
SUBJECTIVE “INTENT” AS A COMPONENT OF FOURTH AMENDMENT REASONABLENESS

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INTRODUCTION

The Supreme Court has increasingly used language suggesting that Fourth Amendment standards are entirely objective ones that give no significance to the state of minds of the officers whose actions are under analysis. “[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer,”¹ Justice Scalia reiterated in the Court's 2004 opinion in *Devenpeck v. Alford*.²

Few corollaries of this approach are more entrenched than the one Justice Scalia also noted in *Devenpeck* that the Court had “repeatedly explained.”³ Quoting *Whren v. United States*⁴ in turn quoting *Frank Scott v. United States*,⁵ Justice Scalia announced once again:

[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal

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¹ *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (quoting *Horton v. California*, 496 U.S. 128, 138 (1990)).

² 543 U.S. 146 (2004).

³ *Id.* at 153.

⁴ 517 U.S. 806 (1996).

⁵ 436 U.S. 128 (1978).

justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.⁶

Under this approach, the reasonableness of law enforcement action subject to Fourth Amendment scrutiny does not depend on any correlation between judicial consideration of whether the action was reasonable, on the one hand, and the officer's actual motivation or state of mind, on the other.

The matter can be put more specifically by considering when, in litigation, a party defends the Fourth Amendment reasonableness of police action on a particular legal theory—for example, that the officer was reasonably making an arrest for crime A—what the party must prove. Must the party prove that the officer in fact subjectively considered whether she was seizing the person? Whether her seizure was in some sense an arrest? That she was aware of the facts on which her action is supported in the litigation? That she subjectively knew the legal standard relied upon in the litigation—probable cause in the case of an arrest? That she believed the facts permitted her to make the seizure she was making?

The Supreme Court's hostility towards subjective components of Fourth Amendment standards, evident in *Frank Scott, Whren* and *Devenpeck*, led the Court in *Brigham City v. Stuart*⁷ to state in the most unequivocal terms it has used that officers' subjective states of mind are irrelevant to Fourth Amendment reasonableness. State courts have shown little more sympathy for a subjective approach under State law. A notable exception is the Supreme Court of Oregon, which has construed the probable cause requirement in the Oregon Constitution⁸ as having both a subjective and an objective component: "An officer must subjectively believe that a crime has been committed and thus that a person or thing is subject to seizure, and this belief must

⁶ *Devenpeck*, 543 U.S. at 153.

⁷ 126 S. Ct. 1943 (2006).

⁸ OR. CONST., art. I, § 9.

be objectively reasonable in the circumstances."⁹ Generally, however, state tribunals have followed the Supreme Court's lead. This overwhelming judicial commitment to a largely objective approach has been generally accepted by commentators,¹⁰ including Professor Wayne LaFave, probably the leading Fourth Amendment academic. Professor LaFave has, in part,¹¹ observed that a subjective aspect of reasonableness would require "that policemen act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers."¹² To the extent that there has been dissent, it has been largely limited to the so-called "pretext" situation in which officers subjectively and often carefully rely on a legal theory they believe in some ultimate sense does not really apply to the situation. This is because they perceive that there is no legal theory consistent with their "real" motivation that would apply to the facts before them.¹³

The general hostility to subjective components of Fourth Amendment law is worth a more careful examination. The

⁹ State v. Owens, 729 P.2d 524, 529 (Or. 1986). *But see* State v. Nagel, 880 P.2d 451, 462-63 (Or. 1994) (Van Hoomissen, J., concurring in part and specially concurring in part) (arguing the subjective component of probable cause recognized in *Owens* is not properly a part of probable cause under state constitution). This court also construed state statutory law as inserting a subjective component into the standard for investigatory stops. *See* State v. Belt, 932 P.2d 1177, 1179-80 (Or. 1997).

¹⁰ Professor Burkoff showed more sympathy to subjective considerations than many commentators, although he framed the issue so as to focus not on the requirement of reasonableness but on possible attacks. *See* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982), discussed in more detail at notes 316-18 *infra*.

¹¹ Professor LaFave's analysis is considered in more detail later. *See infra* text accompanying notes 273-77.

¹² WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.04(d) (4th ed. 2004) (quoting State v. Romeo, 203 A.2d 23, 32 (N.J. 1964)).

¹³ *E.g.*, Daniel B. Yeager, *The Stubbornness of Pretexts*, 40 SAN DIEGO L. REV. 611 (2003). The somewhat more general tendency to consider subjective awareness in terms other than as part of the ordinary and usual demands of Fourth Amendment reasonableness is illustrated by George C. Thomas III and Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21 (1993).

Fourth Amendment issues may be pretty much resolved after *Brigham City*. State law questions remain, however, and the soundness of the basis for Fourth Amendment law is certainly relevant to whether state courts should adopt for state law purposes the approach of the Supreme Court in Fourth Amendment law.

This article first traces the Supreme Court's consideration and disapproval of subjective considerations in Fourth Amendment law. Because of the minimal discussion of these matters in the Court's opinions, this effort looks to the contentions put before the Court even if those are not fully reflected in the Court's explanations. The article then turns to the merits of the major issue posed by the problem: whether Fourth Amendment reasonableness of law enforcement officers' conduct should depend upon the officers' having been subjectively motivated in some sense by the considerations on which that conduct is defended in litigation.

As a preliminary matter, it is necessary to note that the issue could be one of substantive Fourth Amendment law, that is, the law defining what are searches and seizures and whether particular searches and seizures are reasonable.¹⁴ Alternatively, the issue could be one concerning the content of the exclusionary penalty following a demonstration that authorities' acquisition of offered evidence is related to unconstitutional conduct. *Devenpeck*'s reaffirmation of the objective approach in the context of a civil suit for damages strongly suggests that the Court sees the issue as one of substantive Fourth Amendment law—whether officers' motivation affects the reasonableness of searches and seizures.

¹⁴LaFave acknowledges that officers' states of mind might be implicated in either substantive Fourth Amendment law or exclusionary rule doctrine. He discusses it as part of his consideration of the exclusionary sanction in large part because he believes it should be resolved primarily on the basis of exclusionary sanction considerations—how best to prevent constitutionally unacceptable law enforcement conduct by means of excluding evidence in criminal prosecutions. LAFAVE, § 1.04.

I. DEVELOPMENT OF THE SUPREME COURT'S "OBJECTIVE" APPROACH

The development of the Supreme Court's clear current objective approach to Fourth Amendment standards is the result of a complex series of cases. These are considered in Parts C and following. In interesting contrast stands the pre-*Mapp* assumption that Fourth Amendment standards have a subjective component, addressed in Part B. And, as considered in Part A, this is all against the Court's acknowledgement that the basic standards for deciding whether law enforcement conduct even triggers Fourth Amendment analysis has a partly subjective standard.

A. *The Underlying Need for "Intentional Conduct"*

Clearly on the most basic substantive level Fourth Amendment law has a subjective component. In *Brower v. County of Inyo*,¹⁵ the Court held that a seizure of the person occurs only if an officer's acquisition of control over a suspect is intentional. Further, an intentional seizure requires "a governmental termination of freedom of movement *through means intentionally applied*."¹⁶ Why? Primarily because the requirement of intent "is implicit in the word 'seizure,' which can hardly be applied to an unknowing act."¹⁷

¹⁵489 U.S. 593 (1989).

But if the means intended to restrict a suspect's liberty in fact have that result, the fact that the means accomplished this result in an unintended manner will not put the situation beyond Fourth Amendment coverage. Thus an officer who chases a suspect driving a vehicle intending to frighten the suspect into submitting to the officer's control and who, by his pursuit causes the suspect to crash his vehicle and thus become available for arrest, does not "seize" the suspect because the intended result—the restriction of the suspect's liberty—was not accomplished by the intended means—the fright engendered by the pursuit. *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1715 (1998). But

Brower, then, imposes a minimal purely subjective requirement¹⁸ for triggering Fourth Amendment coverage—the acquisition of control over a suspect is a “seizure” only if the officer intended to accomplish this by the means actually used to do so. Almost certainly a seizure of property must be subjectively intentional in the same sense and a search must be the result of conduct subjectively intended to obtain private information regarding the suspect.

Although *Brower* was not decided until 1989, almost certainly the Court would have resolved the issue in the same manner had it been presented earlier. At no point then, was Fourth Amendment law ever purely objective. Whether once the Fourth Amendment is applicable, its reasonableness standards thereby triggered have subjective components has been treated quite haphazardly by the Court

an officer who seeks to acquire control over a suspect by shooting the suspect in the leg and who accomplishes this result but by hitting the suspect in the heart does seize him. This is because the officer accomplished the acquisition of control by the means intended—the firing of the shot. The fact that the means accomplished the result in an unintended *manner* is not significant.

Brower, 489 U.S. at 598-99.

¹⁶*Id.* at 597 (emphasis in original).

¹⁷*Id.* at 596. In addition, the Court noted that the grievances at which the Amendment was directed did not involve unintended consequences of governmental action, apparently establishing that the framers intended that the provision only cover such action. *Id.*

¹⁸Yet *Brower* left some doubt whether this requirement is in fact a subjective one. Justice Scalia's opinion at one point disclaimed the practicability of “inquiry into subjective intent.” *Id.* at 598. This convinced the four concurring justices that the criterion is a purely objective one, which they characterized as requiring a determination of “objective intent.” *Id.* at 600 (Stevens, J., concurring). In fact, Justice Scalia's comment appears to have been intended only to disclaim any inquiry into whether an officer subjectively intended that the intended means accomplish the intended result in the precise manner in which it actually did. *See supra* note 15. Justice Scalia appeared to believe that requiring that an officer have subjectively intended the means to accomplish the result in the precise manner it actually did would involve inquiry into an exceptionally difficult to ascertain state of mind and thus would not be “practicable.” *Brower*, 489 U.S. at 598.

*B. The Early Assumption that Appropriate Subjective
Motivation is Required*

Prior to the explosion of Fourth Amendment law after *Mapp v. Ohio*,¹⁹ the Supreme Court's Fourth Amendment case law uncritically assumed that Fourth Amendment reasonableness required that an officer has been actually motivated by the rationale later relied upon as supporting the officer's actions.

The Supreme Court's pre-*Mapp* approach to the nature of Fourth Amendment is illustrated by its treatment of probable cause. Discussions have used terminology that could be read as suggesting a purely objective standard or as indicating a standard with both subjective and objective components. Almost certainly the terminology used reflected a total lack of recognition of any issue.

In 1813, Chief Justice John Marshall in *Locke v. United States*²⁰ addressed the term "probable cause" as used in a statute providing for forfeiture of certain ships' cargo. According to Marshall, the term "has a fixed and well known meaning," and "imports a seizure made under circumstances which warrant suspicion."²¹ This, of course, suggests a purely objective standard that requires no actual suspicion of any degree.

In *Carroll v. United States*,²² decided in 1925, the Court explained that probable cause means "a belief, arising out of circumstances known to the seizing officer, that an automobile . . . contains that which by law is subject to seizure . . ."²³ This suggests that the officer must have had a subjective belief based on facts subjectively known to the officers. Later in the

¹⁹367 U.S. 643 (1961).

²⁰11 U.S. 339 (1813).

²¹*Id.* at 348. *Accord*, *Stacey v. Emery*, 97 U.S. 642, 645 (1878) ("facts and circumstances . . . such as to warrant a man of prudence and caution in believing that the offence [*sic*] has been committed").

²²267 U.S. 132 (1925).

