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Response

Questions for *The Questionable Objectivity of Fourth Amendment Law*

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Introduction

In his insightful article, *The Questionable Objectivity of Fourth Amendment Law*, Orin Kerr challenges the Supreme Court's repeated assertions that its Fourth Amendment jurisprudence is driven by objective standards in order to "promote[] evenhanded, uniform enforcement of the law."[1] Rather, in the descriptive part of the article, Professor Kerr points to a number of Fourth Amendment inquiries that turn on governmental actors' subjective states of mind. In the normative part of the article, Professor Kerr argues that subjective doctrines can enable courts to adopt "narrower rules" that better detect "harmful" police conduct and thereby realize "a greater public enforcement benefit at a lower civil liberties cost"—assuming judges can accurately assess government officials' mental states.[2] In the final part of the article, Professor Kerr combines the descriptive and normative discussions and analyzes various Fourth Amendment issues with an eye towards evaluating which of them are appropriately governed by subjective tests.

The first part of this response essay reflects on Professor Kerr's descriptive analysis, questioning some of the ways the article classifies the Court's

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1. Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEXAS L. REV. 447, 467 (2021) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011)).

2. *Id.* at 466–67.

subjective standards. Turning to the article's normative analysis, the second part of the response questions Professor Kerr's concept of "harmful" police intrusions and his skepticism about the ability of the criminal justice system to reliably determine some law enforcement intent.

I. The Descriptive Piece

Professor Kerr rightly points out that the Supreme Court's Fourth Amendment jurisprudence has fluctuated wildly between objective and subjective standards (as well as on the related question whose perspective—the defendant's or the officer's—is controlling).[3] Moreover, he observes that the Justices have offered no uniform explanation for the varying choices they have made in different contexts.[4] I would quibble, however, with some of Professor Kerr's categorizations of the Court's subjective Fourth Amendment standards.

As he notes,[5] the Court incorporated a subjective inquiry when it declared in *United States v. Jones* that police conduct a "search" not only when they violate a reasonable expectation of privacy under the *Katz* test[6] but also when they trespass on a constitutionally protected area "to obtain information."[7] Although the subjective element of the *Jones* test apparently escaped the attention of some of the Justices,[8] the Court adhered to that approach, with slight alterations, in *Florida v. Jardines*[9] when it defined a search as an "unlicensed physical intrusion" on a constitutionally protected area "in order to do nothing but conduct a search."[10]

Professor Kerr infers that the Justices' decision to modify *Jones* in *Jardines* may have reflected an attempt to reconcile their endorsement of the knock-and-talk tactic in *Kentucky v. King*.[11] Contrary to his implication, however, the Justices' concept of a permissible knock-and-talk is not limited to law enforcement efforts to locate witnesses who might provide evidence against others. In fact, the police knocked on King's door believing that

3. *See* Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 77–95 (2007).

4. Kerr, *supra* note 1, at 488.

5. *See id.* at 452.

6. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

7. United States v. Jones, 565 U.S. 400, 408 n.5 (2012).

8. *See* Transcript of Oral Argument at 51–52, Florida v. Jardines, 569 U.S. 1 (2013) (No. 11-564) (Justice Breyer wondering in what sense *Jones* endorsed a subjective standard).

9. 569 U.S. 1 (2013).

10. *Id.* at 7, 9 n.4; *see* Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015) (per curiam) (describing *Jardines* as "reaffirm[ing]" *Jones*).

11. 563 U.S. 452 (2011). *See* Kerr, *supra* note 1, at 481–82.

someone inside had just conducted a drug sale.[12] And the *Jardines* Court similarly approved of approaching a residence "in order to speak with the occupant," even for the "'purpose of discovering information,'" but not entering the curtilage "in order to do nothing but conduct a search."[13]

But Professor Kerr is right to question the Court's conclusion that homeowners implicitly consent to a knock-and-talk.[14] It is not obvious why King was amenable to officers approaching his residence to ask questions in an effort to implicate him in a recent drug transaction, but Jardines did not impliedly consent to a detective walking up to his front door hoping his dog would detect the smell of marijuana. In my mind, both law enforcement tactics should qualify as "searches" under the *Jones*/*Jardines* formulation.

