

The officer in *Dickerson* patted down a suspect for weapons and felt “a small lump”<sup>94</sup> sticking out from the suspect’s jacket pocket. With his hands outside the jacket, the officer manipulated the lump, “examin[ing] it with [his] fingers.”<sup>95</sup> The officer’s manipulation of the lump led it to slide around, causing the officer to conclude that it was likely a lump of crack cocaine wrapped in cellophane. At that point the officer reached into the pocket and pulled out the item, confirming his suspicion and leading to charges.<sup>96</sup> Among the issues before the Supreme Court was whether the officer could use his hands to examine the lump from the outside of the pocket to determine what was inside.

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87. See *People v. Toohey*, 475 N.W.2d 16, 19, 24–25, 27 (Mich. 1991) (presenting an overview of Supreme Court exceptions to the need for a warrant and holding that the search was constitutional because there was no showing that it was a pretext for a criminal investigation).

88. *Whren v. United States*, 517 U.S. 806, 811 (1996).

89. *Id.* at 811–12.

90. *Id.* at 812.

91. 392 U.S. 1 (1968).

92. *Id.* at 30.

93. 508 U.S. 366 (1993).

94. *Id.* at 369.

95. *Id.*

96. *Id.*

The Court answered no.<sup>97</sup> The core problem was the officer's subjective state of mind at the time of his act. *Terry* permitted officers to conduct a pat-down for weapons. But the officer in *Dickerson* already had "concluded that it contained no weapon" when he examined the lump.<sup>98</sup> Because the officer believed that there was no weapon in the suspect's pocket, his act of "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"<sup>99</sup> "was unrelated to '[t]he sole justification'" of *Terry* frisks<sup>100</sup> and "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*."<sup>101</sup>

Although the Court did not dwell on the point in *Dickerson*, its analysis appears to rest the scope of *Terry* frisks on the officer's subjective intent. Whether squeezing the lump complied with the Fourth Amendment depended on whether the officer was looking for a weapon or looking for evidence. The officer could squeeze the lump while trying to find a weapon because that goal was related to the officer-safety justification for *Terry* frisks. On the other hand, squeezing while subjectively searching for drugs was unlawful because it was unrelated to that justification.

4. *Probation and Parolee Searches*.—Subjective approaches have also been applied in the lower courts to Fourth Amendment rules on searches of probationers and parolees. The Supreme Court has explained that those on probation and parole can have limited Fourth Amendment rights if courts impose search provisions on their conditions of release.<sup>102</sup> This raises an intriguing question: Does an officer need to know the person's status to rely on the Court's deferential Fourth Amendment search rules?

To see this, imagine an officer searches a person or his property as part of a criminal investigation. The officer only later determines that the person was on probation or parole and had a decreased expectation of privacy. In such a case, how much Fourth Amendment protection does the person receive? Is the level of protection set by the officer's subjective but incorrect belief that the person had full Fourth Amendment rights? Or are protections lowered by the person's status as a probationer or parolee that the officer did not know?

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97. *Id.* at 377, 379.

98. *Id.* at 378.

99. *Id.* (quoting *Dickerson v. State*, 481 N.W.2d 840, 844 (1992)).

100. *Id.*

101. *Id.*

102. *See United States v. Knights*, 534 U.S. 112, 122 (2001) (upholding a limited right to privacy under the Fourth Amendment for those on probation). *See also Samson v. California*, 547 U.S. 843, 852 (2006) (stating that those on parole have a limited but not fully diminished right to privacy under the Fourth Amendment).

Although the Supreme Court has not directly addressed this question, lower courts are uniform that the officer's subjective understanding controls. As one court summarized: "[T]here is a knowledge component to a valid parole search, that is, the officers conducting the search must have knowledge of the elements that validate the search."<sup>103</sup> For the special rules on probation and parole searches to apply, officers must know that the person was on parole or probation, that the person's parole or probation agreement included a search provision, and that the place searched was subject to the provision.<sup>104</sup>

This approach has been justified on the ground that the reasonableness of a search should be measured "based on the circumstances *known to the officer* when the search is conducted."<sup>105</sup> Facts that become known only after a search occurred should not impact its reasonableness.<sup>106</sup> As a practical matter, this makes the reasonableness of the search hinge on the officer's subjective state of mind. If the officer correctly thinks he is searching a person on probation or parole, the lower standards apply. If the officer incorrectly thinks he is searching a person with no prior convictions, they do not.<sup>107</sup>

### C. Fourth Amendment Remedies

Officer subjectivity plays a particularly significant role in the application of the exclusionary rule. Under the exclusionary rule, the fruits of unlawful searches may be subject to suppression in a criminal case. The

103. *United States v. Williams*, 702 F.Supp.2d 1021, 1030 (N.D.Ill. 2010).

104. *See id.* (laying out the specific factors an officer must have knowledge of before being allowed to execute a valid parole search); *see also United States v. Caseres*, 533 F.3d 1064, 1075–76 (9th Cir. 2008) (holding that officer must be aware of search condition to justify search under parole search rules); *Moreno v. Baca*, 431 F.3d 633, 641 (9th Cir. 2005) (holding that officer must be aware of parole status to rely on parole search rules); *State v. Brusuelas*, 219 P.3d 1, 5 (N.M. Ct. App. 2009) (holding that officer must be aware of probation condition for probation search rules to apply).

105. *In re Jaime P.*, 146 P.3d 965, 972 (Cal. 2006).

106. *Id.*

107. It could also be argued that the probable cause and reasonable suspicion tests themselves are examples of subjective government *mens rea* tests in Fourth Amendment doctrine because they look to what an officer knew in order to determine if the government had sufficient cause. *See, e.g., Craig M. Bradley, The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 *MISS. L.J.* 339, 372 (2006) ("[T]here is no such thing as a purely objective Fourth Amendment inquiry. Once one concedes, as the Court does in *Devenpeck*, that what the police know is part of the probable cause equation, the genie of police intent is out of the bottle."). Although this could be included as an example of government subjectivity, I think the picture is somewhat more mixed. First, the Supreme Court has formally rejected an intent-based standard for probable cause. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (noting that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause"). Second, the so-called "collective knowledge doctrine," which allows courts to consider the knowledge among different officers, suggests that the knowledge component in cause thresholds is more about what an officer was objectively told than what an officer subjectively knew. *See generally* WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 3.5(a)–(b), § 9.5(j) (5th ed. 2018) (discussing the collective knowledge doctrine).

complex doctrines that govern the exclusionary rule include frequent consideration of the government's subjective intent. There are four doctrines to consider: the role of *mens rea* in *Herring v. United States*,<sup>108</sup> the fruit of the poisonous tree doctrine, *Franks* challenges,<sup>109</sup> and lower court rules on flagrant disregard of a warrant.

*I. The Role of Mens Rea in Herring v. United States.*—The starting point for considering officer subjectivity in exclusionary rule case law is the Court's 2009 ruling in *Herring v. United States*.<sup>110</sup> Under *Herring*, only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence," is sufficiently deliberate and culpable to trigger the exclusionary rule.<sup>111</sup>

Here are the facts. Officers found drugs and guns on Herring when they searched him after arresting him based on a report that a warrant had been issued for his arrest.<sup>112</sup> It turned out, however, that the report was wrong. The warrant had been recalled months earlier, but the nearby county that reported that a warrant existed had failed to update its database.<sup>113</sup> The county quickly realized its error, but its correction came too late: The officers had already arrested Herring and found the drugs and guns.<sup>114</sup> The question before the Supreme Court was whether the exclusionary rule required the suppression of the fruits of Herring's wrongful arrest.

The answer, the Court reasoned, depended on the officers' culpability in making the unlawful seizure. According to Chief Justice Roberts, suppression is only appropriate when it results in appreciable deterrence that outweighs the social costs of letting the guilty escape punishment.<sup>115</sup> And, critically, the prospects of deterrence hinge largely on the officer's state of mind: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>116</sup>

The exclusionary rule should not be applied to Herring's arrest, the Court ruled, because the "police mistakes [we]re the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements."<sup>117</sup> The officers who relied on the report that there was a

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108. 555 U.S. 135 (2009).

109. *Franks v. Delaware*, 438 U.S. 154 (1978).

110. 555 U.S. 135 (2009).

111. *Id.* at 144.

112. *Id.* at 137.

113. *Id.* at 137–38.

114. *Id.* at 138.

115. *Id.* at 141.

116. *Id.* at 144.