²³*Id.* at 149.

opinion, however, the Court set out a variety of other statements of probable cause some of which were as apparently objective as that given in *Locke*.²⁴ Similarly, in *Henry v. United States*,²⁵ the Court observed that “[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”²⁶ But in the immediately preceding sentence it had noted that “good faith on the part of the arresting officers is not enough.”²⁷ “[N]ot enough,” of course, indicates that is it required but not itself sufficient. Almost certainly this inconsistent use of language within consistent opinions reflects a failure to even recognize the issue.

Carroll's discussion, however, suggested uncertainty only as to whether a subjective belief or conclusion that seizable items were present was necessary. Analysis must begin, it noted, by identifying the “circumstances known to the seizing officer.”²⁸ This made clear that reasonableness as well as the criteria for identifying searches and seizures had at least one subjective component.

In *Jones v. United States*,²⁹ however, the Court explicitly embraced the position that probable cause requires an officer to have been actually and subjectively motivated by the basis later offered to justify the officer's action. Whether the case is firm authority for this position, however, is less than clear if the submissions, as well as the opinion, are considered.

Jones arose from a challenge to the admissibility of moonshine evidence seized in a search of Jones' home.³⁰ Jones sought review on the ground that the lower courts had improperly held that a warrantless search was permissible upon probable cause to believe seizable items were in the premises. The Government responded before the Court that the search was supportable, not

²⁴*Id.* at 161-62.

²⁵361 U.S. 98 (1959).

²⁶*Id.* at 102

²⁷*Id.*

²⁸*Carroll*, 267 U.S. at 149.

²⁹357 U.S. 493 (1958).

³⁰*Id.* at 494.

as one to locate and seize items, but rather as one to locate and arrest a person the officers had probable cause to believe was on the premises and committing an offense.³¹

In support, the Government assumed its theory required proof that the officers were motivated by a desire to find and arrest the suspect. It offered in support that "it is a fair inference that the agents entered to arrest [Jones], and not to make a search."³² Jones, in response, accepted that the Government's theory required proof that the agents were motivated by a desire to find and arrest him. He contended, however, that the record failed to reflect that this was their motive, and that the courts below had not found any such motivation.³³

The Court held the search unreasonable.³⁴ It adopted the common assumption of the parties—that the Government's theory required proof that the officers were subjectively motivated by the desire to find and seize Jones. It then rejected the Government's argument on the ground that it had failed to support it with proof of the necessary motivation: "The testimony of the federal officers makes clear beyond dispute that [the officers'] purpose in entering was to search for distilling equipment, and not to arrest [Jones]."³⁵

Jones, of course, contains language suggesting that a search justified at trial as one to locate and arrest a suspect requires that the officers have acted for the "purpose" of locating and finding that suspect. Fairly read, however, it simply reflects an

³¹In fact, the Court posed the issue as whether the search was reasonable as incident to Jones' arrest, reflecting what in retrospect was an unfortunate statement of that issue. *Id.* at 499. A search incident to an arrest would be permissible, of course, only if the arrest was reasonable, and the arrest would be tainted if the entry to make it was unreasonable. Thus, the validity of the entry turned upon whether it was a valid exercise of the power to sometimes enter without a warrant to search for a person in order to arrest that person.

³²Brief for the United States at 8, 17, *Jones v. United States*, 357 U.S. 493 (1958) (No. 331).

³³Reply Brief for the Petitioner at 3-4, *Jones*, 357 U.S. 493 (No. 331).

³⁴*Jones*, 357 U.S. at 493.

³⁵*Id.* at 500.

uncritical assumption by the Court that the parties accurately assumed a Fourth Amendment requirement that officers be actually motivated by the legal rationale relied upon in later litigation. This is not surprising. A subjective intention to locate a person to arrest seemed implicit in the words used to state a rule permitting searches to find and arrest a suspect, just as forty years later in *Brower*, an intent to seize seemed “implicit in the word `seizure.’”³⁶

Nevertheless, the Government did not offer in *Jones*, and thus the Court did not reject, a contention that the reasonableness of the search was to be determined on a purely objective basis, that is, by inquiring only whether a reasonable officer could (or would) have regarded the search as necessary to locate and seize a person reasonably believed to be in the process of committing a crime. *Jones* cannot fairly be read as authoritative precedent for the proposition that exceptions to the Fourth Amendment warrant requirement require that officers have been motivated by the rationales for which relied-upon exceptions are recognized. *Jones* nevertheless almost certainly reflected a widespread assumption that most Fourth Amendment substantive rules making particular types of law enforcement conduct reasonable had an initial subjective component. A warrantless arrest of X for crime Y, the courts generally assumed, required that the officer actually and subjectively believed that X committed crime Y or at least that the facts sufficiently indicated his guilt of that offense. Controversy generally arose from the second and objective requirement that the basis for this belief be sufficient as measured against a reasonable person standard.

The basis for this assumption was most likely the same as the Court would later rely on in *Brower*—the implicit meaning of the terms used and the concepts invoked. Probable cause implicitly referred to the “cause”—and thus the motive—for the officer's action in taking the suspect into custody. The terminology and concepts used in discussions intuitively suggested the legal standard had a subjective basis or at least a subjective component.

³⁶*Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

*C. Post-Mapp Focus on Officers'
Subjective Motivation: Painten*

Fourth Amendment law took on considerably greater significance in 1961 when in *Mapp* the Supreme Court held that evidence tainted by a violation of the Fourth Amendment had to be excluded in state criminal litigation.³⁷ Shortly after *Mapp*, the Court appeared ready, in *Massachusetts v. Painten*,³⁸ to address the role of subjective motivation in the Fourth Amendment law. Although the Court did not end up reaching the merits in *Painten*, the case set the stage for an objective focus as the Court began to develop the Fourth Amendment law thrust into public attention by *Mapp*.

In 1966, the First Circuit held in *Painten* that the state defendant's Fourth Amendment rights were violated when the prosecution was permitted to use against him evidence tainted by police officers' approach to his residence.³⁹ Although the analysis was somewhat confused, the court appeared to reason that the officers' knock on Painten's door was a violation of the Fourth Amendment because the officers intended to enter and search regardless of whether they developed facts that would, under Fourth Amendment law, permit that action.⁴⁰ In seeking review, Petitioner Massachusetts represented:

[T]he *Painten* decision shifts the test of illegal searches and seizures from one of overt acts to one of the thoughts of the police; it radically changes the law of search and seizure as expounded by the highest court in the land. If certiorari is to be denied in this case, the *Painten* decision will become a dangerous and far-reaching precedent for all law enforcement officials across the nation.⁴¹

³⁷*Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁸386 U.S. 931 (1967).

³⁹368 F.2d 142 (1st Cir. 1966).

⁴⁰*Id.*

⁴¹Petition for Writ of Certiorari at 11, *Massachusetts v. Painten*, 389 U.S. 560 (1968)

The Supreme Court granted review.⁴²

Petitioner Massachusetts explained at length its position in terms of the inappropriateness of subjective considerations:

There are compelling and obvious reasons for the adoption of an objective rather than a subjective standard in determining the existence or non-existence of probable cause for an arrest. How can one possibly ascertain the real motives of any person, including a police officer, for doing what he does? Moreover, it would seem obvious that, for Fourth and Fourteenth Amendment purposes, what a police officer does is more important than what he thinks. A police officer's state of mind cannot violate the constitutional rights of an accused; only his actions can violate the rights of an accused. If the courts are to attempt to decide a case based solely on the thinking of the police as opposed to overt acts, the result will place a premium on prevarication and on the giving of smooth and bland reasons by carefully coached police witnesses. Moreover, it will be impossible to ascertain in advance whether a particular search was or was not legal.

. . . What counts is what the officer does when he arrives at the home of a suspect, and whether what he does violates any substantive rights of the respondent. The officer's testimony as to his own personal reasons for going to the respondent's house is irrelevant.

If the decision of the Court of Appeals is allowed to stand, it will become a dangerous and far-reaching precedent for all law-enforcement officials. Under the decision of the Court of Appeals, the attitude of police officers would necessarily have to be: "Don't think, or your subsequent actions will be invalid." Even worse, police officers would feel compelled to give reasons other than the true ones.

Just as an individual cannot be arrested for what he thinks—just as he must first commit some overt act which constitutes a crime—so a police officer should not be precluded from making an arrest merely because he has private thoughts of his own. So to hold would severely hamper the prosecutions

(per curiam) (No. 37).

⁴²*Painten*, 386 U.S. at 931.

of crime throughout the country. With the increase in crime across the nation, law-enforcement officials need help, not hindrances, in protecting the interests of society. This court can give law-enforcement officials this help while, at the same time, this court can insist that, by every objective standard, proper regard be paid to the protection of the rights of the accused.⁴³

Respondent Painten did not defend the result below as one focused on the subjective motivation of the officers. Rather, he urged it be upheld as based on a finding that the officers entered without effective consent and that all of the evidence was tainted by this unreasonable search. In a somewhat confusing argument, he contended that the court of appeals did not impermissibly rely "solely" on the officers' subjective intentions. He did, however, concede that the court had considered this and appeared to assume that this was appropriate.⁴⁴ At no point did respondent Painten explicitly explain how or why the officers' intentions were properly considered on reasonableness.

The real case for accepting the subjective aspects of the analysis of the court of appeals was made by an amicus brief submitted by the American Civil Liberties Union and co-authored by Professor Anthony Amsterdam.⁴⁵ Somewhat surprisingly, the brief urged the Court, as a general matter, to embrace an objective perspective in Fourth Amendment law:

This is so for reasons which the Commonwealth articulates forcefully. Fourth Amendment rules are principally mandates for the harried policeman and the hurried motions judge. They should be as simple and workable as possible, so that the policeman can know what is expected of him and the judge can enforce it. Subjective standards are difficult to abide by, hard to

⁴³Brief for the Petitioner at 8-9, *Painten*, 389 U.S. 560 (No. 37).

⁴⁴Brief for the Respondent at 14-16, *Painten*, 389 U.S. 560 (No. 37).

⁴⁵Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae, *Painten*, 389 U.S. 560 (No. 37) (hereinafter ACLU Brief). The brief was signed by Professor Amsterdam and Melvin L. Wulf, as attorneys for the amici. It is a curious document consisting entirely of argument and containing no citations to authorities whatsoever.

administer. Judicial investigation of police purpose is a frustrating, ordinarily futile endeavor; and the policeman cannot predict its outcome. The impracticable trial of mental states is, in any event, not worth the trouble, since whatever it is that the policeman does is equally intrusive upon his suspect's privacy, whatever its motivation. What the citizen cares about, and what the Amendment restricts, is where, under what circumstances, the policeman's body ends up, not by what cogitative paths his mind leads him there.⁴⁶

In exceptional situations in which the Fourth Amendment puts few or no limits upon intrusive police conduct, the brief continued, the Court should impose limits based on the officers' subjective motivations. It explained:

This is certainly the case, we believe, with the power of policemen to knock on the doors of dwellings in the night time, as happened to Donald Painten. A night-time knock on the door is no small intrusion to a home-owner. The potential of the knocking practice for abuse—its potential employment by police with no legitimate business, banging around to se[e] whether something turns up—must surely be apparent And, on the Commonwealth's own theory in this Court, the practice is not objectively regulable[,] because there are no necessary objective

⁴⁶*Id.* at 9. Professor Amsterdam again took this position, at least in one specific context, in his 1974 Oliver Wendell Holmes Lectures. Addressing the stop-and-frisk power, he said:

[One possible] curb against abuse is to inquire into the officer's motive or purpose for conducting the stop and frisk. But surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation 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.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974).

preconditions to its validity: police may knock on *any* door, on *any* set of facts, with-out probable cause, as they did to Painten. We think that state of affairs falls considerably short of the protection of the people in their houses envisaged by the Fourth Amendment. Unless this Court is prepared to declare a broader "objective" safeguarding rule—that police without a warrant and without probable cause are never permitted to knock on the doors of dwellings in the night time; or that, at the least, anything they observe as a result of the knock is inadmissible in evidence in a subsequent criminal trial of the home-owner—we submit that the least the Amendment requires is the che[c]k of a "subjective" inquiry into the question whether the knocking officer's purposes were within the range of those legitimate ones for whose effectuation the power to knock is given him.⁴⁷

After briefing and oral argument, a majority of the Court announced, "we have reached the conclusion that the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case."⁴⁸ It therefore dismissed certiorari as improvidently granted.⁴⁹

Three, and perhaps four,⁵⁰ members of the Court disagreed. Justice White, joined by Justices Harlan and Stewart, contended in dissent that the Court should decide the case to disapprove the analysis of the court of appeals and, in support, outlined the case for an objective approach:

⁴⁷ACLU Brief at 12-13.