In contrast to Professor Kerr, however, I believe the Justices were serious about focusing on law enforcement intent in *Jardines* and were not disingenuously employing a subjective standard as a "useful fiction."[15] While the Court's opinion does say that the officers' actions "objectively reveal[ed] a purpose" to search,[16] I interpret that language as simply relying on the officers' conduct to evidence their intent. As discussed below, judges often infer an individual's purpose from her actions, and I take the Justices at their word that the *Jones*/*Jardines* definition of a search "depends upon the purpose for which [the officers] entered."[17]

Moving on to when a Fourth Amendment intrusion is reasonable, unlike Professor Kerr, I would not separate special needs searches from inventory searches.[18] In my mind, inventory searches are a type of special needs search designed to serve the administrative purposes of safeguarding property, protecting police departments from claims of lost property, and preserving police and public safety.[19] While the Justices' concerns about pretextual inventory searches may lead to an assessment of the motives of the individual officers who conducted the search, whereas, as Professor Kerr points out, the Court's

12. *See King*, 563 U.S. at 455–56.

13. *Jardines*, 569 U.S. at 9 n.4 (quoting *id.* at 22 (Alito, J., dissenting)).

14. *See* Kerr, *supra* note 1, at 482.

15. *Id.* at 481.

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

17. *Id. See also* Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018) (noting that police conduct a search when they "physically intrude[] on the curtilage to gather evidence"); Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam) (concluding that electronic monitoring of an offender was a search because it was "plainly designed to obtain information").

18. *See* Kerr, *supra* note 1, at 456–59.

19. *See* Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 643 & n.150 (2019).

special needs opinions sometimes speak in terms of "programmatic purpose,"[20] inventory search precedents are not the only special needs cases that examine the motives of the particular official who performed the inspection.[21]

Some controversy surrounds the question whether the *permissibility* of a *Terry*[22] frisk includes a subjective element, and I have argued elsewhere that an officer who does not actually think a suspect is armed should not be allowed to frisk.[23] The prevailing view is to the contrary, however, authorizing a frisk if a reasonable officer would have feared the suspect was armed and dangerous irrespective of what the officer in question believed.[24]

Nevertheless, as Professor Kerr argues, the proper *scope* of a frisk in cases where such a search is allowed is more of a subjective inquiry.[25] A frisk is supposed to be a search for weapons and not for evidence, and *Terry* therefore limited its "scope to an intrusion reasonably designed" to uncover a weapon.[26] To be sure, judicial analysis of the scope of a frisk often focuses on the officer's actions. Was the search confined to an outer pat-down of the suspect's clothing?[27] Was the frisk of a car limited to the areas of the vehicle that might contain a weapon?[28] In *Minnesota v. Dickerson*,[29] the case discussed by Professor Kerr, did the officer "conduct[] a further search" not allowed by *Terry* when he stopped to squeeze Dickerson's pocket after the pat-down revealed an object the officer knew was not a weapon?[30] But here again, judges are using law enforcement behavior as evidence of intent.

While the *Dickerson* opinion may have been "less than fully explicit[]" on the subjective nature of this inquiry,[31] the Court's prior decision in *Sibron v. New York*[32] was more transparent. In finding inadequate support for the frisk conducted there, the Court explained that the officer never "seriously suggest[ed] that he was in fear of bodily harm and … searched Sibron in self-

20. Kerr, *supra* note 1, at 458 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 46 (2000)).

21. *See* Kinports, *supra* note 19, at 641–45.

22. Terry v. Ohio, 392 U.S. 1 (1968).

23. *See* Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 771–79 (2010).

24. *See id.* at 768.

25. *See* Kerr, *supra* note 1, at 459–60.

26. *Terry*, 392 U.S. at 29.

27. *See id.* at 29–30.

28. *See* Michigan v. Long, 463 U.S. 1032, 1049 (1983).

29. 508 U.S. 366 (1993).

30. *Id.* at 379.