117. *Id.* at 147.

warrant out for Herring’s arrest had no reason to doubt the accuracy of that claim. None of the officers involved had heard of a similar error occurring.<sup>118</sup> Absent a showing of reckless or intentional misconduct—such as evidence that the officers “knowingly made false entries to lay the groundwork for future false arrests”—the degree of fault was mere negligence and not the higher degree of culpability required to trigger the exclusionary rule.<sup>119</sup>

An important caution in treating *Herring* as a case about officer subjectivity is that the Court insisted its test was objective and not subjective. “The pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers,’” the Court wrote.<sup>120</sup> The test relies on “a particular officer’s knowledge and experience, . . . but not his subjective intent,” citing *Whren*.<sup>121</sup> While that may be true for distinguishing mere negligence from gross negligence, it seems hard to see how that applies to “deliberate” wrongful conduct. The dictionary definition of “deliberate” is “intended, not done by chance or accident.”<sup>122</sup> This suggests that intent or awareness of violating the Fourth Amendment can itself reflect the culpability that triggers the exclusionary rule, which to my mind brings the *Herring* inquiry into a more subjective frame despite the Court’s statement to the contrary.

2. *The Fruit of the Poisonous Tree Doctrine*.—An officer’s subjective awareness of illegality is also relevant to the so-called fruit of the poisonous tree doctrine. This doctrine asks whether the discovery of particular evidence was so closely connected to an earlier constitutional violation that the evidence must be suppressed as a result of it.<sup>123</sup> In 2016, in *Utah v. Strieff*,<sup>124</sup> the Court interpreted the doctrine to rely in part on whether the violation was “a purposeful or flagrant violation” of the defendant’s Fourth Amendment rights.<sup>125</sup>

The officer in *Strieff* stopped a man who had just walked out of a house under surveillance for narcotics activity.<sup>126</sup> The officer asked the man for identification, the man produced a state identification card identifying himself as Edward Strieff, and a call to the police dispatcher revealed that

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118. *Id.*

119. *Id.* at 144.

120. *Id.* at 145 (quoting Reply Brief for Petitioner at 4–5, *Herring v. United States*, 555 U.S. 135 (No. 07-513)).

121. *Id.* at 145–46.

122. *Deliberate*, MACMILLAN DICTIONARY, [https://www.macmillandictionary.com/us/dictionary/american/deliberate\\_1](https://www.macmillandictionary.com/us/dictionary/american/deliberate_1) [<https://perma.cc/24FD-FF87>].

123. See generally LAFAVE, *supra* note 67, at § 11.4 (discussing the fruit of the poisonous tree doctrine).

124. 136 S. Ct. 2056 (2016).

125. *Id.* at 2063.

126. *Id.* at 2059–60.

there as a warrant out for his arrest.<sup>127</sup> The officer searched Strieff and found drugs, leading to drug charges.<sup>128</sup> The initial stop violated the Fourth Amendment because the officer lacked the reasonable suspicion to justify the stop.<sup>129</sup> The question in *Strieff* was whether the drugs discovered in the search incident to arrest were fruits of the unlawful stop and therefore should have been suppressed.<sup>130</sup>

In a nod to *Herring*, Justice Thomas reasoned in *Strieff* that the exclusionary rule was proper “only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.”<sup>131</sup> The officer’s violation “was at most negligent,” Justice Thomas concluded, based on “good-faith mistakes” about how the law applied to his acts.<sup>132</sup> The conclusion that the officer’s “errors in judgment hardly r[ise] to a purposeful or flagrant violation of Strieff’s Fourth Amendment rights” counseled against suppression.<sup>133</sup>

3. *Franks Challenges*.—The test for challenging false statements in search warrants also has a subjective element. Under *Franks v. Delaware*,<sup>134</sup> the fruits of a search warrant can be suppressed if the defense can make a showing that the warrant was issued based on false statements of probable cause made “knowingly and intentionally, or with reckless disregard for the truth.”<sup>135</sup>

The problem addressed in *Franks* is that a search warrant can establish probable cause based on erroneous facts. Consider three different kinds of errors. In some cases, the officer might assert evidence honestly believed that turns out to be wrong.<sup>136</sup> For example, an affidavit might correctly report an informant’s claim that he saw the defendant commit the crime, but it may turn out that the informant was mistaken.<sup>137</sup> In other cases, the officer marshalling the evidence in the affidavit might make an innocent mistake.

127. *Id.* at 2060.

128. *Id.*

129. *See id.* at 2062 (noting the Court’s assumption that the initial stop was unconstitutional for lack of reasonable suspicion).

130. *See id.* at 2059 (framing the case around the question of whether the Fourth Amendment violation justified suppressing the seized evidence).

131. *Id.* at 2063.

132. *Id.*

133. *Id.*

134. 438 U.S. 154 (1978).

135. *Id.* at 155–56.

136. *See id.* at 165 (“This does not mean ‘truthful’ in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge that sometimes must be garnered hastily.”).

137. *See id.* (acknowledging that information received from informants may include incorrect material).

For example, the officer might accidentally misstate the evidence by reading a police report incorrectly in a way that makes the evidence seem stronger than it is.<sup>138</sup> Finally, the officer might deliberately or recklessly falsify the evidence, such as when a corrupt officer simply lies in the affidavit to intentionally create an impression of probable cause that did not exist.

*Franks* holds that evidence obtained from a warrant search should be suppressed when a defendant can show by a preponderance of the evidence that assertions in the warrant affidavit fit into the third category: the statements are “deliberate falsehood[s]” or false statements made with “reckless disregard for the truth,” without which no probable cause would have been found and the warrant should not have issued.<sup>139</sup> Justice Blackmun’s opinion for the Court does not delve into why the test treats false statements based on an affiant’s “negligence or innocent mistake” one way but those based on “deliberate falsity or reckless disregard”<sup>140</sup> another. But it suggests that the reason was the seriousness of the harm. The “specter of intentional falsification”<sup>141</sup> threatened to reduce the warrant requirement “to a nullity.”<sup>142</sup> The Fourth Amendment would have little meaning, Justice Blackmun reasoned, “if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.”<sup>143</sup>

4. *Flagrant Disregard of Warrant Limitation.*—A final exclusionary rule doctrine that relies on subjective intent is the “flagrant disregard” standard for executing warrants that has been widely adopted by the federal courts of appeals.<sup>144</sup> When a warrant is executed in flagrant disregard of its terms, the entirety of the fruits of the warrant search can be suppressed. Courts applying this test consider whether the officers so grossly exceeded the scope of the warrant that the officers appeared to be subjectively on a “fishing expedition” seeking other information.<sup>145</sup> When this occurs, the remedy is blanket

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138. *See id.* at 170 (recognizing “instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination”).

139. *Id.* at 171–72.

140. *Id.*

141. *Id.* at 168.

142. *Id.*

143. *Id.*

144. *See, e.g.,* *United States v. Khanani*, 502 F.3d 1281, 1289 (11th Cir. 2007) (applying the standard of flagrant disregard to test a Fourth Amendment violation); *United States v. Le*, 173 F.3d 1258, 1269–70 (10th Cir. 1999) (describing the test for transforming a valid warrant into a general warrant as a test of “‘flagrant disregard’ for the terms of the warrant”); *United States v. Matias*, 836 F.2d 744, 747–48 (2d Cir. 1988) (citing cases). The test has not yet been addressed by the United States Supreme Court, however.

145. *See, e.g.,* *United States v. Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (describing circumstances in which government agents “flagrantly disregard” the terms of a warrant in ways that justify “wholesale suppression” of the evidence); *United States v. Young*, 877 F.2d 1099, 1105–06 (1st

suppression of all of the evidence—even that evidence described in the warrant that was properly found and seized.

*United States v. Foster*<sup>146</sup> provides an example. Officers executed a search warrant at Foster’s home for marijuana and several guns.<sup>147</sup> When the officers found that evidence, Foster was arrested and transported to the county jail. The officers continued the search for additional evidence, however. During the continued search, officers watched home movies that Foster had apparently recorded that included sexual acts between Foster and his stepdaughter. Federal agents ended up seizing the videos and state agents seized anything of value they could find in the home, including a lawn mower and three vehicles.<sup>148</sup>

The Tenth Circuit held that everything found in Foster’s home should be suppressed because the officers had executed the warrant in flagrant disregard of its terms. Once in the house, the officers had ignored the warrant and simply looked for any evidence of any crime and had looked for “anything of value”<sup>149</sup> to seize. The officers had viewed the warrant “as a general warrant,” and they “executed the warrant in accord with those views.”<sup>150</sup> The district judge’s factual finding that the officers had gone on a “fishing expedition” was supported by the record: “the officers’ disregard for the terms of the warrant was a deliberate and flagrant action taken in an effort to uncover evidence of additional wrongdoing”<sup>151</sup> unrelated to the warrant’s terms. Thus, the entire fruits of the search were suppressed.<sup>152</sup>

## II. The Normative Case for Objective Versus Subjective Fourth Amendment Rules

Part I showed that Fourth Amendment doctrine relies increasingly on a mix of objective and subjective tests. This section turns to the normative question: When are subjective approaches appropriate? This section makes two related arguments and then puts them together.