⁴⁸*Painten*, 389 U.S. at 561. At oral argument, several members of the Court expressed concern regarding whether the district judge had addressed and resolved whether the officers' entry into the premises might have been supportable on a consent theory. Further, the record of the state court trial—although considered by the district judge—had not been made a part of the record before the court of appeals and thus was not before the Supreme Court.

⁴⁹*Id.*

⁵⁰Justice Fortas disagreed with the dissenters' proposal for developing the record all members of the Court agreed was required for it to reach the merits of the case. He stressed, however, that he did not disagree with the dissenters' view that that "the court below erred in relying on its inferences as to the undisclosed intent of the officers." *Id.* at 562 (Fortas, J., concurring).

The position of the courts below must rest on a view that a policeman's intention to offend the Constitution if he can achieve his goal in no other way contaminates all of his later behavior. . . .

. . . The expanded exclusionary rule applied in the opinions below would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements.⁵¹

Justice White then, in words that have become almost a mantra for those opposing subjective standards, commented, “In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”⁵²

Some discussions after *Painten* continued to uncritically assume that at least some Fourth Amendment standards had a subjective component. In *Hill v. California*,⁵³ for example, the Court left undisturbed the state court's conclusion that officers reasonably arrested one Miller.⁵⁴ That conclusion was described as based on a finding that the officers “had a reasonable, good faith belief” that Miller was in fact Hill, whom they had probable cause to believe committed an offense. The Court noted—and in fact stressed—the state trial judge's finding that the officer “acted in the good-faith belief that Miller was in fact Hill.”⁵⁵

Nevertheless, *Painten* made clear that when that assumption

⁵¹*Id.* at 564-65 (White, J., dissenting).

⁵²*Id.* at 565.

⁵³401 U.S. 797 (1971).

⁵⁴*Id.* at 802.

⁵⁵*Id.*

was challenged, the propriety of subjective components generally lacked spirited and principled defense. It also provided Fourth Amendment jurisprudence with Justice White's colorful assertion—unsupported by authority or reasoning—that application of subjective criteria would be too difficult and costly to be practical.

*D. Formulation of the Objective Approach:
Robinson and Scott*

In retrospect, *United States v. Robinson*⁵⁶ and *Gustafson v. Florida*,⁵⁷ both decided in 1973, were—or, more accurately, were to become under *Frank Scott v. United States*⁵⁸—the pivotal Supreme Court discussions regarding the significance of officers' states of mind in substantive Fourth Amendment analysis. Both *Robinson* and *Gustafson* involved searches after arrests for driving without a license.⁵⁹ As the Court disposed of them, *Robinson* was the case of major significance.

At issue in *Robinson* was the reasonableness of a search incident to an arrest for driving after revocation of one's driver's license.⁶⁰ Review was apparently granted to consider and ultimately to reverse the holding below that an arrest for this offense would not support an incidental search.⁶¹ *Robinson* argued that where no basis for anticipating the discovery of weapons existed, an

⁵⁶414 U.S. 218 (1973).

⁵⁷414 U.S. 260 (1973).

⁵⁸436 U.S. 128 (1978).

⁵⁹*Robinson*, 414 U.S. at 220; *Gustafson*, 414 U.S. at 261.

⁶⁰414 U.S. at 220.

⁶¹*Id.* at 220, 237. In both cases, the argument was for a rule that would apply only to cases in which upon arrival at the stationhouse the suspect was likely to be released—probably pursuant to bail set on the basis of a schedule—without being introduced into the general jail population or even presented before a magistrate. *See Gustafson*, 414 U.S. at 263. Neither opinion of the Court made clear that the rule the Court was rejecting might well not apply to arrests for more serious crimes where that arrest was likely or certain to result in extended detention after arrival at the stationhouse and placement of the suspect in the jail population.

officer making an arrest could initially make only a frisk.⁶² The officer could search more extensively if, but only if, on the basis of the frisk the officer reasonably believed a weapon was present.⁶³ He stressed that the officer did not actually fear for his safety from Robinson,⁶⁴ apparently as a basis for arguing that on the facts of the case itself a frisk could not have developed into a more intrusive search. He simply assumed that if the Court imposed any limitation upon an officer's ability to conduct more than a patdown, this limitation would require an actual subjective belief that a weapon was present and an objectively-sufficient basis for that belief.⁶⁵

The Government argued that the Fourth Amendment permitted a full search simply as a consequence of a custodial arrest.⁶⁶ It never contended that *if* some case-specific objective basis for a search was required, the officer need not have been actually motivated by the supporting rationale. It did not argue that if the Court required information on which a reasonable officer would believe a weapon present, it should not require in addition that the officer actually believe there was a weapon and act on the basis of that subjective belief.

None of the submissions to the Court focused on whether, if a search after arrest required some objective basis for believing the suspect had weapons or evidence, the Fourth Amendment also required that the officer have subjectively believed this to be the case.⁶⁷ In fact, that issue was totally ignored in the rather complicated briefings.

Deciding *Robinson*, the Court made clear that a search incident

⁶²Brief for the Respondents at 9, *Robinson*, 414 U.S. 218 (No. 72-936).

⁶³*Id.*

⁶⁴*Id.* at 7.

⁶⁵*Id.*

⁶⁶Brief for the United States at 9, *Robinson*, 414 U.S. 218 (No. 72-936).

⁶⁷The American Civil Liberties Union, as amicus curiae, essentially supported Robinson's position. Brief of the American Civil Liberties Union, Amicus Curiae at 9, *Robinson*, 414 U.S. 218 (No. 72-936) ("a warrantless search for weapons incident to an arrest for a traffic infraction should not be permitted absent special facts or circumstances which lead the officer to reasonably conclude that the individual with whom he is dealing is armed and dangerous").

to arrest is reasonable for Fourth Amendment purposes because of the need for officers to discover and seize weapons as well as to locate evidence or fruits of crime.⁶⁸ Therefore, even an arrest for an offense almost certainly not evidenced by items on the suspect's person was nevertheless within the rationale of the rule. The Court also, however, indicated that the search of Robinson was reasonable although the searching officer did not in fact suspect that Robinson was armed⁶⁹—or, apparently, in possession of evidence.

This result was reached only after an intervening conclusion that the Fourth Amendment does not require the litigation in each case of whether or not there the case-specific facts actually invoked the rationale for the rule establishing the reasonableness of such searches. Since officers should not be forced to make the quick and difficult decisions whether and how to search an arrested suspect with knowledge that courts will later second guess their decisions, the reasonableness of a search incident to an arrest is established by a showing that a reasonable arrest occurred and the search was in fact incident to it.⁷⁰

Why did the officer not need to have a subject fear of harm or a subjective belief that Robinson had a weapon? The Court explained only that this was the case “[s]ince it is the fact of custodial arrest which gives rise to the authority to search.”⁷¹ This explanation was not developed further.

The Court did not, then, distinguish between, first, a possible objective requirement that grounds exist that would support a

⁶⁸414 U.S. at 235.

⁶⁹414 U.S. at 236 (“[I]t is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed.”). The Government had not specifically argued that no inquiry into the officer's subjective perception or beliefs was necessary. It did, however, note that the officer had testified he had followed a departmental regulation mandating a search in the situation presented, and contended to the Court that the regulation was “reasonable in scope and proper in purpose.” Brief for the United States at 33-37, *Robinson*, 414 U.S. 218 (No. 72-936).

⁷⁰414 U.S. at 235.

⁷¹*Id.* at 236.

belief that the suspect is dangerous or in possession of evidence and, second, a possible subjective requirement that the officer in fact form a belief regarding these matters. It assumed, quite reasonably, that no requirement of a subjective belief would be conceivable unless the objective requirement was imposed. Since no objective requirement was imposed, it found no need to consider whether, in addition, a subjective inquiry was necessary. *Robinson's* significance for Fourth Amendment law generally was discovered five years later in *Frank Scott v. United States*,⁷² decided under the federal "wiretap" statute. Officers executing a court order issued under the statute are obligated to minimize the interception of protected communications beyond the scope of the order.⁷³ Under the facts accepted by the Court, the officers in *Frank Scott* had made no effort to avoid complete interception of all communications to which they had access and thus arguably ignored the requirement of minimization.⁷⁴ Yet they actually intercepted no communications which they would not have been able to intercept had they in fact been "minimizing."⁷⁵ Did the officers' "bad faith" render their actions in violation of the statute and thus require exclusion of the fruits?⁷⁶

The Court itself characterized Scott's position as that the Government's elaborate analysis of transcriptions of the intercepted calls was an inappropriate basis for analysis "having been

⁷²436 U.S. 128 (1978).

⁷³18 U.S.C. § 2518(5).

⁷⁴436 U.S. at 132.

⁷⁵*Id.* at 134.

⁷⁶Apparently there was no effort in the trial court to explicitly inquire whether the officers were in the process of preparing an approach to minimizing. The supervising officer testified that the officers operated "on the understanding that they were to terminate the interception of any particular conversation if and when they determined that it was not properly interceptable." Brief for the United States at 10, *Frank Scott*, 436 U.S. 128 (No. 76-6767). But "when [the supervising officer] was asked whether he could 'point to any discretion exercised by any agent at any time that resulted in the non-recording . . . as to what was overheard,' he responded that he could not." *Id.* at 10-11 (citing Appendix p. 131). Arguably the record showed only that the officers had not finished formulating a system for identifying calls not covered by the description and thus for actually terminating any calls.

prepared after the fact by a Government attorney and using terminology and categories which were not indicative of the agents' thinking at the time of the interceptions. As a result, it does not reflect the perceptions and mental state of the agents who actually conducted the wiretap."⁷⁷

Scott contended that the language of the statute required exclusion of all intercepted communications if the interception was conducted in noncompliance with the court order.⁷⁸ No link between a particular interception and that noncompliance was necessary. He also argued rigorously for a standard of reasonableness that turned in whole or at least in part on subjective good faith.⁷⁹ In support, he explained:

Any rule primarily concerned with police deterrence must make its results turn on the intention of the police at the time they acted and the reasonableness of their perceptions and actions in light of the facts known to them; the model rewards reasonable good faith efforts and punishes those which are in bad faith or are unreasonable. This need to examine the conduct of the police in light of their intention and the facts known to them applies with equal force under [the statute at issue here]. Under Fourth Amendment deterrent rationale and [the statute], after-the-fact analysis of the results of police conduct is irrelevant if the officers failed in bad faith in execution of their responsibilities or acted unreasonably.⁸⁰

Conceptually, he added, a Fourth Amendment standard of the sort at issue necessarily requires both subjective and objective components: "Absent good faith efforts at compliance with minimization requirements, it is impossible to assess the objective reasonableness of the agents' conduct."⁸¹

The Government acknowledged that the subjective or objective nature of criterion for determining the Fourth Amendment

⁷⁷436 U.S. at 135.