31. Kerr, *supra* note 1, at 459.

32. 392 U.S. 40 (1968).

protection to find weapons," but rather "made it abundantly clear" that he searched Sibron because he "sought narcotics."[33]

Turning finally to the exclusionary remedy, I am sympathetic with Professor Kerr's critique of the Court's analysis of whether the suspicionless *Terry* stop in *Utah v. Strieff*[34] was a "purposeful or flagrant" Fourth Amendment violation.[35] In discounting the impermissible stop as a "good-faith mistake[]" that was "at most negligent" and therefore triggered the attenuation exception to the fruits of the poisonous tree doctrine, the Court reasoned that the officer was conducting "a bona fide investigation of a suspected drug house."[36] A flagrant violation requires "more severe police misconduct . . . than the mere absence of proper cause for the seizure," the Court concluded.[37]

But *Brown v. Illinois*,[38] the attenuation precedent the *Strieff* Court was purportedly applying, adopted a somewhat different notion of flagrance. The *Brown* Court found it "obvious" that the arrest there was not based on probable cause and was made simply "in the hope that something might turn up."[39] The arrest in *Brown* seems no different from the stop in *Strieff*. The detectives in *Brown* were directing a "bona fide" murder investigation,[40] and the officer in *Strieff* apparently became impatient and decided to stop the next person who emerged from the house he was surveilling, a seizure so clearly unsupported by reasonable suspicion that the prosecution never bothered even trying to justify it.[41] Despite the *Brown* Court's reference to the detectives' hopes, the opinion does not foreclose a finding of flagrance based on the patent unconstitutionality of a Fourth Amendment intrusion, an inquiry that does not turn on the officers' subjective intent.

I also agree with Professor Kerr's doubts that the "isolated negligence" exception to the exclusionary rule articulated in *Herring v. United States*[42] is a purely objective standard.[43] The Court's conclusion that the exclusionary rule operates as a deterrent sufficient to justify the costs of suppression only in cases of "deliberate, reckless, or grossly negligent" police misconduct, and

33. *Id*. at 46, 64. *See also* Kinports, *supra* note 23, at 775 n.108 (citing lower court cases similarly relying on the frisking officer's intent).

34. 136 S. Ct. 2056 (2016).

35. Kerr, *supra* note 1, at 463 (quoting *Strieff*, 136 S. Ct. at 2063).

36. *Strieff*, 136 S. Ct. at 2063.

37. *Id.* at 2064.

38. 422 U.S. 590 (1975).

39. *Id*. at 605.

40. *Strieff*, 136 S. Ct. at 2063; *see Brown*, 422 U.S. at 592.

41. *See* Kit Kinports, *Illegal Predicate Searches and Tainted Warrants After* Heien *and* Strieff, 92 TUL. L. REV. 837, 872 n.171 (2018).

42. 555 U.S. 135 (2009).

43. *Id.* at 137.

possibly in those involving "recurring or systemic negligence,"[44] includes a reference to "deliberate" violations, which Professor Kerr rightly notes inherently connotes a subjective assessment.[45]

Additionally, the *Herring* Court's assertion that it was adopting an objective standard, and not "an 'inquiry into the subjective awareness'" of particular officers, is difficult to square with its acknowledgement just two sentences later that an officer's "knowledge" is relevant in assessing good faith—as well as in evaluating probable cause.[46] The opinion in *Herring* notes that a reasonable-person-under-the-circumstances test often incorporates an individual's "knowledge and experience" and that knowledge is distinguishable from "subjective intent," but an examination of knowledge necessarily involves a subjective analysis.[47] While an inquiry focused on the reasonable officer with similar information and experience arguably retains the objectivity of a reasonable person test, that is a negligence standard and not one of the higher levels of culpability required by *Herring*.

Moreover, the Court's reference to probable cause undercuts its characterization of *Herring*. In *Devenpeck v. Alford*,[48] for example, the Court pointed out that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant" in assessing probable cause and therefore the key question is whether "the facts known" to the officer gave rise to probable cause.[49] *Herring* notwithstanding, the *Devenpeck* Court seemed to recognize that an examination of what a particular officer "knows" clearly depends upon that individual's subjective "state of mind."