First, reliance on subjectivity can advance Fourth Amendment goals because it allows courts to enact narrower rules that more accurately identify harmful police practices. What an officer was thinking tells us what the officer was trying to do. What an officer was trying to do sheds light on what

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Cir. 1989) (citing cases to support suppression only when the lawful parts of a search seem to be a pretext for the unlawful parts).

146. 100 F.3d 846 (10th Cir. 1996).

147. *Id.* at 848.

148. *See id.* at 848, 848 n.1 (discussing the items seized during the process of the warrant’s execution).

149. *Id.* at 848.

150. *Id.* at 850.

151. *Id.* at 850–51.

152. *Id.* at 853.

interests the officer's conduct furthers. If courts can know an officer's state of mind, doctrinal reliance on states of mind can allow courts to more accurately distinguish acts likely to advance important government interests from those unlikely to advance them. More tailored and specific Fourth Amendment rules can allow those rules to achieve a greater public enforcement benefit at a lower civil liberties cost.<sup>153</sup>

The second argument is that the benefit of subjectivity depends on the error rates of determining it. Subjectivity is useful when it can be measured relatively accurately. But when courts can't identify states of mind accurately, subjective tests that aim to maximize the public benefit of enforcement can inadvertently have the opposite effect.<sup>154</sup> Importantly, subjective approaches are not monolithic. Some states of mind can be reliably determined while others cannot be. But whether subjectivity can advance Fourth Amendment interests depends in large part on whether that particular subjective inquiry can be accurately measured.

Combining these two points suggests a framework for choosing between objective and subjective rules in Fourth Amendment doctrine. In each context, courts should consider the potential benefit of a narrower subjective rule in light of the likelihood courts can identify the government's state of mind accurately.

#### A. *The Existing Debate on Objective Versus Subjective Rules*

It's useful to begin with the existing scholarly debates on objective versus subjective Fourth Amendment rules. That debate has been plentiful but also relatively narrow. It has focused primarily on the reasonableness of Fourth Amendment searches and seizures, especially in the context of *Whren* and pretextual stops. Here's a quick overview.

On one hand, the Supreme Court has defended objective rules for the reasonableness of searches and seizures primarily on the ground that "the Fourth Amendment regulates conduct rather than thoughts" and objectivity "promotes evenhanded, uniform enforcement of the law."<sup>155</sup> When Fourth Amendment law relies on individualized suspicion to justify a search or seizure, that objective suspicion provides the objective and reliable justification.<sup>156</sup> The alternative of relying on what an officer was subjectively thinking is comparatively arbitrary, as two similarly situated officers might do exactly the same things but have two different sets of thoughts.<sup>157</sup> The best

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153. See generally *infra* subpart II(C).

154. See generally *infra* subparts II(D)–(E).

155. *Ashcroft v. Al-Kidd*, 563 U.S. 731, 736 (2011).

156. See generally *Whren v. United States*, 517 U.S. 806 (1996).

157. See *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004) (articulating that Fourth Amendment reasonableness analysis relies on objective standards of conduct, rather than the officer's subjective state of mind).

way to have consistent rules is for the reasonableness balance to look to the factual basis for the officer's conduct rather than the thoughts in his head.

Scholars have generally doubted these claims. Much of the literature has focused on the debate over *Whren*, and especially the concern that allowing pretextual law enforcement gives the police so much discretion that *Whren* effectively blesses racially discriminatory police practices.<sup>158</sup> Scholars have explained that racially discriminatory enforcement inflicts grievous harms, and they argue that these harms should be considered as part of the reasonableness of the government's action.<sup>159</sup> The harms of racially discriminatory enforcement are so severe that the "objective" measure of reasonableness provided by probable cause is no longer accurate: The subjective must be considered.<sup>160</sup> While *Whren* itself suggested that the Fourteenth Amendment might be a better source for addressing this concern, the critics (including Justice Ginsburg, in a recent concurrence)<sup>161</sup> forcefully argue that it is a Fourth Amendment concern that justifies a Fourth Amendment response.<sup>162</sup>

These arguments are tremendously important, especially in light of the recent and long-overdue renewal of public interest in racially discriminatory

158. The literature here is vast and impressive. Prominent examples include: Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 192–96; Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 894, 898–99, 919, 941 (2015); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1065–75 (2010); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2010–11 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 376–78 (1998); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1413–14 (2000); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 320–22 (2001); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 312–316 (1997). Cf. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978–83 (1999).

159. See, e.g., Chin & Vernon, *supra* note 158, at 917–22, 924–26 (arguing that *Whren* is in tension with the Fourteenth Amendment's nondiscrimination principles and that nondiscrimination should be incorporated into reasonableness calculations).

160. Cf. Jonathan Witmer-Rich, *Arbitrary Law Enforcement Is Unreasonable: Whren's Failure to Hold Police Accountable for Traffic Enforcement Policies*, 66 CASE W. RES. L. REV. 1059, 1080 (2016) (suggesting that addressing arbitrariness, which can be described objectively, is insufficient to address discrimination in law enforcement, which is subjective).

161. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment) ("I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry.").

162. See, e.g., Bradley, *supra* note 15, at 343 (rejecting the objective approach); Burkoff, *supra* note 15, at 111 (1982) (same); Dix, *supra* note 15, at 377 (same).

police enforcement.<sup>163</sup> But it seems to me that both sides of this existing debate are only part of a broader dynamic. The choice between subjective and objective doctrines in Fourth Amendment law raises broader stakes that have been underdiscussed and underdeveloped. The remainder of this section tries to develop that broader perspective, which will then be applied in Part III to evaluate existing doctrine.

### B. *Costs and Benefits in Fourth Amendment Law*

In my view, the debate over officer subjectivity in Fourth Amendment law is best framed in terms of the expected costs and benefits of government action. Officer subjectivity matters because an officer's subjective thoughts are often relevant to those costs and benefits. Subjectivity can bring promise or peril, however, making officer subjectivity both appealing and risky as a doctrinal mechanism to weigh competing interests in Fourth Amendment law. Understanding this point requires starting with first principles about the functional role of search and seizure law. With that foundation explored, we can then see how it plays out with officer subjectivity.

Here's the big picture. Fourth Amendment law can be understood as an effort to internalize the civil liberties harms of government investigations.<sup>164</sup> Investigators try to collect evidence to solve cases and enforce the law. Ideally, this can further the public benefits of criminal enforcement such as protecting public safety and punishing wrongdoers. But there's a catch: Typically, government officials undervalue the civil liberties harms that their investigations cause.<sup>165</sup> They are less attuned than they should be to the harms to privacy, property, and collective community well-being that their investigations can trigger.<sup>166</sup>

Fourth Amendment law can be understood as a way to internalize investigative harms by imposing a rough cost-benefit framework on policework.<sup>167</sup> In a world without the Fourth Amendment, we would expect officers to engage in societally harmful searches and seizures because they

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163. See, e.g., Giovanni Russonello, *Why Most Americans Support the Protests*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html> [<https://perma.cc/ZJ74-NM8F>] (describing recent shifts in public opinion about racism and policing, noting that “[n]ever before in the history of modern polling have Americans expressed such widespread agreement that racial discrimination plays a role in policing — and in society at large.”).

164. For an economic model of search and seizure protections explaining these harms as “externalities” that can be addressed through a cost-benefit analysis, see Kerr, *supra* note 65, especially subparts I(A)–(D).

165. *Id.* at 603–05.

166. *See id.* at 600.

167. *See id.* at 605–06.

would fail to account fully for those societal costs.<sup>168</sup> Fourth Amendment law pushes the police to account for the externalities of their investigations by prohibiting steps when their civil liberties costs can be expected to outweigh the public benefits to the enforcement of the law.<sup>169</sup>

When judges implement Fourth Amendment law, they intuitively try to account for this dynamic. They will consider both how much a government action furthers legitimate government interests in enforcing the law and public safety and how much it infringes on privacy and civil liberties. And they will channel those instincts through the basic framework of Fourth Amendment doctrine, regulating those steps that impose high civil liberties costs as “searches” or “seizures” and subjecting searches or seizures to a rough cost–benefit analysis of reasonableness.<sup>170</sup> The outcome, at least ideally, is more efficient investigations that achieve greater public safety benefits at lower costs to civil liberties.<sup>171</sup>

### C. *The Scope Problem in Weighing Costs and Benefits*

Now, let’s focus on the role of government subjectivity. The subjectivity debate relates to a particular problem of measuring costs and benefits that I will call the scope problem. In an ideal world, courts could measure the costs and benefits of every single law enforcement step in isolation. They could determine if a particular officer’s act in a particular case on a particular day advanced public interests more than its civil liberties costs.