⁷⁸Brief of Petitioners at 22, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

⁷⁹*Id.* at 22-23.

⁸⁰*Id.* at 22-23, 31.

⁸¹Petitioners Reply Brief on the Merits at 4, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

reasonableness of a search “is not one that this Court appears to have explored at length in any of its decisions.”⁸² It cited *Robinson* and language in *Terry v. Ohio*⁸³ as supporting the wisdom of an objective approach.⁸⁴ An objective standard, it continued, is supported by sound policy:

The focus of the courts on actions rather than thoughts reflects considerations both of justice and practicality. . . . [A]n individual's right to be free from unreasonable official invasions of privacy are best secured by considering whether or not the invasion is justified by the facts and circumstances known to the officer. . . .

The practical considerations include the difficulty to which Mr. Justice White alluded [in *Painten*] of reliably ascertaining subjective intent (something we hereafter contend the district court failed to do in the instant case), particularly in the absence of objective facts evidencing illegality. Where the action in question (here, intercepting conversations) is the product of human decision made in relation to particular existing circumstances, it is rarely possible to conclude with assurance what decision would have been made in other circumstances.⁸⁵

⁸²Brief for the United States at 28, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

⁸³392 U.S. 1, 21-22 (1966).

⁸⁴The brief quoted from *Terry*:

[I]t is imperative that the facts be judged against an objective standard. . . . [S]imple “`good faith on the part of the arresting officer is not enough.’ . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be “secure in their persons, houses, papers, and effects,” only in the discretion of the police.” *Beck v. Ohio*, [379 U.S. 89] at 97. *See also* *Henry v. United States*, 361 U.S. 98; [Anthony G.] Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 373 (1974).

Brief for the United States at 28, *Frank Scott*, 436 U.S. 128 (No. 76-6767). This ignored that the *Terry* discussion spoke approvingly of the need to address the objective reasonableness of officers' actions only after commenting that good faith *alone* is not enough. *Id.* at 31.

⁸⁵Brief for the United States at 31, *Frank Scott*, 436 U.S. 128 (No. 76-6767).

In deciding the case, the Court quite uncritically concluded—or rather assumed—that the statute was intended to coincide with Fourth Amendment requirements. Thus, the issue before it was informed and perhaps controlled by whether subjective bad faith renders law enforcement conduct unreasonable in Fourth Amendment terms. The “existence *vel non*” of a constitutional or statutory violation, the Court explained in response, “turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time.”⁸⁶

Frank Scott thus apparently endorsed the Government's contention, as stated by the Court, that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.”⁸⁷ Apparently it meant that the same would be the result upon a showing of a lack of “[s]ubjective intent.”

The Court offered no reasoning whatsoever in support of its conclusion. The only authority cited in support was *Robinson*. The Court asserted that in *Robinson* it had “held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.”⁸⁸

To the extent that subjective factors may play a role in the overall Fourth Amendment scheme, as *Frank Scott* suggested, this role would be in addressing the procedural—that is, exclusionary—consequences of a determination that law enforcement conduct was unreasonable under substantive Fourth Amendment law. “[C]onsideration of official motives,” the Court commented almost offhandedly, “may play some part in determining whether application of an exclusionary rule is appropriate *after* a statutory or constitutional violation has been established.”⁸⁹

⁸⁶436 U.S. at 136.

⁸⁷*Id.*

⁸⁸*Id.* at 138.

⁸⁹*Id.* at 136.

Frank Scott simply misrepresented what *Robinson* held. This is evident from the meaning of the critical statement, "the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action." The legal justification for a search incident to arrest is, under *Robinson*, simply the fact of the arrest. "[T]he state of mind which is hypothecated by the reasons" for this justification would be the officer's awareness that he had arrested the searched person.

If *Robinson* had held that a search incident to an arrest requires a reasonable basis for suspicion that the arrestee has on his person weapons or destructible evidence, the situation would have been different. Then, the legal justification for the action would be this reasonable suspicion. The state of mind hypothecated by the reasons for this justification would be something like a subjective belief (or suspicion) that the person does (or may) have such weapons or evidence which would be revealed by the search.

Despite the arguably narrow issues actually decided in *Robinson* and *Frank Scott*, the Court's discussions left no doubt that it disfavored subjective components at least for purposes of determining whether the Fourth Amendment applied to particular law enforcement activity and whether activity covered by the Amendment was reasonable. Without making clear how subjective considerations might be conceptually relevant to any Fourth Amendment issues, *Frank Scott* suggested such relevance would most likely be to matters addressing whether unreasonable law enforcement action rendered inadmissible evidence later acquired by law enforcement.

E. Mixed Signals: Frank Scott to Whren

Between *Frank Scott* and *Whren*, the Court's treatment of officers' states of mind as a factor in Fourth Amendment litigation differed. *Scott* suggested that motivation might more appropriately be considered on exclusionary sanction matters rather than as a part of substantive Fourth Amendment analysis, and thus the Court's treatment of the two types of cases might best be considered separately. However, one decision—*Florida v. Royer*⁹⁰—stands out and needs to be first discussed separately.

1. Florida v. Royer: Officers' Characterization Not Controlling

Royer is by general consensus a major development of Fourth Amendment analysis, even though the Court issued only a plurality opinion. Although it is widely used for its identification of detentions that require probable cause, it also made a major contribution to the development of objective Fourth Amendment standards.

Officers approached Royer in an airport and their interaction with him was characterized—by the plurality at least—as developing first into a seizure requiring only reasonable suspicion but then into one that for constitutional purposes required probable cause. By the time he provided consent for the search at issue, the detention had become unreasonable and tainted that consent. The plurality reasoned that the detention had become one requiring probable cause and the information possessed by the officers did not rise to that level.

For present purposes, however, what is of major significance is the plurality's treatment of what it viewed as testimony by one of the officers that, at the time Royer gave consent, the officers did not have probable cause: "[T]he fact that the officers did not

⁹⁰460 U.S. 491 (1983).

believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying of Royer's consent to search."⁹¹

This suggests that the plurality viewed the officers' subjective and contemporaneous characterization of their conduct as irrelevant to its later Fourth Amendment analysis. Even if the officers at the time believed that Royer was never detained or seized, the discussion indicates, the prosecution was free to later support their action as having given rise to a seizure that was supported by facts sufficient to meet the applicable Fourth Amendment standards. To the extent that the prosecution defended the law enforcement officers' actions as a reasonable seizure because it was based on probable cause, it did not need to show that the officers subjectively concluded their information constituted probable cause. It did not need to show that the officers even addressed whether they were detaining the suspect at all. Alternatively, even a showing that the officers subjectively regarded their actions as a seizure based on reasonable suspicion, did not preclude the prosecution from defending their actions as a different type of seizure requiring and supported by probable cause.

In fact, the parties neither framed the case in this manner nor even recognized any such issue.⁹² Certainly Royer did not argue

⁹¹*Id.* at 507.

⁹²The only witnesses to testify were Royer and one of the officers, Johnson. The prosecution elicited negative answers from Johnson as to whether Royer was ever told he was under arrest, and whether Johnson had, "in fact," placed him under arrest. Joint Appendix at 50A-51AA, *Royer*, 460 U.S. 491 (No. 80-2146). Overall, the prosecution's position in the trial court appeared to be that Royer was never seized. It never explicitly asked Johnson how he and the other officer subjectively perceived the situation.

The United States, participating as *amicus curiae*, contended the court below had erred in determining that the detention had become an arrest in part on the basis of the officers' intent—uncommunicated to Royer—to not permit him to leave. The officers' subjective intentions, it argued, were irrelevant. Even if relevant, their subjective intentions went at most to whether there was a seizure and not to whether the seizure was an arrest for Fourth Amendment purposes. Brief for the United States as *Amicus Curiae* Supporting Petitioner at 17-18, *Royer*, 460 U.S. 491 (No. 80-2146).

that, even if the officers were aware of facts amounting to probable cause, the prosecution was precluded from establishing reasonableness on this theory because of the officers' subjective state of mind.

To the extent that *Royer* established that the officers' subjective intentions are irrelevant to determining how the prosecution can later support those actions against Fourth Amendment challenge,⁹³ that significant determination was a novel one.⁹⁴ Also, it was reached without adversary presentations or even identification by the parties.

2. Exclusionary Sanction Considerations

Frank Scott's suggestion that officers' motives might appropriately be considered in determining whether an exclusionary penalty is properly attached to a violation of substantive Fourth Amendment requirements was followed with mixed results. In 1984, the Court addressed two major possible exceptions to the federal constitutional exclusionary rules. These cases, considering the most pervasive modifications of exclusionary sanction law, seemed most likely to add subjective components to federal search and seizure law as *Frank Scott* suggested would be appropriate. In fact, however, this was not the case.

⁹³The majority for affirmance included Justice Brennan and the four justices joining Justice White's plurality opinion. Justice Brennan concurred in the result on the ground that the record supported the state court's conclusion that *Royer's* seizure "matured into an arrest unsupported by probable cause." *Royer*, 460 U.S. at 509 (Brennan, J., concurring in the result). He identified numerous ways in which he disagreed with the plurality's analysis, but he did not mention the plurality's assumption that the prosecution was free to support the officers' actions without regard to how the officers subjectively perceived it at the time.

⁹⁴In support of its statement the plurality cited only *Peters v. New York*, 392 U.S. 40, 66-67 (1968). *Peters*, however, held only that the state appellate court's holding that the detention as issue was legal under the state's "stop and frisk" statute did not preclude the prosecution from defending the seizure as an arrest based on probable cause before the Supreme Court. This is a much different matter.

a. Inevitable Discovery

In *Nix v. Williams*,⁹⁵ decided early in the 1984 term, the Court embraced an inevitable discovery exception to all or most federal constitutional exclusionary rules. In doing so, however, it explicitly rejected a requirement that the officers have acted in “good faith.”

A good faith requirement, the Court reasoned in *Nix*, would add little to the deterrent impact of the exclusionary penalty. Seldom will officers be able to anticipate the inevitable discovery of evidence they are seeking, but when they do they have considerable disincentives to exploit that knowledge by taking unconstitutional “shortcuts” to accelerate their access to the evidence. In any case, the “enormous societal cost” of excluding evidence simply because the officers acted in bad faith reliance on the inevitable discovery rule far outweighs whatever deterrence value a good faith requirement might have.⁹⁶

In *Nix*, the court below had both assumed the requirement of good faith and explicitly defined it as subjective in nature.⁹⁷ Before the Supreme Court, the petitioner argued that the subjective approach applied by the court of appeals would mean that cases would turn on the “elusive state of mind of law enforcement officers.”⁹⁸ Respondent Williams did not defend the lower court’s approach. Rather, he argued that if the Court imposed a requirement of good faith, it should be an objective one.⁹⁹

The matter was addressed at somewhat more length by the United States as amicus curiae. Any good faith requirement adopted by the Court, the United States argued, should focus on the objective reasonableness of the officers’ actions rather than on their “subjective intent.” The task of probing officers’ minds

⁹⁵467 U.S. 431 (1984).