Herring's distinction between knowledge and intent brings me to the final point in this part of the response. The word "intent" is ambiguous: it can refer either to purpose[50] or to both purpose and knowledge.[51] Professor Kerr's article understandably addresses both knowledge and purpose because both states of mind trigger subjective standards,[52] but I wonder about two of the comparisons he makes between knowledge and other inquiries.

First, Professor Kerr agrees with the lower court caselaw requiring that police officers know a suspect is on probation or parole and subject to a

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44. Kerr, *supra* note 1, at 462 (quoting *Herring*, 555 U.S. at 144). Although Professor Kerr accepts this proposition for purposes of the article, *see id.* at 486, the Court's reasoning is subject to serious challenge. *See*, *e.g.*, Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 835–40 (2013).

45. Kerr, *supra* note 1, at 463.

46. *Herring*, 555 U.S. at 145 (quoting Reply Brief for Petitioner at 4–5, Herring v. United States, 555 U.S. 135 (2009) (No. 07-513)).

47. *Id.* at 145–46.

48. 543 U.S. 146 (2004).

49. *Id*. at 153.

50. *See*, *e.g.*, MODEL PENAL CODE § 1.13(12) (AM. L. INST. 1985).

51. *See*, *e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 14.2(a), at 971 (6th ed. 2017).

52. *See* Kerr, *supra* note 1, at 451.

search condition in order to justify the warrantless searches approved in *United States v. Knights*[53] and *Samson v. California*.[54] While he correctly points out that an officer who is unaware of a suspect's status is not attempting to "advance the government's interest in monitoring parolees or probationers," I am less convinced that this "knowledge test" reliably "correlates with intent" and thus "genuinely advanc[es]" the government's monitoring concerns.[55]

The detective who searched Knights's home was investigating charges unrelated to the drug offense that led to Knights's probation, acting in the government's general "interest in apprehending violators of the criminal law."[56] But the Court saw nothing in the search condition that required "a 'probationary' purpose" or in fact "mention[ed] anything about purpose."[57] The officer in *Samson* testified that he searched parolees "'on a regular basis' unless he ha[d] 'other work to do' or already 'dealt with' the parolee," but it is not clear whether the officer searched Samson because he was bored and had nothing better to do or because he was genuinely interested in fulfilling the State's monitoring function.[58] Moreover, the officer's actions in *Samson* "diverge[d]" from the State's supervisory interests because the amount of narcotics in Samson's possession would not have led to revocation of his parole.[59] The lower courts may require awareness of probation and parole search conditions, but the Supreme Court seems completely unconcerned with law enforcement purpose here.

Second, in rejecting the idea that probable cause assessments involve a subjective inquiry, Professor Kerr relies on the collective knowledge doctrine in distinguishing between what an officer was "objectively told" and what she "subjectively knew."[60] But the collective knowledge doctrine, which allows courts to pool the knowledge of different police officers in evaluating probable cause, insists that the officers involved must actually have been aware of the suspicious circumstances that allegedly added up to probable cause.[61]

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53. 534 U.S. 112, 121 (2001) (permitting a search of a probationer's home based only on reasonable suspicion).

54. 547 U.S. 843, 846 (2006) (allowing a suspicionless search of a parolee).

55. Kerr, *supra* note 1, at 483.

56. *Knights*, 534 U.S. at 121.

57. *Id.* at 116.

58. People v. Samson, No. A102394, 2004 Cal. App. Unpub. LEXIS 9304, at *4 (Cal. Ct. App. Oct. 14, 2004) (quoting suppression hearing testimony), *aff'd*, 547 U.S. 843 (2006).

59. *Samson*, 547 U.S. at 859 n.1 (Stevens, J., dissenting).

60. Kerr, *supra* note 1, at 461 n.107.

61. *See* Kinports, *supra* note 23, at 783 n.149.

Moreover, even without taking the postmodern position that all knowledge is contingent, Professor Kerr's distinction strikes me as one without much difference. An officer does not really "know" anything firsthand unless she saw it with her own eyes. In other cases, her knowledge is typically based on information she received from others or her experience in the field. Returning to the parolee search in *Samson*, for example, the officer may have known Samson was on parole because he "checked the file"[62] or because he had a "prior contact" with Samson.[63] Either of those "objective" factors could explain the officer's awareness of Samson's parole status, but an examination of what he knew about Samson is no more a subjective inquiry than an assessment of what information an officer had that gave rise to probable cause.