But this isn’t realistic. In the real world, the need for *ex ante* clarity and the impossibility of measuring costs and benefits in any one case requires courts to generalize.<sup>172</sup> Instead of looking at each case in isolation, courts devise rules that generalize from groups of facts. They analyze the costs and benefits of government-investigative steps by measuring the typical costs and benefits of that step over the range of facts governed by the rule.

The scope problem is that the costs and benefits of any step depend on the level of generality used to describe it. Because Fourth Amendment doctrine can use broad or narrow rules, courts have significant flexibility in selecting a scope that determines how costs and benefits will be

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168. *See id.* (stating that “[a]bsent legal restriction, the police will discount external costs and take steps that seem desirable to officers but are welfare-reducing to society as a whole[.]” and presenting an example of these calculations).

169. *Id.*

170. *Id.*

171. *See id.* (arguing that Fourth Amendment rules tend to serve this function).

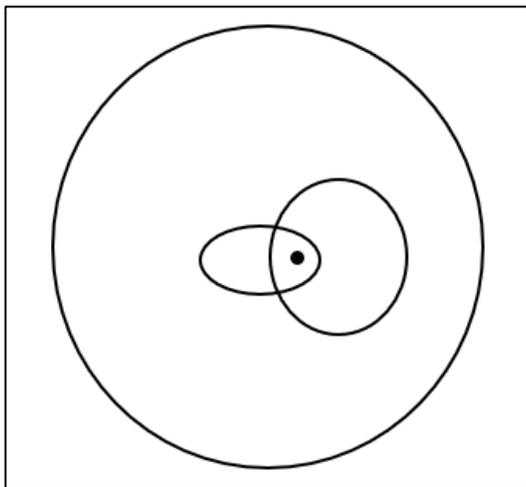
172. *See id.* at 608–10 (discussing the difficulties of predicting and measuring costs and benefits in individual cases).

categorized.<sup>173</sup> This has major implications for the role of officer subjectivity in search and seizure law.<sup>174</sup> Relying on an officer's state of mind allows courts to craft narrower rules, making it an important tool to generate more accurate rules if intent can be known.

It's important to understand why the scope problem exists and the role it plays in crafting Fourth Amendment doctrine. The problem exists because any factual scenario can be described as being inside an infinite number of different sets of broader facts that can be harnessed for a legal rule. Any one state of affairs in the world can be seen as an example of a range of possible sets, some larger and some smaller, which focus on different variables.

Figure 1 helps illustrate the point. The single dot represents the facts of any one case. The different shapes, all of which include the dot, are groupings of facts that represent the coverage of different possible rules. Note that some of the groupings are broad while others are narrow, representing broad or narrow rules. But the single dot—representing the specific facts of one case—is within all of these sets.

**Figure 1**



The scope problem is important because a judicial assessment of how much a step typically advances government interests and imposes costs largely depends on the scope courts select. Implementing the cost-benefit framework of Fourth Amendment law requires assessing costs and benefits

173. Cf. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–94 (1981) (discussing how the reasonableness of a person's action in criminal law varies based on the timeframe over which that action is analyzed).

174. See *supra* notes 164–72 and accompanying text (exploring how the existence of the Fourth Amendment helps police departments internalize civil-liberties-based harms through a cost-benefit analysis framework).

over a presumed set of cases. Courts generalize about what is typical for that set based on their plausible intuitions about how facts in that grouping tend to work.<sup>175</sup>

But here's the key point: Because the scope defines the set, the scope also determines how much the costs and benefits of that step will be assessed. When judges are picking the set, they are picking the groupings of facts (such as those represented in Figure 1) over which the balance will be made. Picking the set picks the group of facts, and picking the group of facts can determine how a generalization over those facts will inform the cost-benefit balance.<sup>176</sup>

This likely sounds hopelessly abstract, so let me use a stylized example to render it more concrete. Imagine a traffic stop. Specifically, let's say that an officer pulls over a car with a broken taillight. He does so, let's assume, because he has some suspicion that the driver is a murderer. The officer has no interest in enforcing the traffic laws. Instead, he wants to question the driver to see if he can gather evidence of the murder.

Now imagine you are a judge tasked with deciding if the officer violated the Fourth Amendment. To make things interesting, assume that Fourth Amendment law is largely undeveloped. Imagine prior law has established that pulling the car over was a seizure,<sup>177</sup> but that it does not resolve when a traffic stop is a reasonable seizure. Your job, as a judge, is to craft the legal doctrine that answers whether the act of pulling over the car is a "reasonable" seizure.

As part of that task, you must create a legal test that analyzes how much the stop helped advance public interests in enforcement of the law. But as we will see below, the measurement of benefit depends on the scope you choose. We can see how by describing the stop in four different ways. We'll start at the broadest level of generality and move to a more specific description, focusing on how the measurement of government benefit may change.

Start at the broadest scope, what I will call Description 1. If we had to describe the stop in the most general terms, we might say that the officer's act was *detaining a person*. The driver is a person, after all, and pulling over the car is an example of detaining a person.<sup>178</sup> Using Description 1 requires us to answer a very broad question: On average, how much does detaining a person advance government interests?

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175. See Kerr, *supra* note 164, at 610–11.

176. Cf. Kelman, *supra* note 173, at 594–95 (highlighting that, in the criminal context, factual settings can be regarded either as disjointed events or as one unified incident depending upon which outlook the viewer chooses).

177. See *Brendlin v. California*, 551 U.S. 249, 251 (2007) (holding that pulling over a car seizes all of its occupants).

178. See *id.* at 255–56 (acknowledging that the police's stopping of a vehicle and detention of its occupants, no matter how brief, is sufficient to constitute a seizure).

At that level of generality, the answer seems to be “not much.” Government officials can detain individuals in an incredibly wide range of hypothetical cases. On one hand, the cases include moments when an officer has good reasons to detain the person. But they would also include times when an officer has terrible reasons to detain the person, such as to harass or intimidate him. Those cases would also include when an officer detains someone for no real reason at all, such as for entertainment value. Generalizing across all of these cases, the act of detaining a person is not associated with a reliable amount of government benefit.

Next let’s be more specific. For Description 2, describe the act as *a police officer pulling over a driver who has violated the traffic code*. Detaining the person now advances a more direct public interest. Unsafe driving leads to thousands of deaths and countless injuries every year.<sup>179</sup> Pulling over a driver who has violated the traffic code is an important way to identify traffic violations and ensure that he is driving in compliance with safety-oriented laws. Of course, we can’t know at this level of generality if any particular act of pulling over a driver who has violated the traffic code actually advances safety. But generalizing across all of the hypothetical cases, pulling over a driver who has violated the traffic code likely advances a significant public safety benefit.

Next get more specific again. For Description 3, let’s describe the act as *pulling over a driver who has violated the traffic code when the traffic violation is a pretext for the stop*. Adding information about the officer’s state of mind changes the picture. We are now dealing with the subset of cases in which the officer has no interest in furthering the public safety benefit that the stop earlier seemed to benefit. We would expect that pretextual stops do not advance the traffic benefit and instead raise concerns about racial discrimination and profiling. Generalizing across all of these cases, it doesn’t seem like pretextual stops benefit enforcement of the law at all.

One last example. For Description 4, let’s offer every detail we know and return to the original statement of the hypothetical: *The officer pulls over a car with a broken taillight because he has some suspicion that the driver is a murderer. The officer has no interest in enforcing the traffic laws, but he wants to question the driver to see if he can gather evidence of the murder*. This last example fills in the true reason for the stop. Our assessment of how much the stop advances public safety goes up again, at least somewhat, because the stop will enable the officer to question a murder suspect. The

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179. As the Supreme Court has recognized, the number of driving-related fatalities is “staggering.” *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (citing NHTSA, TRAFFIC SAFETY FACTS, 2014 DATA, SUMMARY OF MOTOR VEHICLE CRASHES 2 (No. 812263, May 2016) (Table 1), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812263> [<https://perma.cc/S57U-FHZQ>]) (showing 29,989 fatalities and 1,648,000 injuries in 2014).

pretextual stop was not racial profiling or a personal vendetta, we learn. Instead, the officer was trying to solve an important case.

I hope this example explains the scope problem. The public benefit associated with a government step depends on how we group it. The description conjures up a range of facts, and that range of facts will lead to an assessment of the typical benefit of the step. When courts craft Fourth Amendment doctrine, they necessarily pick a rule that determines the relevant grouping. What benefit the law estimates for a particular step depends on the group produced by the chosen specificity of the rule.

#### *D. Officer Subjectivity as a Tool to Narrow the Scope of Rules*

Why does all of this matter for officer subjectivity in Fourth Amendment law? It matters, I think, because considering an officer's subjective state of mind can let us narrow the scope of Fourth Amendment rules. Subjectivity allows the courts to distinguish the subset of cases with a particular state of mind from the subset of cases without it. Subjectivity can act as a scalpel, dividing up the general set of cases into the narrower subsets with different states of mind.