⁹⁶*Id.* at 445-46.

⁹⁷*Williams v. Nix*, 700 F.2d 1164, 1170-71 (8th Cir. 1983) (“The relevant question—bad faith—is subjective.”).

⁹⁸Petitioner’s Brief at 20-21, *Nix*, 467 U.S. 431 (No. 82-1651).

⁹⁹Brief of the Respondent at 23, *Nix*, 467 U.S. 431 (No. 82-1651).

would be "time consuming," "unwieldy," and "awkward." It relied heavily upon the Court's then-recent decision in *Harlow v. Fitzgerald*,¹⁰⁰ which eliminated the previous subjective aspect of the standard for qualified immunity.¹⁰¹

As a bottom line, however, no case for a subjective good faith requirement was put before the Court.

b. "Good Faith"

Near the end of the 1983 term the Court addressed a proposed "good faith" exception to the federal constitutional exclusionary requirements. Whether any such exception should have a subjective component was a matter with which the Court was familiar.

The Court had ordered argument on the possible exception in *Illinois v. Gates*,¹⁰² although the issue had not been raised in the lower courts. Respondent Gates argued in part that the lack of a record on the matter militated against addressing the issue, particularly since the submissions favoring an exception were divided on "whether subjective state-of-mind determinations, objective conditions, or both are appropriate standards."¹⁰³ Ultimately, the Court declined to address the matter in *Gates*, pointing specifically to the lack of anything in the record "regarding the subjective good faith of the police officers."¹⁰⁴ This, it commented, "might well be an important consideration in determining whether to fashion a good faith exception to the exclusionary rule. Our consideration of whether to modify the exclusionary rule plainly would benefit from a record containing

¹⁰⁰ 457 U.S. 800 (1982).

¹⁰¹ Brief for the United States as Amicus Curiae Supporting Petitioner at 26-27, *Nix*, 467 U.S. 431 (No. 82-1651).

¹⁰² 462 U.S. 213 (1983).

¹⁰³ Brief of Respondent on Reargument, at 11, *Gates*, 462 U.S. 213 (No. 81-430).

¹⁰⁴ *Gates*, 462 U.S. at 221.

such facts.”¹⁰⁵

After *Gates*, the Court granted review in three cases for purposes of addressing the issue left open in *Gates*. It adopted a limited exception in *United States v. Leon*,¹⁰⁶ removing the exclusionary penalty upon a showing that the officers had obtained a warrant.

The case for the exception was made most effectively by the United States, first in *Gates* on reargument, and again in *Leon*. The briefs referred to the lack of any rationale “for faulting an officer who has made a reasonable but incorrect assessment [of a situation].”¹⁰⁷ Generally, the briefs discussed the matter as if the United States were urging an exception with both subjective and objective components. In *Gates*, however, the brief indicated the standard should probably be only objective.¹⁰⁸ In the *Leon* brief, the United States explicitly urged an objective approach. To reflect this, the *Leon* brief called the doctrine it urged a “‘reasonable mistake’ exception.” It explained that it chose this terminology to avoid the “good faith” phraseology that suggested the officers’ intentions were relevant.¹⁰⁹

The United States indirectly supported this aspect of its proposal on the ground that a purely objective standard would remove the necessity for courts “to engage in unwieldy and awkward inquiries into the subjective intent of . . . officers” and consequently the exception would not likely unduly burden the

¹⁰⁵ *Id.* The issue had been briefed by one of the parties and amicus in *Taylor v. Alabama*, 457 U.S. 687 (1982), but the Court did not reach or even mention it. Both proponents of an exception in *Taylor* assumed that the exception would have both a subjective and an objective component. Brief for Respondent at 13-21, *Taylor*, 457 U.S. 687 (No. 81-5152); Brief of Americans for Effective Law Enforcement, Inc., *et al* as Amici Curiae Supporting Respondent at 10-21, *Taylor*, 457 U.S. 687 (No. 81-5152).

¹⁰⁶ 468 U.S. 897 (1984).

¹⁰⁷ Brief for the United States at 51, 57, *Leon*, 468 U.S. 897 (No. 82-1771) (asserting no policies are served by excluding evidence “when law enforcement officers . . . reasonably attempt to navigate the intricate channels of Fourth Amendment law”); *accord* Brief for the United States as Amicus Curiae at 30, *Gates*, 462 U.S. 213 (No. 81-430).

¹⁰⁸ Brief for the United States as Amicus Curiae at 58 n.39, *Gates*, 462 U.S. 213 (No. 81-430).

¹⁰⁹ Brief for the United States 53 n.19, *Leon*, 468 U.S. 897 (No. 82-1771).

courts.¹¹⁰ Omitting a subjective component, it added, would be unlikely to alter the outcome of particular cases on many occasions, because seldom would a reasonable officer not have known the action was improper but the particular officer did in fact know this. Nevertheless, even in *Leon*, the United States stopped short of urging a totally unqualified objective approach:

It is possible . . . to imagine cases in which the objective reasonableness of a belief in the legality of particular conduct could be overcome by a showing that, for example, the victim of the search was singled out for harassment. In such strictly limited circumstances, a subjective inquiry might be appropriate. Plainly, no such circumstances are present in the cases now before the Court.¹¹¹

In *Leon*, as earlier in *Gates*, the United States relied upon the Court's 1982 decision in *Harlow v. Fitzgerald*.¹¹² *Harlow* held that the standard for determining whether a defendant sued for civil damages under federal law for actions taken in an official capacity had qualified immunity was purely objective.¹¹³ Thus a plaintiff could no longer defeat a claim of qualified immunity by allegation and proof that the defendant actually knew the action the defendant took violated the constitutional rights of the plaintiff. The plaintiff was required to show that the defendant should have known this.¹¹⁴ The Court explained that "substantial costs attend the litigation of the subjective good faith of government officials," and noted that with regard to "questions of subjective intent, . . . there often is no clear end to the relevant evidence."¹¹⁵

¹¹⁰ *Id.* at 80-81; *accord*, Brief for the United States as Amicus Curiae at 58-59, *Gates*, 462 U.S. 213 (No. 81-430).

¹¹¹ *Id.* at 81 n.47.

¹¹² 457 U.S. 800 (1982). In *Gates*, the United States described the *Harlow* result as reached "for reasons only partly applicable in the present context." Brief for the United States as Amicus Curiae at 58 n.39. *Gates*, 462 U.S. 213 (No. 81-430). By the time *Leon* had been decided, this qualification had been eliminated.

¹¹³ 457 U.S. at 819.

¹¹⁴ *Id.* at 815-818.

¹¹⁵ *Id.* at 816-17. *Harlow's* applicability was at best questionable. *Harlow*

Respondent Leon acknowledged that the proposed objective approach was “doctrinally attractive” but argued it was “not workable or logically coherent.”¹¹⁶ All officers who do not subjectively believe their conduct proper can be deterred. He suggested that courts would recognize this and either create exceptions to any purely objective standard or simply examine actual intent despite formal doctrine.¹¹⁷ “[A] subjective inquiry is inherent to a good faith exception and simply unavoidable,” he argued. This meant the objective proposal “would present impossible problems of proof,”¹¹⁸ including the need to rely on “self-serving, untrustworthy, and generally uncontradicted police testimony.”¹¹⁹ During oral argument in *Leon* and its companion case, the only references to the subjective-objective issue were two summary mentions of it by counsel for *Leon* in his opening and closing remarks.¹²⁰ No questions from the justices inquired about this aspect of the proposed exception.

In its *Leon* decision, the Court acknowledged it had granted review to determine whether a good faith exception should be recognized,¹²¹ and in fact sometimes described the position of law it adopted as a good faith exception.¹²² It did not adopt the ter-

found the litigation costs it emphasized controlling because of several aspects of the type of litigation at issue. Civil litigation of the sort under scrutiny involved extensive discovery by deposition, a fact that the Court stressed. Since the defendants were often governmental officials, litigation costs impaired their continued ability to perform their functions. Perhaps most significantly, the nature of subjective issues tended to prevent resolution of these lawsuits on summary judgment and thus interfered with the Court's efforts to give such defendants considerable leeway in minimizing litigation costs by obtaining summary judgment in nonmeritorious cases.

¹¹⁶ Brief for Respondent at 31, *Leon*, 468 U.S. 897 (No. 82-1771).

¹¹⁷ *Id.* at 34-35.

¹¹⁸ *Id.* at 36.

¹¹⁹ *Id.* at 37.

¹²⁰ Transcript of Oral Argument at 22, 35, *Leon*, 468 U.S. 897 (No. 82-1771)

(noting that the rationale for the exception assumes actual good faith but proponents purport to offer an objective test and that omitting a subjective component will not work “because the premise of petitioner's argument is that the individual is acting in good faith”).

¹²¹ 468 U.S. at 905 (quoting *Petition for Certiorari*).

¹²² *Id.* at 924 n.25 (referring to “the good-faith exception we adopt today”).

minology carefully formulated by the United States. Nevertheless, the Court explicitly asserted that the exception it adopted had no subjective component and required only that the officers have acted in an objectively reasonable manner.¹²³ In a footnote to a textual discussion of "the officer's reliance" on the issuing magistrate, the Court made clear that actual subjective reliance was not necessary or even relevant. The "good faith inquiry," it explained, "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."¹²⁴ Why? Despite *Frank Scott's* reference to the role of motivation in exclusionary penalty analysis, it relied upon Justice White's *Painten* warning that "sending . . . courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."¹²⁵

¹²³ *Id.* at 919 n.20 (requirement of objective reasonableness responds to objections that the exception "will turn on the subjective good faith of individual officers").

¹²⁴ *Id.* at 922 n.23.

¹²⁵ *Id.* at 922 n.23 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)). This aspect of *Leon* caused some consternation. *Bernie v. State*, 524 So. 2d 988, 996 (Fla. 1988) (Kogan, J., concurring in part and dissenting in part) ("It is unclear how an inherently subjective concept such as good faith can be measured objectively."). The answer, of course, is that *Leon's* exception simply is not a "good faith" exception in any meaningful sense of that term. As the California Supreme Court has recognized, the good faith term is simply misleading. *People v. Machupa*, 872 P.2d 114, 115 n.1 (Cal. 1994).

Leon's judgment that the exception could not practically include a subjective element has not been obvious to others. The broad exception recognized by the Fifth Circuit prior to *Leon*, for example, clearly includes a subjective requirement of actual good faith. *United States v. Williams*, 622 F.2d 830, 841 n.4a (5th Cir. 1980). *See also* *Creamer v. Porter*, 754 F.2d 1311, 1317 n.5 (5th Cir. 1985).

The Court may have anticipated addressing the subjective-objective distinction in more detail in deciding *People v. Quintero*, 657 P.2d 948 (Colo. 1983), *cert. granted*, 463 U.S. 1206 (1983), *and cert. dismissed*, 464 U.S. 1014 (1983). *Quintero* involved Colorado's statutory good faith exception, which appeared at the time to include a subjective requirement. This was later proved true. *People v. Leftwich*, 869 P.2d 1260, 1271 (Col. 1994). Review was dismissed in *Quintero*, however, when respondent *Quintero* died. 464 U.S. 1014 (1983).