II. The Normative Piece

This part of the response interrogates Professor Kerr's definition of "harmful" police intrusions and his skepticism about the criminal justice system's ability to accurately assess the motivation underlying some law enforcement behavior.

Professor Kerr maintains that officers' reasons for acting help determine whether their conduct furthers important government interests. As a result, subjective standards can allow courts to articulate "narrow rules" that act as "a scalpel" rather than "a sledgehammer" and thereby "better identify harmful practices . . . at lower civil liberties costs."[64]

Professor Kerr has "mixed views"[65] about the many critiques of the Supreme Court's unanimous ruling in *Whren v. United States*[66] that a traffic stop justified by individualized suspicion is constitutional even if it was pretextual and not really prompted by an interest in enforcing the traffic laws.[67] He notes that such stops do not serve the governmental safety concerns underlying the traffic rules and create a risk of race discrimination, but he worries about how reliably courts can distinguish between "good" and "bad" stops.[68] At points in the article, he defines traffic stops designed to enforce the traffic laws as based on "good" reasons and those motivated by other purposes as based on "bad" reasons.[69] But he also seems to approve of a pretextual traffic stop of a suspected murderer on the ground that the officer was "trying to solve an important case."[70]

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62. Kerr, *supra* note 1, at 483.
63. *Samson*, 547 U.S. at 846.
64. Kerr, *supra* note 1, at 474–75.
65. *Id.* at 483.
66. 517 U.S. 806 (1996).
67. *Id.* at 813–14.
68. Kerr, *supra* note 1, at 473, 484–85.
69. *Id.* at 478, 484.
70. *Id.* at 473–74.

Professor Kerr is probably right that the murder hypothetical represents a "very small" number of actual traffic stops, but what about pretext stops designed to investigate drug offenses or "another crime"?[71] Narcotics were presumably the motivation for the stop in *Whren*, which was conducted by two vice-squad officers in plain clothes who were patrolling a "high drug area" in an unmarked car.[72] D.C. police department regulations allowed those officers to intervene only in cases of particularly dangerous traffic violations, which presumably did not include turning without signaling,[73] and the primary officer testified he was "out there almost strictly" to investigate drug offenses and made traffic stops "not very often at all."[74] I have no reason to think *Whren* is an especially unusual case.[75]

In addition, Professor Kerr's concept of impermissible pretextual stops seems somewhat narrow to me. He is appropriately critical of stops designed to pursue "personal vendetta[s]" or "to engage in racial profiling," "harassment," "intimidat[ion]," or "fishing expedition[s]."[76] But concerns about law enforcement bias extend beyond the rogue officer who acts with "discriminatory intent."[77] Professor Kerr's view is reminiscent of the "bad apple" approach to race discrimination, which attributes inequality to a few racist individuals and ignores both the systemic racism that creates structural inequity[78] and the implicit bias that leads society, including law enforcement, to view Black and Brown people as more dangerous and criminogenic than Whites.[79]

For example, Black and Brown individuals are less likely to sell drugs than Whites, and they do not use drugs at higher rates. [80] Nevertheless, Black defendants are more likely to go to jail for drug offenses, and Black nonviolent federal drug offenders spend about the same amount of time in prison as White defendants who commit violent crimes.[81] The mass incarceration crisis

71. *Id.* at 475, 476.

72. *Whren*, 517 U.S. at 808.

73. *See id.* at 815.

74. David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 550 n.39 (1997) (quoting Transcript at 78, United States v. Whren, Nos. 93-cr00274-01 and 93-cr00274-02 (D.D.C. Oct. 20, 1993)).

75. For other blatant examples from lower court caselaw, see Kit Kinports, Heien*'s Mistake of Law*, 68 ALA. L. REV. 121, 138 n.106 (2016).

76. Kerr, *supra* note 1, at 473–74, 476, 478.

77. *Id.* at 484.

78. *See*, *e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 423, 464 (2018).

79. *See*, *e.g.*, Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580–84 (2013).

80. *See* IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 25 (2019).