This can be useful because states of mind will often correlate with the public benefits and civil liberties costs of government action. What an officer was thinking tells us what he was trying to do. That, in turn, tells us what interest he was hoping to advance. And because we are more likely to hit what we aim for,<sup>180</sup> the interest that an officer was trying to advance viewed *ex ante* likely correlates with the interest the act actually did advance viewed *ex post*.

From this perspective, reliance on officer subjectivity lets courts craft narrower rules that can lead to more accurate cost-benefit balancing. It lets courts pick smaller sets in the Venn diagram of Fig. 1. Narrower rules mean less generalization of costs and benefits. And that in turn can more specifically regulate police practices to better identify harmful practices and achieve higher public benefits at lower civil liberties costs by channeling law enforcement conduct away from acts with low public benefits and higher civil liberties costs.

Let's go back to the traffic stop hypothetical above to see the dynamic. Description 1 was extremely general. It covered any detention for any reason or no reason at all, requiring one estimate of benefit for an incredibly wide range of facts. Description 2 was somewhat more specific, carving out a subset of detentions (traffic stops) in a category of circumstances (traffic violations). But it's still a very broad category.

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180. Cf. HENRY D. THOREAU, WALDEN 27 (J. Lyndon Shanley ed., Princeton Univ. Press 1971) (1854) ("In the long run men hit only what they aim at.")

The primary narrowing then came in Descriptions 3 and 4, both of which used officer subjectivity. Description 3 narrowed the category to cases in which the officer was acting pretextually. The subjectivity was still broad in that it ruled out one intent (a wish to enforce traffic laws) while permitting all others. Description 4 then provided the final narrowing. It carved out what we would hope is a very small category of stops when the officer is making a pretextual stop to find and question a suspected murderer. Relying on the officer's state of mind enabled a more finely grained doctrine with the potential for more accurate cost-benefit assessments.

This in turn can lead to police practices that better advance the public interest. The objective rule groups together government acts with bad intents and good intents: It allows both, even though the acts with bad intent are harmful. If states of mind can be accurately determined, the subjective rule will deter officers from the harmful acts associated with bad intents. Relying on subjectivity can permit narrow rules that distinguish good from bad practices with a scalpel instead of a sledgehammer. The subjective rule can minimize how often the harmful, bad-intent acts occur, resulting in law enforcement investigations with more public benefit at lower civil liberties cost.

#### *E. The Difficulty of Determining Government States of Mind*

The potential benefit of officer subjectivity is tempered by the widely recognized problem of measurement error.<sup>181</sup> It can be difficult for a court to determine an officer's state of mind.<sup>182</sup> As Justice White complained over a half century ago, "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."<sup>183</sup>

The problem derives in part from how courts resolve disputed facts in Fourth Amendment cases. Facts typically will be found after hearings on motions to suppress. The officer will take the stand weeks or months after a search or seizure occurred. A prosecutor will conduct a direct examination followed by a defense counsel's cross-examination. In an adversarial hearing, far removed in time and place from the relevant events, only the officer may know what he had been thinking. If the lawfulness of a government investigation hinges on officer subjectivity, the officer is likely to be keenly aware of which states of mind will lead to victory (a ruling for the

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181. *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (concluding that an officer's subjective intent in conducting an exigent circumstances search does not matter, "even if their subjective motives could be so neatly unraveled").

182. *See id.* at 405 (expressing the difficulty in accurately ascertaining an officer's subjective intent in conducting an exigent circumstances search).

183. *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting).

government) and which ones may lead to defeat (a ruling for the defendant). This is not an environment particularly conducive to revealing the truth.

Nor is the problem just that some officers will simply lie, although some will. Like everyone else, government officials on the job may act for an inchoate mix of reasons. An officer who pulls over a car with a broken taillight might do so in part to enforce the traffic laws or to question the driver as a suspect in another crime. He might do so in part for an illegitimate reason, such as to engage in racial profiling or harassment.<sup>184</sup> But he might do so in part because he has been instructed to by his boss, because he is expected to make a certain number of stops per day, or because he just thinks it is part of his job.

And he might not know exactly why he did it. As Anthony Amsterdam has pointed out, “[m]otivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.”<sup>185</sup> Trying to reconstruct a specific state of mind may be trying to create a clarity that never existed.<sup>186</sup>

This doesn’t mean that courts can never figure out an officer’s mental state. Instead, the challenge typically will vary depending on how specific the subjective inquiry might be. A very narrow subjective test may be difficult to apply while a more general test may be easier. Go back to the traffic stop example. Imagine the subjective test is specific: Did the officer pull over the car with at least in part a genuine wish to enforce the traffic code? That will often be hard to tell, as the stop will objectively look the same with or without that wish. But the picture changes if the subjective inquiry is more inclusive. Say the test asks whether the officer pulled over the car with an intent to obtain information. Answering *that* question will be easy. All of the plausible narratives for an ordinary traffic stop will include that intent.

In general, however, the difficulty of reconstructing officers’ states of mind provides a critical cautionary note on the role of subjectivity in Fourth Amendment doctrine. When states of mind can be accurately identified, subjectivity allows courts to use narrower and more specific rules that can impose more precise cost–benefit weighing and thereby achieve more benefits at lower costs. At the same time, inability to determine states of mind

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184. This, of course, was the concern of the petitioners in *Whren*. See *Whren v. United States*, 517 U.S. 806, 810 (1996) (“Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car’s occupants.”).

185. Amsterdam, *supra* note 13, at 437.

186. See *Stuart*, 547 U.S. at 405 (concluding that an officer’s subjective intent in conducting an exigent circumstances search does not matter “even if their subjective motives could be so neatly unraveled”).

accurately can thwart or even reverse this benefit. A rule that carves out a specific set of cases based on officer intent cannot achieve the needed benefit assessment if the officer's intent can't be accurately identified.

It may be helpful to break down why this is true. The first reason is deterrence. The goal of a subjective rule is to deter officers from engaging in wrongful-intent acts that have low governmental benefit and high civil liberties cost. If courts can identify subjectivity accurately, the officer will know that his bad intent will be sussed out in a suppression hearing. The threat of suppression can discourage the wrongful thought and encourage more beneficial and less harmful police practices. But the prospect of measurement error weakens the deterrent benefits of a subjective rule. It is difficult for courts to deter what they can't identify. The less a court can accurately tell *ex post* whether an officer had a wrongful thought, the less an officer will link the wrongful thought to a risk of suppression *ex ante*.

Second, the remedies of Fourth Amendment law further upset the cost-benefit balance if subjectivity cannot be measured accurately. Consider the effect of the exclusionary rule. If suppression results from a finding of improper intent, but intent cannot be determined accurately, a subjective rule will mean that evidence often will be suppressed when the benefits are likely high (a proper-intent act misinterpreted as an improper one) but can be used when the benefits are likely low (an improper-intent act misinterpreted as a proper one). The result will be less usable evidence and less public benefit of enforcement of the law.

The remedies following from an improper finding of wrongful intent could also over-deter investigations. The prospect of losing evidence even when officers do everything correctly may push law enforcement resources into other enforcement techniques.<sup>187</sup> The prospect of civil liability when an officer is wrongly deemed to have violated the law because of his wrongful state of mind might similarly over-deter officers from investigative steps that rely on a subjective intent rule.<sup>188</sup>

#### F. *An Example*

This is all very abstract, so let me show how it works with a stylized example. Let's stick with the *Whren* question of when the police can pull over a car based on a traffic violation. Imagine the Supreme Court is trying to choose among three rules. The first rule is the *Whren* objective rule: probable cause always allows the stop. The second rule is a narrower

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187. Investigators generally have multiple ways to collect evidence of different crimes, and they can allocate resources depending on what methods are easy and reliable and which are not. *See, e.g.,* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267, 1275-76 (1999).

188. *Cf. id.* (concluding that when the law taxes some kinds of policing more than others, the police will shift time and energy away from more expensive tactics and towards cheaper ones).

subjective rule: probable cause plus an actual intent to enforce the traffic laws allows the stop. And the third rule is a flat ban: probable cause of a traffic violation never allows the stop. Which is the best rule?

Let's fill in some numbers. Assume officers stop cars to enforce the traffic laws (what we can label the "good" reason) 80% of the time. They stop cars to engage in a fishing expedition or for reasons other than enforcing the traffic laws (bad reasons) 20% of the time. Assume that a good stop causes on average 10 utils of public benefit while a bad stop causes on average zero utils of public benefit. Further assume that a good stop causes on average 2 utils of civil liberties harm while a bad stop causes on average 10 utils of civil liberties harm.

Let's start by comparing the objective rule with the ban. Under *Whren's* objective rule, a court would not distinguish between good and bad reasons for the stop. The average stop will be expected to cause 8 utils of public benefit (10 utils per stop 80% of the time) and 3.6 utils of harm (2 utils 80% of the time and 10 utils 20% of the time) for a net benefit of 4.4 utils. Allowing stops under the *Whren* objective rule leads to more public benefit from enforcement than harm. Under these assumptions, *Whren's* objective rule is better than the ban.