Despite the indications from *Gates* that officers' subjective states of mind would be significant in "good faith" analysis, *Leon* rejected that possibility with no discussion of the possible conceptual value a subjective component might have. Whatever value the Court may have seen in Leon's argument that the general Fourth Amendment scheme argued in favor of a subjective component, it apparently found the anticipated costs of administering a test with such an element as outweighing that value.

c. Attenuation of Taint

Despite these rejections of subjective components to the two exceptions to the exclusionary requirement, the Court did somewhat develop subjective components of several other aspects of Fourth Amendment exclusionary sanction law.

The vague exception to exclusionary requirements for situations in which the "taint" of the constitutional violation is "attenuated" was developed so as to permit consideration of officers' motivation. The leading cases,¹²⁶ decided between 1975 and 1980, established that whether the link between a constitutional

When *Leon* was expanded in *Illinois v. Krull*, 480 U.S. 340 (1987), to cover warrantless police action authorized by an unconstitutional statute, the Court continued to speak generally of a requirement of "good faith reliance," suggesting a demand of actual and thus subjective reliance. In addition, however, it carefully reaffirmed the Court's determination in *Leon* that the standard of reasonableness—and presumably the application of the exception—"does not turn on the subjective good faith of individual officers." *Id.* at 355.

This confusion in *Krull* between the standard of reasonableness—inherently objective, of course—and a possible underlying requirement of actual—and thus inherently subjective—reliance on the statute or warrant seems to have eluded the Court. Perhaps the seeming confusion was intentional. By posing the question as whether the requirement of reasonableness has a subjective component, the Court was avoiding the much more difficult question of how reliance could be defined without such a subjective component. *Leon*, at least, acknowledged that the issue was the content of the "good-faith inquiry," not of the requirement of reasonableness. 468 U.S. at 922 n.23.

¹²⁶ *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Brown v. Illinois*, 422 U.S. 590 (1975).

violation and actual discovery of evidence is such as to attenuate the taint of the violation depends on a totality of the circumstances analysis. *Brown v. Illinois*,¹²⁷ however, made clear that "the purpose . . . of the official misconduct" is relevant and—along with the "flagrancy" of that misconduct—is of "particular[]" significance.¹²⁸ Thus, it is significant whether the violation rose to the level of "conscious" misconduct¹²⁹ and whether the officers actually—and subjectively—intended to find evidence of the sort actually found and at issue in the litigation.¹³⁰

The attenuation of taint cases reflect none of the misgiving evident in *Leon* regarding the difficulty of inquiry into officers' subjective states of mind. Of course, the totality of the circumstances nature of the analysis means that such difficulty should seldom or never actually frustrate analysis; if the officer's state of mind proves elusive, the totality contains many other circumstances that can be explored and used in resolving the issue. Use of officers' subjective state of mind is *permitted* but not *required* by the Fourth Amendment standard.

¹²⁷ 422 U.S. 590.

¹²⁸ *Id.* at 603-04.

¹²⁹ *Rawlings*, 448 U.S. at 110.

¹³⁰ *Ceccolini*, 435 U.S. at 279-80 ("not the slightest evidence to suggest" that officer made search with intent of locating a witness). *But see* *Taylor v. Alabama*, 457 U.S. 687, 693 (1982) (noting officers took improperly detained suspect to stationhouse "for interrogation in the hope that something would turn up").

One court has questionably held that, despite *Whren*, a suspect's fingerprints can be the excludable "fruit" of an unlawful arrest only if the officers were subjectively motivated by a desire to obtain fingerprints in making the arrest. *United States v. Ortiz-Gonzalbo*, 946 F. Supp. 287, 289-90 (S.D.N.Y. 1996). Perhaps in such situations, the absence of a subjective desire to obtain fingerprints is more accurately characterized as a factor, perhaps a major one, suggesting that the taint of the arrest was attenuated by the time the officers acquired the fingerprints.

d. Independent Source

Even greater weight was given to officers' subjective state of mind in the Court's application of what is often characterized as the "independent source" rule. Whether challenged evidence was tainted by earlier police activity violating the Fourth Amendment—whether it is potentially excludable "fruit of the poisonous tree"—is determined by first inquiring whether there is a causal relationship between that activity and the obtaining of the evidence. If there is not, the evidence has an "independent source" and is clearly untainted by the law enforcement impropriety. In *Murray v. United States*,¹³¹ the Court made clear that the casual relationship necessary to avoid the independent source problem would exist if officers were subjectively motivated to take action supportable on independent grounds by the results of the earlier impropriety.¹³²

Murray opposed a subjective approach. This, however, was only because he favored a broader rule that would require suppression of all evidence observed by officers during an initial and unreasonable search, whether or not there was proof that this influenced the officers in deciding to make the later search that resulted in the actual seizure of that evidence.

At oral argument, the United States accepted the burden of proving that the decision of the officers to proceed legitimately (in this case with a warrant) was independent of anything learned during the earlier and unreasonable search.¹³³ It depreciated a suggestion from one member of the Court that it would seldom fail in this task because the defense could not effectively contest testimony by the officers regarding their intentions.¹³⁴ Murray, in contrast, suggested that if an intent to obtain a warrant rendered admissible evidence observed in an unreasonable entry, officers

¹³¹ 487 U.S. 533 (1988).

¹³² *Id.* at 541-42.

¹³³ Transcript of Oral Argument at 21-22, *Murray*, 487 U.S. 533 (No. 86-995).

¹³⁴ *Id.* at 34.

would falsely testify with impunity that they had this intent.¹³⁵

In any case, the Court in disposing of the case evidenced no misgivings that so applying the "fruits" doctrine would require a subjective inquiry. There is general agreement that, as so applied, the doctrine's inquiry is subjective.¹³⁶

Arguably the nature of the factual causation requirement underlying the independent source doctrine conceptually required that the officers' subjective motivation be given its full logical significance in such cases, and thus *Murray* presented the Court with no real choice. Yet, *Leon's* development of a purely objective "good faith" doctrine does nearly equal violence to the widely-accepted conceptual nature of "good faith," and this did not trouble the Court. Moreover, the Court could well have reasoned in *Murray* as it has elsewhere that if the causal link between the illegal activity and the obtaining of the challenged evidence is only one of motivation, the challenged evidence may be characterized as not obtained by "exploitation" of the earlier illegal activity.¹³⁷

3. Substantive Fourth Amendment Law

The Court's treatment of officers' motivation on substantive Fourth Amendment issues between *Frank Scott* and *Whren* was, like its treatment of this consideration on exclusionary sanction matters, considerably varied. Like the attenuation of taint and independent source discussions, the Court's treatment of officers' motivation in these substantive areas did not focus upon the subjective aspects of the factors.

¹³⁵ *Id.* at 11-12.

¹³⁶ *United States v. Restrepo*, 966 F.2d 964, 972 (5th Cir. 1992); *State v. Lange*, 463 N.W.2d 390, 391-92 (Wis. Ct. App. 1990).

¹³⁷ *New York v. Harris*, 495 U.S. 14, 19 (1990) (confession obtained from suspect removed from premises after unreasonable entry of premises to make arrest of suspect "was not an exploitation of the illegal entry" and hence was admissible). Although *Harris* is not entirely clear, its rule seems to be that the necessary "exploitation" may be lacking even if "but for" factual causation is present.

a. Misrepresentations in Warrant Affidavit

Frank Scott's insight that *Robinson* signaled disapproval of subjective criteria in Fourth Amendment analysis apparently escaped the Court later in 1978,¹³⁸ when in *Franks v. Delaware*¹³⁹ it recognized a Fourth Amendment right on the part of defendants to challenge warrant affidavits as factually inaccurate. *Franks* held that a defendant was entitled to prevail in such an attack only on proof—among other matters—that the affiant had made the false statement with at least “reckless disregard for the truth.”¹⁴⁰ The *Franks* criterion almost certainly includes a subjective component,¹⁴¹ but the discussion suggests this was adopted offhandedly and with no careful decision to override a strong policy against subjective considerations in Fourth Amendment law.¹⁴² The opinion does not acknowledge even the possibility of tension between its analysis and the *Frank Scott-Robinson* discussion written earlier the same term.

¹³⁸ Between *Frank Scott* and *Franks*, the Court decided *Michigan v. Tyler*, 436 U.S. 499 (1978), in which it indicated that officials investigating a fire under essentially administrative authority which does not require a traditional search warrant would be subject to the general warrant requirement if they “find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution . . .” *Id.* at 512. Thus, the need for a traditional search warrant appeared to turn in part at least upon whether the officers were subjectively motivated by a perception that a crime had in fact occurred and that a search was necessary to gather evidence for prosecution. *Tyler's* analysis, however, may not have survived *Michigan v. Clifford*, 464 U.S. 287 (1984), in which a split majority of the Court rejected the earlier decision's approach.

¹³⁹ 438 U.S. 154 (1978).

¹⁴⁰ *Id.* at 155-56.

¹⁴¹ *Franks* failed to flesh out what it meant by a reckless disregard for the truth. *Franks* had assumed that the definitions of recklessness and negligence in Delaware criminal law would apply. Petitioner's Reply Brief at 6-7, *Franks*, 438 U.S. 154 (No. 77-5176). The United States, in contrast, assumed without discussion that recklessness would mean “without regard for . . . accuracy.” Brief for the United States as Amicus Curiae at 29, *Franks*, 438 U.S. 154 (No. 77-5176).

¹⁴² Since the court below had held that no attacks whatsoever were permit-

This is somewhat surprising, given the submissions. The United States, as amicus supporting a rule permitting challenges to warrant affidavits, argued that sound exclusionary rule policy suggested that defendants be able to raise intentional or reckless errors but not negligent ones. It relied primarily on the proposition that the administrative costs of a rule permitting challenge on negligent errors would be excessive. Negligence is a "subjective and slippery" concept, and inquiry into whether officers were negligent or "completely innocent" would involve "elaborate evidentiary hearings" that would seldom provide "satisfactory results."¹⁴³ Franks argued that defendants should be permitted to rely on even negligent misstatements. The line between innocence and negligence is clearer than that between negligence and recklessness, he contended, and both recklessness and negligence "involve a degree of culpability which is both preventable and deterrable."¹⁴⁴

ted on the face of warrant affidavits, *Franks* did not present the Court with a focused issue regarding the subjective or objective nature of the standard applicable if any such attacks were permissible. The Court was obviously concerned that any opportunity to mount such attacks would be abused by defendants at great inconvenience to the nation's trial courts, and the discussion was aimed at setting out standards that would minimize the risk of such abuse. Almost certainly the Court sought to impose a high—and some would argue impossible—burden on defendants seeking to attack an affidavit, and did this in part by incorporating what it viewed as a difficult-to-meet subjective state of mind element.

¹⁴³ Brief for the United States as Amicus Curiae at 29, *Franks*, 438 U.S. 154 (No. 77-5176).

¹⁴⁴ Petitioner's Reply Brief at 6-7, *Franks*, 438 U.S. 154 (No. 77-5176).

b. Scope of Permissible Search Under Warrant

In 1987, the Court again showed little concern regarding subjective considerations when, in *Maryland v. Garrison*,¹⁴⁵ it held that a search of premises beyond the scope of a search warrant was nevertheless sometimes reasonable in Fourth Amendment terms. The key is whether the officers reasonably believed at the time that the place was within the terms of the warrant. Although the Court's discussion stressed the need for objective reasonableness,¹⁴⁶ it is clear that the first and basic demand was a showing that the officers in actual subjective fact believed the searched premises to be within the terms of the warrant.¹⁴⁷ The situation, it added, was analogous to that in *Hill v. California*,¹⁴⁸ which held that officers with probable cause to arrest one Hill and who, both reasonably and with a good faith subjectively believed that Miller was Hill, made a reasonable arrest of Miller.