81. *See id.*

in this country can be directly traced to the war on drugs, and the Black and Brown communities account for three-fourths of jailed drug offenders.[82]

The landscape is similar when it comes to traffic stops. Law enforcement officials cannot possibly stop everyone who violates a traffic rule. As Professor Kerr colorfully wrote on another occasion, "[I]f an officer can't find a traffic violation to stop a car, he isn't trying very hard."[83] Professor Paul Butler likewise reported that he played a game with a police officer friend—Stop that Car!—and his friend was able to cite a traffic violation after following any vehicle for no more than three or four blocks.[84] Police therefore necessarily make choices in deciding whether to stop a driver who exceeds the speed limit or fails to signal a lane change.

And the ways in which law enforcement officials choose to exercise that discretion disproportionately affect communities of color: Black drivers are more likely to be stopped than White drivers and much more likely to be searched and arrested as a result of those stops.[85] An eight-year study of more than 4.4 million *Terry* stops in New York City likewise found that Black and Brown individuals were subjected to a disproportionate number of stops and that the overwhelming majority of stops and frisks were unproductive, leading to neither an arrest nor the discovery of weapons or other evidence.[86]

If law enforcement decisions about when to conduct a stop are influenced by implicit racial bias—either as to which traffic violations merit a stop in their own right or which drivers who violate the traffic rules are suspected of committing drug offenses or other crimes—then those stops represent "racially discriminatory enforcement."[87] And even if the individual officers involved are not consciously engaging in a racially discriminatory act, their state of mind does not "correlate[] with likely harm": it underestimates that harm.[88] The disparate impact of their behavior contributes to the indignity and resentment Black and Brown communities experience as a result of being over-policed, which "affects the everyday lives of people of color" and is one

82. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6, 96–97 (2010).

83. Orin Kerr, *Can a Police Officer Lawfully Pull Over a Car for a Traffic Violation Based on an Erroneous Understanding of the Traffic Laws?*, THE VOLOKH CONSPIRACY (Dec. 21, 2012, 3:42 PM), http://volokh.com/2012/12/21/can-a-police-officer-lawfully-pull-over-a-car-for-a-traffic-violation-based-on-an-erroneous-understanding-of-the-traffic-laws/ [https://perma.cc/X4M6-YRLE].

84. *See* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 24–25 (2009).

85. *See* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 5 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/KVU4-E24C].

86. *See* Floyd v. City of N.Y., 959 F. Supp. 2d 540, 558–59 (S.D.N.Y. 2013).

87. Kerr, *supra* note 1, at 484.

88. *Id.* at 450.

of the many manifestations of the institutionalized racism that pervades this country.[89]

Finally, Professor Kerr is dubious of the criminal justice system's capacity for making error-free determinations of officers' intent in some cases. He argues that a suppression hearing "far removed in time and place from the relevant events" is "not an environment particularly conducive to revealing the truth," especially when the law enforcement official is the only person who "know[s] what he had been thinking."[90] Professor Kerr is especially pessimistic about the judiciary's ability to identify pretextual traffic stops because they "look mostly identical" to other stops and the officer is not likely to confess a discriminatory purpose.[91]

Admittedly, accurately ascertaining an actor's intent can be problematic. But the same obstacles are present in many cases that turn on questions of *mens rea*. The Supreme Court acknowledged as much in *City of Indianapolis v. Edmond*,[92] noting that, despite "the challenges inherent" in a subjective "purpose inquiry," constitutional standards often require such assessments in order to "sift[] abusive governmental conduct from that which is lawful."[93] Getting into any actor's head and determining with complete confidence her subjective state of mind at some point in the past is impossible, and fact-finders are therefore forced to make imperfect judgments, often relying on objective measures to apply subjective standards. As the Court observed in *Devenpeck v. Alford*, "of course subjective intent is always determined by objective means."[94]

In a homicide case with no eyewitnesses, for example, only the defendant knows whether she intended to kill, acted in the heat of passion, or feared she was in imminent danger of death or serious bodily harm. And a jury is asked to make those *ex post* assessments based on the testimony of a defendant who has an obvious incentive to shade the truth. The jury does so by

89. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002). *See also* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 660, 681 (1994) (arguing that the disproportionate number of stops directed at communities of color and economically vulnerable populations "perpetuates a cycle of mistrust and suspicion," thereby "widening the racial divide"); 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, 1075 (2010) (charging that pretext stops are "in no small part responsible for the fact that race dominates much of modern U.S. law enforcement").