Now introduce the subjective rule. Assume, for now, that courts can distinguish good intent and bad intent with perfect accuracy. The narrower subjective rule lets courts see two different kinds of stops: Good-intent stops and bad-intent stops. With their perfect ability to distinguish the two, courts can allow stops based on good intent because their benefits (10 utils) far exceed their harms (2 utils). On the other hand, courts can prohibit stops based on bad intent because their harms (10 utils) far exceed their benefits (zero).

Among the three options, the subjective rule is superior. Because courts can distinguish good intent from bad, suppressing the latter, officers will have a strong incentive to only make stops with an appropriate intent. As that number approaches zero, the overall benefit of traffic stops would approach the average of 8 utils from the stops with the lawful intent. The average benefit of a stop would go up (from 8 utils under the objective rule to 10 utils under the subjective rule) while the average harm of a stop would go down (from 3.6 utils under the objective rule to 2 utils under the subjective rule). With bad-intent stops now out of the picture, the net benefit of a stop would jump from 4.4 utils under the objective rule to 8 utils under the subjective rule.

Next remove the assumption that courts can accurately determine an officer's state of mind. Let's assume the worst case, that courts have zero ability to distinguish good from bad intent. The judicial judgment is now a coin flip. Under the subjective legal rule, the officer now faces a 50% chance of a finding of illegality regardless of his intent. Half of the stops with good

intent would be wrongly judged unlawful, and half of the stops with bad intent would be wrongly judged lawful.

Under this assumption, the objective test is superior. The 20% error rate of the objective rule will zoom up to 50% under the subjective rule. And if the benefit of a stop depends on evidence being admissible, and the exclusionary rule applies when a court finds bad intent, the net expected benefit of a stop will decline. When the officer has a good intent, the net benefit will be 8 utils if the court correctly identified the intent but minus 2 utils if the court incorrectly does so. The average benefit of a stop will be 3 for a good-intent stop or minus 10 for a bad intent stop. This would greatly reduce if not eliminate the public value of traffic stops. If 80% of the stops are good intent stops, the average benefit of a stop under a subjective rule is just 0.4 as compared to the flat ban—far below the net benefit of the objective rule.

This example is entirely artificial, of course, with made-up numbers and stylized assumptions. But it's the proof of concept, not the details, that I care about. If courts can accurately identify an officer's state of mind, subjective tests can enable narrow doctrines that accurately select out and discourage harmful practices and improve the net benefits of police practices. On the other hand, when courts cannot identify states of mind accurately, subjective tests can aim for that task but fail, reducing or even eliminating those benefits. Subjective tests may be best if subjectivity can be measured, but objective tests may be better otherwise.

### III. Existing Doctrine and the Normative Role of Subjectivity

Part I of this Article described the role of subjectivity in existing doctrine, and Part II offered a normative framework for its use. This Part now puts the two Parts together. Specifically, it asks whether existing doctrine from Part I is plausibly justifiable under the normative standard of Part II. Does existing law make sense? Should the Supreme Court rely on subjectivity more? Or does it use subjectivity too much already?

This section will offer tentative thoughts on several but not all of the doctrines addressed in Part I. My analysis suggests that the choices the courts have made on past doctrine are a mixed bag. The Court's use of a subjective test for searches and seizures seems appropriate, as does its use of subjective tests for special needs and probation searches. The objective test in *Whren* is more difficult to assess, as a subjective test in this context pairs particularly high potential benefit with particularly high risk of measurement error. On the other hand, the Court's reliance on subjective concerns in the exclusionary rule setting is problematic.

A. *Searches and Seizures*

As Part I showed, existing law on the threshold question of searches and seizures has a modest subjectivity requirement. Government action must include an “attempt to find something or to obtain information” to constitute a Fourth Amendment search.<sup>189</sup> A seizure must be “through means intentionally applied,” taking control of property “by the very instrumentality set in motion or put in place in order to achieve that result.”<sup>190</sup> It could be argued in both instances that these subjective limits are textually or historically required. (Most obviously, the word “search” may linguistically imply an attempt to obtain information.)<sup>191</sup> But our question is different: Does the subjective requirement of searches and seizures plausibly aid in the cost–benefit function of existing doctrine?

For the most part, I think it does. The intent requirement excludes acts that fail to trigger the balancing of interests Fourth Amendment law contemplates. When the government acts without any intent to control others or collect information, it is not acting in its role as law enforcer or sovereign. An officer who accidentally touches a person while walking through a crowded public event has not taken a step that needs justification from a cost–benefit perspective. Adopting definitions of searches and seizures that exclude accidents allows courts to focus on acts that need justification within the balancing of interests that the law elsewhere presumes.

Further, the nature of the subjective test for searches and seizures makes it relatively straightforward to apply. Searches and seizures typically are distinctive acts, and an officer is likely to lack the intent of obtaining information or taking control through means intentionally applied only in rare accidents or other very unusual circumstances. Take the facts of *United States v. Jones*.<sup>192</sup> It’s hard to imagine an officer attaching a GPS device to the underbody of a suspect’s car for a reason other than to obtain information. There is similar certainty in *Brower v. County of Inyo*,<sup>193</sup> the roadblock case.

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189. *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012). For more in-depth analysis, see subpart I(A).

190. *Brower v. County of Inyo*, 489 U.S. 593, 597, 599 (1989) (emphasis omitted). For more in-depth analysis, see subpart I(A).

191. As Justice Scalia noted in *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001):

When the Fourth Amendment was adopted, as now, to “search” meant “[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.” N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989) (emphasis omitted).

*Id.* But see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70 (2013) (“The word ‘search’ has several possible meanings. . . . The ambiguity of the word ensures that a wide range of concepts might plausibly define the meaning of searches.”).

192. 565 U.S. 400 (2012).

193. 489 U.S. 593 (1989).

A roadblock is a distinctive event. The facts identify its purpose. It's hard to imagine officers creating a roadblock without an intent to stop a car driving on the road. There can be difficult cases, of course.<sup>194</sup> But on the whole, the intent requirement in searches and seizures seems like a plausible aid to the cost-benefit assessment: It narrows the category and the intent usually will be clear.

One oddity amidst the Court's otherwise sensible use of subjective intent in defining searches and seizures is *Florida v. Jardines*.<sup>195</sup> Recall that *Jardines* adopted what looks like a subjective test for the scope of implied license. *Jardines* concludes that a person at home gives implied license to officers to conduct a knock-and-talk, but that the implied license does not extend to officers who have an intent to gather evidence against that person. The person's implied license depends on the officer's intent, with people giving implied license to some intents but not others.

The subjective test in *Jardines* seems difficult to justify under my framework. In narrowing the category, *Jardines* does not draw a plausible line between acts that seem different based on the government interests they advance. An officer seeking eyewitness testimony about a burglar in the neighborhood has the same kind of intent to collect evidence as an officer seeking to gather evidence of a homeowner's crimes. And it's typically hard to know whether an officer approaching a home had an intent that a homeowner might approve. An officer with a trained drug-sniffing dog may have intent to use the dog there. But who knows whether an officer conducting a knock-and-talk is treating the person who answers the door as a suspect? Under my framework, a subjective test in *Jardines* seems problematic.

A possible catch is that the role of intent in *Jardines* may be only a legal fiction. The Court may have been boxed in by doctrine to express an objective test in a subjective way. Here's the context. In *Kentucky v. King*,<sup>196</sup> the Court had blessed the knock-and-talk procedure generally. *Jardines* then concluded that bringing the dogs to sniff went too far. In explaining the line between those two outcomes, the claim that the two scenarios differed based on the officer's subjective intent may have been a useful fiction. It's a fiction

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194. Two recent examples are illuminating. First, when a parking enforcement employee "chalks" a tire, is that done to obtain information? In the short term, no, but in the long term, yes: Which perspective controls? See *Taylor v. City of Saginaw*, 922 F.3d 328, 333 (6th Cir. 2019) (concluding that chalking was done to obtain information). Similarly, when an officer places a seized cell phone into airplane mode, is that done to obtain information? Cf. *United States v. Evans*, 780 F. App'x 340, 344–45 (6th Cir. 2019) (finding that an officer's action in placing a seized cell phone into airplane mode would seem to require reasonableness review and remanding to district court for further development of the record). Again, a long-term perspective suggests it is, while a short-term perspective may suggest to the contrary.

195. 569 U.S. 1 (2013).