Nothing in *Garrison* suggests discomfort with an initial subjective requirement of actual belief. In fact, the Court's discussion indicates that the Court most likely gave no consideration to the possibility that it should apply a purely objective standard asking whether reasonable officers could have believed the premises searched were within the terms of the warrant.¹⁴⁹

¹⁴⁵ 480 U.S. 79 (1987).

¹⁴⁶ *Id.* at 87-88.

¹⁴⁷ *Id.* at 88 (referring to officer's "failure to realize the overbreadth of the warrant" and posing issue as whether this "was objectively understandable and reasonable"). In stating the case before it, the Court had explicitly stated that at the time of the search in issue, the officer "reasonably believed" that the area being searched contained only one apartment—that described in the warrant—and therefore were in fact unaware that they were in another apartment. *Id.* at 80.

¹⁴⁸ 401 U.S. 797 (1971). *See supra* text accompanying notes 54-55

¹⁴⁹ In one footnote discussion of a particular aspect of the facts, however, the Court did explain its results in terms of what the police "could reasonably have believed." 480 U.S. at 88 n.12 (stating when McWebb unlocked door to third floor of building, "[t]he police could reasonably have believed" he was admitting them to a floor containing only one undivided apartment). This suggests no contemplation that a purely

c. Pretext Administrative and Inventory Searches

In several other 1987 cases, the Court, in the course of upholding searches made on less than probable cause, used language suggesting that in situations other than those before the Court, officers' subjective states of mind might affect the reasonableness of such searches.

Discussing an administrative search in *New York v. Burger*,¹⁵⁰ the Court commented that "[i]t is undisputed" that the inspection at issue "was made solely pursuant to the administrative scheme," and thus there was "no reason to believe that the . . . inspection was actually a 'pretext' for obtaining evidence of . . . violation of the penal laws."¹⁵¹ In the course of upholding an inventory search of a seized automobile in *Colorado v. Bertine*,¹⁵² it noted "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation."¹⁵³

objective approach could conceivably be adequate.

¹⁵⁰ 482 U.S. 691 (1987).

¹⁵¹ *Id.* at 716 n.27.

¹⁵² 479 U.S. 367 (1987).

¹⁵³ *Id.* at 372.

d. Protective Sweeps

In the 1989 term the Court in *Maryland v. Buie*¹⁵⁴ addressed the reasonableness of a protective sweep of premises by officers making an arrest in residential premises. Such a sweep, it held, requires “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.”¹⁵⁵ This suggests an objective standard. On remand, however, the Maryland court split on whether the standard was purely objective. A plurality, however, reasoned that it was and thus in complying with the Supreme Court's directive to reconsider the case it was not required to demand that the prosecution prove that the officers involved actually did believe the premises harbored a dangerous individual.¹⁵⁶

In fact, the issue had been raised before the Supreme Court. *Buie* had argued that if probable cause was not demanded for a sweep, that action did require that officers have a reasonable and particularized belief that dangerous persons were in the premises.¹⁵⁷ He puzzlingly appeared to misunderstand the implications of his position, however, because he then contended that whether or not the officers actually held a fear that such persons were present was merely “useful” in assessing whether reasonable suspicion existed.¹⁵⁸ From the fact that the officers involved had no such fear, he reasoned, the Court could infer that the circumstances “would not evoke a self-protective motivation in a reasonable mind.”¹⁵⁹ He failed to distinguish between useful

¹⁵⁴ 494 U.S. 325 (1990).

¹⁵⁵ *Id.* at 334.

¹⁵⁶ *Buie v. State*, 580 A.2d 167, 170 (Md. 1990), *cert. denied*, 498 U.S. 1106 (1991).

¹⁵⁷ Brief for Respondent at 13, *Buie v. Maryland*, 498 U.S. 1106 (1991) (No. 90-6725).

¹⁵⁸ *Id.* at 21.

¹⁵⁹ *Id.*

but not essential evidence and an explicit requirement that a subjective belief be proved.

Maryland responded that reasonable suspicion is based on a purely objective standard. Thus, a showing that the officers involved did not have a subjective fear of danger "does not negate the objective basis for determining that the officers were, indeed, at risk."¹⁶⁰

e. "Plain View" Seizures

Stronger and broader language disfavoring subjective considerations was used in 1990, when in *Horton v. California*¹⁶¹ the Court rejected an earlier indication in its case law¹⁶² that a warrantless "plain view" seizure of an item during the execution of a search warrant would be reasonable only if the officers' discovery of the item was "inadvertent." Precisely when discovery of an item would be inadvertent was not clear, as the potential requirement had not been developed. Since the critical question was whether the officer had foreseen the certainty or likelihood of discovery of the item, the inquiry would clearly be in part a subjective one.

Refusing to adopt the proffered subjective requirement, *Horton*

¹⁶⁰ Reply Brief for Petitioner at 6-7, *Buie*, 498 U.S. 1106 (No. 90-6725). The United States agreed that a sweep required that officers "have a reasonable belief that their security is at risk," Brief for the United States as Amicus Curiae Supporting Petition at 13, *Buie*, 498 U.S. 1106 (No. 90-6725). Without acknowledging the inconsistency, it later argued that the officers' lack of any subjective apprehension does not matter, because the standard is objective. *Id.* at 22-23 n.18. At oral argument, counsel for the United States began by asserting, "a protective sweep is lawful when the police have a reasonable belief that their security is in jeopardy." Transcript of Oral Argument at 20, *Buie*, 498 U.S. 1106 (No. 90-6725). But later, when asked about what the officers in the cases before the Court thought at a particular moment, he responded in more careful terms: "I think . . . what they thought, or in any event what the objective factors would have justified them in thinking." *Id.* at 24.

¹⁶¹ 496 U.S. 128 (1990).

¹⁶² *Coolidge v. New Hampshire*, 403 U.S. 443, 469-70 (1971) (opinion of Stewart, J., announcing the judgment).

reasoned primarily that the limitation on seizures is not necessary to assure that judicially-authorized searches are adequately limited.¹⁶³ It also, however, paused to depreciate—without development—the proposed requirement because of its subjective nature: “[E]venhanded law enforcement is best achieved by objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”¹⁶⁴

Respondent California did argue that the inadvertence requirement was inconsistent with *Frank Scott* and the objective approach reflected by that decision.¹⁶⁵ Petitioner Horton assumed that the inadvertence requirement was subjective in nature,¹⁶⁶ but made no effort to defend it against attacks based on that subjectivity.

¹⁶³ 496 U.S. at 139-40.

¹⁶⁴ *Id.* at 138. Since the Fourth Amendment explicitly provides that “no Warrants shall issue, but . . . particularly describing . . . the . . . things to be seized,” it is arguable that by its terms the provision mandates a subjective rule—a warrant must describe those items the officer executing the warrant intends to seize. Whatever its appeal elsewhere, literalism in reading the Fourth Amendment seems to have little appeal where the framers used language suggesting a subjective approach.

Professor Colb has treated *Horton* as resting on the difficulty of determining officers' subjective intentions. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1491 n.87 (1996). This seems inaccurate, and perhaps *Horton* is most significant because of the Court's reliance upon the conceptual inappropriateness of a subjective standard rather than the practical difficulty of implementing that approach.

¹⁶⁵ Brief for Respondent, at 20. The United States, supporting the respondent, assumed that an inadvertence requirement would ask whether the offices had probable cause in an objective sense. It did acknowledge that the Court could adopt a subjective approach, but it argued against that on the ground, among others, that “it would likely give rise to litigation over the bona fides of the officer's testimony as to his beliefs, as well as challenges to the reasonableness of those beliefs.” Brief for the United States as Amicus Curiae Supporting Respondent at 22 n.8.

¹⁶⁶ *E.g.*, Petitioner's Reply Brief, at 1 (“Where police officers enter a residence with the intent to search for and seize items not described in the warrant, the amendment has been violated.”)

f. Consent Issues

The substantive Fourth Amendment rule that a search pursuant to effective consent is reasonable was considered in 1990 and 1991 with both discussion and results that reflected the Court's increasing disapproval of subjective considerations.

In *Illinois v. Rodriguez*,¹⁶⁷ the Court adopted the view that consent from a person in fact lacking authority to consent would sometimes be effective. Its articulation of the standard suggested a purely objective criterion: reliance upon consent renders a search reasonable if "the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief" that the person had sufficient authority over the premises to give effective consent.¹⁶⁸ Whether *Rodriguez* reflected a formal determination that only a reasonable person standard must be met—and that the officer need not have actually and subjectively concluded that the person had authority—was not clear. Arguably, the critical language assumed that a subjective conclusion by the officer had been satisfactorily established or was not contested, and was therefore intended only to make clear that in addition the prosecution was required to establish the objective reasonableness of the officers' conclusion.¹⁶⁹

The next year, in *Florida v. Jimeno*,¹⁷⁰ the Court turned to the scope of consent and made clear the objective nature of the standard adopted. "The touchstone of the Fourth Amendment is

¹⁶⁷ 497 U.S. 177 (1990).

¹⁶⁸ *Id.* at 188.

¹⁶⁹ In the first paragraph of the opinion, Justice Scalia's statement of the issue presented it as whether entry was reasonable if based on consent from a person "whom the police, at the time of the entry, reasonably believe to possess common authority over the premises." *Id.* at 179. Thus the assumption of the discussion was apparently that the proposed criterion would require both that the police have had a belief and that this belief have been objectively reasonable.

¹⁷⁰ 500 U.S. 248 (1991).

reasonableness,” the Court observed.¹⁷¹ Then—assuming that the matter had been settled by *Rodriguez*—it put the issue in such cases as what a “reasonable person [would] have understood by the exchange between the officer and the [consenting person].”¹⁷² Under *Jimeno*, determining the scope of consent apparently requires no inquiry into the actual understanding of the officer but rather turns on what objectively a reasonable person would understand from the words in the context. This conclusion, unnecessary to the resolution of the case, was supported only by the inaccurate assumption that *Rodriguez* somehow established that all or most consent matters turned only on objective criteria.

g. Scope of a Frisk

Given the increasing focus on objective criteria, the Court surprisingly appeared to rely on a purely subjective approach in defining the scope of a permissible weapons frisk.

In *Minnesota v. Dickerson*,¹⁷³ the question was whether an officer, assumed to have had the right to conduct a weapons search of Dickerson, overstepped his authority when he manipulated a small, hard object he felt in Dickerson's pocket after concluding that the object was not a weapon. Under *Terry v. Ohio*,¹⁷⁴ the Court explained, the search must be “related to” the justification—“the protection of the police officer and others nearby”—and the officer's search of Dickerson exceeded this because it constituted a “continued exploration of [Dickerson's] pocket after having concluded that it contained no weapon.”¹⁷⁵ The search became improper, in other words, because the officer subjectively concluded that the object being explored was not a weapon and thus was subjectively motivated by something other than the justification offered for the search.

The choice of terminology in *Dickerson* was almost certainly not

¹⁷¹ *Id.* at 250 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

¹⁷² *Id.* at 250-51.

¹⁷³ 508 U.S. 366 (1993).

¹⁷⁴ 392 U.S. 1 (1968).

¹⁷⁵ *Dickerson*, 508 U.S. at 378.

accidental. Minnesota argued explicitly that the state court had erred in determining the scope of the search permissible under a subjective standard.¹⁷⁶ Dickerson, in contrast, assumed that the state court had properly used a subjective standard¹⁷⁷ but did not defend that standard on its merits.