90. Kerr, *supra* note 1, at 475–76.

91. *Id.* at 484. *See also id.* at 486 (raising similar objections to the Court's efforts to limit the exclusionary remedy to bad faith constitutional violations).

92. 531 U.S. 32 (2000).

93. *Id.* at 46–47.

94. 543 U.S. 146, 154 (2004) (emphasis omitted).

considering objective evidence such as the actions of the defendant and victim, the prior relationship between them, and the credibility of the defendant's testimony.

Likewise, a judge tasked with deciding whether a traffic stop was pretextual can take into account, as Professor Kerr notes, whether the officer asked about an unrelated offense.[95] Perhaps the officer could try to "explain[] away" such questions, but what credible justification is there for asking a suspected murderer driving a car with a broken taillight about her whereabouts on the night of the killing?[96] And other aspects of the officer's behavior can also be helpful in evaluating the purpose of a traffic stop. Did the officer seek consent to conduct a vehicle search unlikely to uncover evidence of the traffic offense that purportedly inspired the stop? Was the car stopped by officers who are part of a specialized narcotics or immigration unit or by those who normally enforce the traffic laws? Were the law enforcement officials, as in *Whren*, acting inconsistently with their own police department's regulations by making a traffic stop? Did the officer actually give the driver a ticket or warning in connection with the traffic violation? Assessing the credibility of an officer's assertions about the motivation for a traffic stop does not seem to involve any more intractable difficulties than many determinations of intent judges and juries make every day.

Professor Kerr proposes a creative end run around the fact-finding hurdles he identifies: using an "objective rule" to address the "subjective concern" with racially discriminatory police behavior.[97] Specifically, he suggests excluding any evidence found during a traffic stop that is unrelated to a traffic violation.[98] Not only would this approach be unhelpful to the officer who Professor Kerr thinks should be allowed to stop the murder suspect, but it would presumably be unpopular with other law enforcement officials, who rely on traffic stops precisely because they hope to uncover evidence of another crime.[99] For that same reason, I do not expect the current Supreme Court to be sympathetic to an approach the Justices would likely view as tying the hands of the police. But it would certainly diminish law enforcement's temptation to use pretextual stops to investigate other charges.

Conclusion

95. *See* Kerr, *supra* note 1, at 485.

96. *Id.*

97. *Id.*

98. *Id.*

99. For illustrations, see *supra* notes 71–75 and accompanying text. The same could perhaps be said about frisks. *See*, *e.g.*, Floyd v. City of N.Y., 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (reporting that searches conducted during *Terry* stops that extended beyond a pat-down were more likely to uncover contraband than a weapon).

Professor Kerr perceptively points out that the Court cannot be taken at its word when it repeatedly asserts that its Fourth Amendment jurisprudence is driven by objective standards. I might categorize some of his examples a bit differently, but these are minor points.

While I would be more critical of the Court's decision in *Whren* and endorse a broader definition of improper stops, Professor Kerr comes up with the provocative suggestion of using objective standards to disincentivize pretext stops while dodging the fact-finding complexities that surround inquiries into an actor's purpose. The current Court may not embrace his recommendation, but I am not optimistic that a majority will be any more receptive to Justice Ginsburg's sensible plea, in response to concerns about "police unaccountability," that the Justices reconsider their reluctance to take officers' motives into account in cases like *Whren*.[100] Until some such reform is implemented, however, the Fourth Amendment's "objective façade"[101] will continue to allow law enforcement to subject communities of color to a disproportionate number of police intrusions, including pretextual ones.[102]

100. District of Columbia v. Wesby, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part).

101. Kerr, *supra* note 1, at 449.

102. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. (forthcoming Apr. 2021) (manuscript at 45–51), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506876 [https://perma.cc/VBW9-56R9] (reporting greater racial disparities when ban on pretext stops was relaxed).