196. 563 U.S. 452 (2011).

because the Court has never subjected standard knock-and-talks to the same subjective test. It has simply assumed that a homeowner would welcome a knock-and-talk as friendly, when often that will be untrue.<sup>197</sup>

The idea that the intent test is a fiction in *Jardines* is bolstered by the last line of the Court's analysis: bringing the dog was unlawful, the Court says, because it "objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do."<sup>198</sup> This reading of *Jardines* suggests the test may not be subjective at all. Perhaps the distinction is whether the objective facts can only be explained as "snooping" about<sup>199</sup> or look inconsistent with speaking to the person at home in a way a homeowner might want. It is objective behavior, not subjective intent, that counts.

### B. Reasonableness

Now turn to the role of subjectivity in reasonableness doctrine. Here existing doctrine strikes me as a mixed bag. In some instances, its use is readily justifiable by the cost-benefit framework advanced in this Article. In other cases, its use is questionable or dubious. In particular, reliance on subjectivity seems appropriate in the special-needs cases and in probation and parole cases. The benefits of subjectivity in these contexts are clear and the risk of error low. On the other hand, *Whren* is a harder case. The theoretical payoff of a subjective approach in *Whren* is extremely high, but the risks of measurement error are also great.

Start with the Court's use of modified subjectivity in the context of roadblock programs such as those in *Indianapolis v. Edmond* and *Sitz*.<sup>200</sup> Recall that, in those cases, the Court relied on the "programmatic purpose" of the roadblock programs to see if they were enacted for a special need.<sup>201</sup> This seems appropriate, in my view. Reliance on programmatic purpose allows the Court to adopt narrower rules that distinguish roadblocks designed to advance special needs from ordinary law enforcement programs. Absent reliance on subjectivity, the Court would have to treat roadblocks as all-or-nothing: It would have to group together genuinely safety-related programs and standard-issue law enforcement. Reliance on programmatic purpose allows the Court to adopt a more finely grained rule that allows reasonable safety-related programs while prohibiting the rest.

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197. Cf. *Illinois v. Wardlow*, 528 U.S. 119, 132–35 (2000) (Stevens, J., dissenting) (noting the distrust among many of the police, "particularly [among] minorities and those residing in high crime areas").

198. *Jardines*, 569 U.S. at 10.

199. *Id.* at 9 n.3.

200. See *supra* subpart I(B).

201. See *id.*

Further, accurately identifying whether the programmatic purpose of a roadblock falls within a special need seems achievable. When the government has a special program that focuses resources in a particular way at a particular time and place, someone must have directed that program. Managerial decisions will have been made, and records likely kept, that should make it possible to reconstruct the programmatic purpose in most cases through discovery and affidavits. In this context, relying on the modified subjectivity of the “programmatic purpose” doctrine allows a narrow rule that seems relatively reliable to apply correctly.

A subjective test also seems proper in the context of probation and parole searches. As Part I showed, lower courts have required officers to have prior knowledge of a person’s special status as a parolee or probationer, as well as knowledge of the search terms of a person’s parole or probation agreement, to trigger the more deferential Fourth Amendment rules for probationers and parolees.<sup>202</sup> This is an appropriate knowledge test that correlates with intent. It allows courts to limit the deferential rules for probation and parole searches to cases genuinely advancing those interests, and it does so using a subjective test that is likely to be measured accurately.

Consider the two parts of the framework. First, knowledge limits the deference trigger to contexts when the search is most likely to advance the interests that justify deference. Think about the flip side. An officer who doesn’t even realize that a search target has a special status as parolee or probationer obviously isn’t trying to advance the government’s interest in monitoring parolees or probationers by conducting the search. To that officer, the later realization of the target’s special status merely raises the prospect of a windfall.

A knowledge requirement for parole and probation searches is also likely to be applied accurately. In most cases, it should be possible to tell whether an officer knew a suspect’s probation or parole status and the terms of their agreement. Obtaining that knowledge usually requires checking a file. In most cases, it will be easy to tell whether an officer checked the file and knew its contents before the search or only learned that information afterwards. The ability to identify knowledge in most cases makes a knowledge test relatively reliable, justifying a subjective test to trigger the probation and parole rules.

But what about *Whren*? Should courts consider an officer’s pretextual purpose as part of the reasonableness of a traffic stop? I have mixed views.

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202. See *United States v. Caseres*, 533 F.3d 1064, 1075–76 (9th Cir. 2008) (holding that an officer must be aware of search condition to justify search under parole search rules); *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005) (holding that officer must be aware of parole status to rely on parole search rules); *State v. Brusuelas*, 219 P.3d 1, 5 (N.M. Ct. App. 2009) (emphasizing the importance of officer knowledge of probation condition in analyzing whether probation search rules apply).

On one hand, it would be extremely helpful for courts to be able to distinguish good-faith from pretextual traffic stops. An officer's motive in making a traffic stop likely correlates strongly with the interests that the stop advances. A stop motivated by an officer's genuine wish to enforce the traffic laws is likely to advance the public interest in enforcing the traffic laws. A stop motivated by other reasons is not.

The public interest in identifying pretextual traffic stops is particularly great in the context of racially discriminatory enforcement. Our country's continuing failures to come to grips with racially discriminatory policing and the great harms that policing has caused make a rule that distinguishes stops motivated by good-faith government interests from those motivated by discrimination very appealing. If courts could accurately identify an officer's discriminatory intent during a stop, then courts could invalidate stops made with harmful intent and permit stops made without it.

The problem is that it is particularly difficult to know an officer's state of mind in making a traffic stop. Traffic stops are routine police actions, not special programs, which makes it unlikely that there would be a reliable programmatic purpose to invoke. And no one but the officer who had probable cause to make the stop is likely to know with any reliability whether it was made for traffic or non-traffic reasons. To an outside observer, traffic stops made for pretextual and non-pretextual reasons will look mostly identical. Reliably distinguishing stops based on officer purpose seems particularly difficult.

The difficulty is particularly great in the context of discriminatory enforcement. An officer who pulls over a car to harass a motorist is extremely unlikely to admit that goal on the witness stand. Statistical evidence could be used to show a general trend of officers pulling over more minority motorists than facts justify.<sup>203</sup> Data could even be produced about the racial composition of the drivers that a particular officer stopped.<sup>204</sup> But generalized statistical evidence is an awkward fit for a doctrine based on an officer's state of mind at a particular time: It will be difficult to know based on general statistics to what extent any particular stop was racially motivated.<sup>205</sup>

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203. See, e.g., WILLIAM R. SMITH, DONALD TOMASKOVIC-DEVEY, MATTHEW T. ZINGRAFF, H. MARCINDA MASON, PATRICIA Y. WARREN & CYNTHIA P. WRIGHT, THE NORTH CAROLINA HIGHWAY TRAFFIC STUDY 345–46 (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/204021.pdf> [<https://perma.cc/75BR-FKQR>] (“Adjusting for response bias . . . , the data suggests that African Americans are actually 1.65 times as likely [as whites] to have been stopped in the last year.”).

204. For example, in *United States v. Buford*, No. 1:20CR54RLW(SPM), 2020 WL 5413528 (E.D. Mo. Aug. 19, 2020), the government produced data about the racial composition of the individuals stopped by the detaining officer during both the year and the week preceding the stop in question. According to that data, 32.4% of the officer's stops in the prior year were of black motorists, while 55% of the officer's stops in the prior week were of black motorists. *Id.* at \*5.

205. For example, in *Buford*, the magistrate judge was reluctant to conclude that this data showed that the stop of Buford was done on the basis of his race: In rejecting reliance on the

It's possible that technology might help courts identify a discriminatory intent. Today's traffic stops are often recorded by police cameras.<sup>206</sup> The presence of audio or video recording the stop may make it easier to discern some kinds of intent. For example, an officer who makes a speeding stop and quickly launches into a series of questions about an unrelated crime is likely to have made a pretextual stop. Is it possible that, *ex post*, a judge could tell from listening to the audio of the officer's questions whether the officer had a different goal in making the stop? Perhaps—although the same inquiry could be easily gamed or explained away by an officer.

A more promising approach might be an objective rule designed to capture the subjective concern with discriminatory enforcement. For example, Professor Amsterdam once proposed dealing with the harms of pretextual *Terry* frisks with a suppression rule: *Terry* frisks should be permitted, but the fruits of such searches—other than weapons—should be suppressed.<sup>207</sup> Courts could adapt this approach for traffic stops. For example, perhaps stops could be allowed under *Whren*, but only evidence of the traffic violation could be admitted. The rule would be objective, but its goal would be discouraging stops made for improper subjective reasons.

### C. Remedies

The use of subjective standards for the exclusionary rule seems particularly problematic. As Part I showed, recent doctrine has focused on officers' states of mind toward the legality of their acts.<sup>208</sup> If the officer deliberately violated Fourth Amendment law, the act is culpable and the exclusionary rule is likely to apply.<sup>209</sup> On the other hand, if the officer had a good-faith belief that his act was legal, or the violation was merely part of a garden variety and non-systemic negligence, the act is less culpable, and suppression is less likely.<sup>210</sup>

In my view, this approach is dubious. The aim of relying on an officer's mental state is commendable. But it is particularly difficult for courts to identify an officer's state of mind (and the broader practices of law

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numbers, the court noted that "there was no expert testimony or other information provided to the Court to explain or otherwise contextualize the information." *Id.*

206. See generally BARRY J. POLLACK, GERALD B. LEFCOURT, E.G. "GERRY" MORRIS, NORMAN L. REIMER, KYLE O'DOWD & JUMANA MUSA, *POLICING BODY CAMERAS: POLICIES AND PROCEDURES TO SAFEGUARD THE RIGHTS OF THE ACCUSED* (2017), <https://www.bja.gov/bwc/pdfs/BWC-NACDL-March2017.pdf> [<https://perma.cc/AB6L-W3R5>] (summarizing the criminal defense bar's findings on the effectiveness of body cameras and offering recommendations to increase police accountability and protect the rights of the accused).

207. See Amsterdam, *supra* note 13, at 437–38 (explaining how an exclusionary rule would reduce undesirable incentives for police officers to conduct unconstitutional searches and seizures).

208. See *supra* subpart I(C).

209. See *supra* subpart I(C).

210. See *supra* subpart I(C).

enforcement) toward legal violations. Relying on officer intent in the exclusionary rule setting triggers many of the same difficulties as it does in the *Whren* setting. And the exclusionary rule context also brings additional challenges, owing to the specific problem of trying to assess culpability in a multimember law enforcement structure using tools generally designed to determine a single officer's state of mind.

At the outset, we can appreciate the goal of relying on officer *mens rea* in the exclusionary rule setting. The Court has defended its focus on officer subjectivity based on notions of culpability and deterrence. An officer who has intentionally violated the law can be easily deterred, the thinking runs. In contrast, it is difficult to deter mere negligence or even an entirely innocent legal violation.<sup>211</sup> We can reframe the Court's thinking using this Article's approach by recognizing that a subjective test can allow a narrower and more focused remedy.

To see this, imagine you think that suppression for intentional violations would have major deterrent payoff while suppression for merely negligent violations would have little or no deterrent payoff. If that is true, a test that hinges on officer *mens rea* helpfully allows courts to distinguish the two. Courts don't have to lump all violations together, either adopting a suppression remedy for all of the violations or for none of them. Instead, they can apply the exclusionary rule when the payoff is highest while rejecting suppression when the payoff is lower, zero, or even a net negative. Assuming that the costs and benefits actually play out that way—which is hardly clear, but an assumption beyond the scope of this Article—a subjective approach permits a narrower rule that produces greater public benefit at lower cost.

This salutary goal is unfortunately very likely to go unmet, however, owing to the difficulty of determining the relevant mental states accurately. The first problem is the same one that makes a subjective intent test for racial discrimination in *Whren* cases so difficult. An officer who suspects or knows that he is violating the law is unlikely to admit it, and there is normally no way to tell other than through his own testimony. Imagine an officer who decides to make an arrest knowing he lacks probable cause because he wants to remove a person from the scene and doesn't care if evidence found in a search incident to arrest is later suppressed. The officer will not announce his legal conclusion, or otherwise act in an outward way any differently. Instead, the officer will follow the usual arrest procedure and keep his state of mind to himself. In that setting, a subjective test is as difficult to apply accurately as it is in the traffic-stop context of *Whren*.

Determining mental states in the exclusionary rule setting is even more challenging because law enforcement is a "they," not an "it." An individual officer who conducts a search or seizure may not be fully or even partially

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211. *See supra* subpart I(C).

responsible for the decision to do so. Perhaps he was advised to search by another officer. Perhaps a judgment to make an arrest was made by a team of lawyers or other advisors. When decisionmaking power to search or seize is divided among different actors, the notion of mental states with respect to legality is tricky. It forces courts to adopt one of two approaches, both of which are plagued with measurement difficulties.

The first approach is the macro perspective, which looks at law enforcement as a whole and determines its culpability. The Supreme Court suggested this approach in *Herring v. United States*,<sup>212</sup> the case of an arrest based on an erroneous entry in a police county database. According to the Court, suppression could be appropriate if a defendant showed that error involved “recurring or systemic negligence,” rather than merely “isolated negligence,” depending on whether “errors in [the] County’s system [we]re routine or widespread.”<sup>213</sup>

This is a test that is particularly difficult to apply. The defendant has the burden of proof.<sup>214</sup> But how can a defendant establish that a broader law enforcement “system” as a whole had widespread errors? The defendant likely will have neither the legal nor financial means to conduct a broad review of the relevant law enforcement system. A defendant can place an officer on the stand, and that officer presumably will testify (as did the officers in *Herring*<sup>215</sup>) that the system is quite reliable. But it’s hard to see how that claim can be tested, and the broader system evaluated, in the context of a suppression motion.

Equivalent problems also arise under a micro approach, in which we look at the culpability only of the officers who conducted the search or seizure. An officer may have been advised to conduct the search by others who are aware of the possible or likely illegality of the search but who deem the risk acceptable. In that case, the officer who actually conducts the search may lack a culpable mental state even if others in the system did have a culpable mental state.

We saw this dynamic in recent litigation over the Playpen warrant.<sup>216</sup> The Playpen warrant authorized installation of software on the computers of visitors to a child pornography site on the dark web.<sup>217</sup> In colloquial terms, the software hacked into the computers of visitors, searching thousands of different machines in places unknown. We know from the extensive litigation

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212. 555 U.S. 135 (2009).

213. *Id.* at 137, 144, 146–47.

214. See LAFAVE, *supra* note 67, at § 3.1.

215. *Herring*, 555 U.S. at 147.

216. See Transcript of Motion hearing at 44–46, *United States v. Anzalone*, 221 F. Supp. 3d 189 (D. Mass. 2016) (No. 15-10347-PBS) (discussing how an FBI agent was directed to execute a search warrant by multiple levels of management in the FBI and Department of Justice).

217. *Id.* at 46, 62.

over the warrant that it was authorized by a team of high-level lawyers within the executive branch who carefully considered the legal risks of going forward with the warrant application.<sup>218</sup> And indeed, courts later held that the warrant violated the Fourth Amendment.<sup>219</sup> But at least some of the courts that have applied the good-faith exception have assumed the application was made only by the line attorney and FBI-agent affiant and considered their culpability in isolation.<sup>220</sup> The risks and deliberative process of the actual decisionmakers were not even considered.

### Conclusion

In a recent concurrence in *District of Columbia v. Wesby*,<sup>221</sup> Justice Ginsburg called on her colleagues to rethink the persistent objectivity of Fourth Amendment law. Fearing that the objective approach “sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection,” Justice Ginsburg called for the introduction of some subjective standards to restore the balance.<sup>222</sup> “I would leave open, for reexamination in a future case,” she explained, “whether a police officer’s reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry.”<sup>223</sup>

The good news for Justice Ginsburg is that the government’s reason for acting already factors into the Fourth Amendment inquiry in a wide variety of circumstances. Although the Supreme Court talks a good game about the objective standards of Fourth Amendment law, the cases, especially recent ones, often embrace officer subjectivity. An officer’s thoughts and goals are relevant to what counts as a search or seizure, to constitutional reasonableness, and to the scope of remedies. Although the Court has not articulated a consistent theory of why it sometimes chooses objective tests and why it sometimes picks subjective tests, it’s important to see that the Justices are making a choice. Fourth Amendment law is not unquestionably objective. It is a mix, and the Justices choose in each case whether a particular doctrine is appropriately objective or subjective.

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218. *See id.* at 43–46 (discussing the interagency deliberative process that led to the approval of the Playpen warrant).

219. *See, e.g.,* *United States v. Taylor*, 935 F.3d 1279, 1284 (11th Cir. 2019) (noting that lower court decisions for this case held that the warrant violated the Fourth Amendment).

220. *See, e.g., id.* at 1291, 1292 n.14 (focusing on the awareness of the agent and prosecutor who applied for the warrant).

221. 138 S. Ct. 577 (2018).

222. *Id.* at 594 (Ginsburg, J., concurring in the judgment in part).

223. *Id.*

The framework offered in this paper can help courts choose between the two approaches. A subjective approach is useful when it allows courts to adopt narrower rules that can distinguish more harmful police practices from less harmful ones. In that setting, relying on subjectivity can ensure a greater public benefit in enforcement at a lower civil liberties cost. At the same time, the benefits of subjectivity have to be weighed against the challenge of making reliable mental state determinations. Mental states are not monolithic. A subjective approach is preferable only if mental states can reliably distinguish more harmful practices from less harmful ones. The best path forward is for courts to make context-sensitive decisions based on the potential benefits of narrower subjective rules and the ease of determining intent in suppression hearings.