Yet amazingly the Court offered no defense for, or explanation

¹⁷⁶ Petitioner's Reply Brief on the Merits at 6, *Dickerson*, 508 U.S. 366 (1993) (No. 91-2019), 1993 WL 286634. In oral argument, counsel for the petitioner emphasized that the State believed the state court erroneously "focus[ed] solely on what was in the mind of the officer." Transcript of Oral Argument at 10, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1993 WL 761230.

The United States did not address or perhaps even recognize the issue. Its position was primarily that the state appellate courts erred in dividing the officer's conduct into two parts divided by his subjective realization that the object was not a weapon. Brief for United States as Amicus Curiae Supporting Petitioner at 11, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1992 WL 12012063. ("Officer Rose . . . did not make an initial determination that the object was not a weapon and then a separate decision to keep searching."). It did argue incidentally that the state courts erred in "relying on the officer's testimony that he stopped respondent to search for both weapons and drugs" because this was inconsistent with *Horton's* objective approach. *Id.* at 11 n.3. But it did not explicitly challenge the state court's use of a subjective standard in determining the scope of the permissible search.

At oral argument, counsel for the United States argued that the state court erred in stating that an officer is not entitled to go further if "the officer feels an object that cannot possibly be a weapon." Transcript of Oral Argument at 22, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1993 WL 761230. When asked how he would amend the state court's language, he responded that he would say that an officer cannot go further "if the officer feels an object that he knows is not a weapon." *Id.* at 23. He was then asked if this was not a subjective test "that the law eschews." He answered affirmatively, and then gave no indication that the United States regarded this as inappropriate. *Id.*

Later, counsel urged that the Court "adopt an objective standard that recognizes as presumptively reasonable momentary handlings of unrecognized objects, so that courts in innumerable cases aren't confronted with the difficulty of determining [whether] the police officer [did] determine that [the object] was not a weapon before he finished manipulating the object." *Id.* at 27. He then added, "that presumption could be overcome by evidence that, in fact, the police officer had satisfied him or herself there was no weapon there, but continued searching." *Id.* at 28.

¹⁷⁷ Respondent's Brief on the Merits at 20, 34, *Dickerson*, 508 U.S. 366 (No. 91-2019), 1992 WL 511981.

of, its reliance on an apparently subjective component for determining the reasonableness of the scope of weapons search. Certainly review was granted primarily to disclaim the holding below that further action by an officer could not be supported by what the officer had learned by "plain feel" during a frisk. But the parties did not focus on this to the exclusion of the lower court's reliance on a subjective analysis, and that issue simply could not have escaped the Court's attention.

F. Explicit Rejection of Future Intrusiveness: Hodari D.

The case for emphasizing officers' states of mind in determining Fourth Amendment reasonableness is stronger if the Fourth Amendment is properly used to identify and discourage improper law enforcement activity because of what is likely to follow rather than what has already occurred. Much of the Court's approach during the period discussed in the last section appeared to reflect, in part, the Court's developing perception that Fourth Amendment analysis should focus on demonstrated past intrusions on protected interests rather than the risk of future ones.

This attitude was solidified in *California v. Hodari D.*,¹⁷⁸ addressing when law enforcement conduct constitutes a seizure of a person. Technically, *Hodari D.* posed the question of whether a seizure occurs when an officer makes a show of authority and the suspect does not submit but flees. In practical terms, as one member of the Court recognized during oral argument, the real question is whether the Fourth Amendment should apply to attempted seizures.¹⁷⁹ Although it is a question of Fourth Amendment coverage rather than reasonableness, its resolution by the Court reaffirmed the trend towards objective criterion clearly reflected in the reasonableness decisions.

The Court's holding in *Hodari D.*, that the situation at issue did not give rise to a seizure, was based largely on the majority's

¹⁷⁸ 499 U.S. 621 (1991).

¹⁷⁹ Transcript of Oral Argument at 7, *Hodari D.*, 499 U.S. 621 (No. 89-1632), 1991 WL 636280.

conclusion that law enforcement shows of authority will be sufficiently discouraged if the Fourth Amendment is applied only to those that are successful.¹⁸⁰ In effect, it solidified the Court's developing perception that generally Fourth Amendment focus is properly on the actual impact of law enforcement activity rather than the risk of future and more intrusive impacts that particular activity poses.¹⁸¹

Had *Hodari D.* gone the other way, the Fourth Amendment concern with the future impact of at least some law enforcement activity would have made a strong case for more emphasis on officers' states of mind.

¹⁸⁰ 499 U.S. at 627.

¹⁸¹ No contention was made in *Hodari D.* that the criterion for determining whether police action was a seizure should include a subjective component. Respondent argued essentially that attempted detentions should be seizures because, as a general matter, they were made with a state of mind that rendered them intrusive. *Cf.*, Brief for Petitioner at 54-59, *Hodari D.*, 499 U.S. 621 (No. 89-1632), 1990 WL 508078 (challenging Respondent's implied contention that officers who make shows of authority frequently intend to impermissibly search subjects).

Petitioner California did argue that if a seizure was found, the officer's state of mind was relevant to whether discarded contraband was the excludable fruit of that seizure. In the absence of proof that the officer intended to search rather than just detain and question, it suggested, the abandoned contraband was not obtained by exploiting the unreasonable search and hence not fruit of the poisonous tree. *Id.* at 49-53.

G. *Reaffirmation of the Objective Approach:
Whren and Robinette*

The Court addressed more broadly and expansively the area of subjective awareness and Fourth Amendment standards in *Whren v. United States*,¹⁸² although the case appeared to present a relatively narrow aspect of the long-standing “pretext” issue. Whren had been stopped by officers with grounds for a traffic stop—probable cause to believe that the driver had violated several traffic laws¹⁸³—but unquestionably motivated by their suspicions that the occupants of the vehicle had been engaged in a drug transaction. Attempting to avoid the baggage of an argument tied to subjective motivation, Whren urged that the officers' actions should be evaluated under a Fourth Amendment standard prohibiting as unreasonable a traffic stop that would not have been made by a reasonable officer motivated only by a desire to enforce the traffic laws.

The United States' position was that any pretext doctrine is inherently subjective and thus inappropriate under the Fourth Amendment. It briefly defended on its merits a purely objective approach. In part, it suggested that reliance upon officers' states of mind would inappropriately confer different rights on persons in essentially the same situation, and cause prosecutions to come to “incongruous[ly different] results.”¹⁸⁴ But it also argued that the nature of Fourth Amendment matters demanded an objective approach: “Because the ultimate Fourth Amendment question is whether the law enforcement interests at stake justify the particular intrusion on privacy interests, the subjective good faith or bad faith of the particular searching officer is not the

¹⁸² 517 U.S. 806 (1996).

¹⁸³ Whether probable cause is a Fourth Amendment requirement is not clear, and in fact the definition of a traffic stop has not been addressed in the Court's case law.

¹⁸⁴ Brief for the United States at 14-15, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 115816.

proper test."¹⁸⁵

Whren himself made no effort to defend a subjective approach and in fact voiced approval of an objective criterion.¹⁸⁶

Only the American Civil Liberties Union, participating as amicus curiae, lent any support to a subjective aspect of Fourth Amendment law.¹⁸⁷ It condemned "pretext" law enforcement conduct as inherently inconsistent with constitutional values, and without using the term defined pretext action in subjective terms.¹⁸⁸ It then suggested an analysis that used—but did not rely exclusively on—what a reasonable officer would have done under the circumstances:

If a defendant succeeds in demonstrating that a reasonable officer would have acted differently under the same circumstances . . . the burden should shift to the police to establish a valid, non-pretextual reason for the search. If the police meet this burden, the evidence should be admissible. If they do not, it should be excluded.¹⁸⁹

Perhaps quite carefully, it avoided explicitly stating that the prosecution's effort to show "a valid, non-pretextual reason" for the police activity required it to show that the officer was subjectively motivated by that "reason."

Implicitly recognizing that its approach was ultimately subjective in nature, the Union included in its brief a short section arguing that courts can and should consider "clear evidence" that a police officer acted "with subjective bad faith to

¹⁸⁵ *Id.* at 14.

¹⁸⁶ Brief for the Petitioners at 31, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758 ("This Court's reluctance to attempt to pin down the subjective motivations of the police who actually made an intrusion makes sense, and the standard urged here does not require any finding of subjective motivation.").

¹⁸⁷ Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners at 6-12, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75760.

¹⁸⁸ *Id.* at 13 ("The issue of pretext only arises when there is a facially plausible reason to conduct the search but there is also reason to believe that the police are using the search to circumvent important Fourth Amendment safeguards.").

¹⁸⁹ *Id.* at 16-17.

circumvent the Fourth Amendment."¹⁹⁰ It then offered a defense of this approach:

The whole point of Fourth Amendment doctrine has been to send messages to officers about their conduct in order to protect constitutional values. It would be inconsistent to ignore the real reason officers act and, instead, ask only whether there might be an acceptable reason that could have justified the officers' behavior. The latter approach encourages pretextual claims; it does not encourage compliance with the requirements of the Fourth Amendment.

In suggesting that an inquiry into motive is appropriate, we do not mean to say that the mere thought that someone might have drugs is enough to invalidate actions taken to enforce traffic laws. The relevant question is whether the operative reason for the stop was invalid. It is the defendants' burden to make that showing and the burden is a heavy one. But, if that showing can be made, it would be an odd notion of law that asked the court to ignore it.¹⁹¹

Deciding *Whren*, Justice Scalia writing for a unanimous Court brushed aside Whren's effort to paint his approach as objective. Whren's proposed approach, the Court concluded, was "driven by subjective considerations."¹⁹² It then rejected it on that basis.

The Court, Justice Scalia asserted, had "repeatedly held and asserted" that a law enforcement officer's subjective motive does not invalidate "objectively justifiable behavior under the Fourth Amendment."¹⁹³ After discussing *Robinson* and the other Fourth Amendment cases and reiterating the holding of *Robinson* as described in *Frank Scott*, he concluded that the case law forecloses "any arguments that the constitutional reasonableness of traffic stops depend on the actual motivations of the individual officers involved." Continuing to broaden his coverage, he added, "[S]ubjective intentions play no role in ordinary, probable-cause

¹⁹⁰ *Id.* at 17-20.

¹⁹¹ *Id.* at 18.

¹⁹² 517 U.S. at 814.

¹⁹³ *Id.* at 812.

Fourth Amendment analysis."¹⁹⁴

Turning obliquely to possible rationales for this position, *Whren* acknowledged that *if* the Fourth Amendment's abhorrence of criteria utilizing the subjective intent of the officers was based on the "evidentiary difficulty of establishing subjective intent," *Whren's* proffer of a standard put in objective terms "might make sense." But the "principal basis" for the Court's cases is not this evidentiary difficulty.

Rather, Justice Scalia continued, the principal basis for the objective standard "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."¹⁹⁵ *Why* does Fourth Amendment reasonableness disregard the actors' subjective intent? The Court neither addressed the matter nor evidenced any concern regarding the rationale.

Whren was summarily applied the next term in *Ohio v. Robinette*.¹⁹⁶ Only one of the numerous briefs was filed after *Whren* was decided. Although it is therefore understandable why the applicability of *Whren* was not addressed until oral argument, the manner in which the *Robinette* issues were put and debated illustrated the lack of coherence in analyzing these matters.

In *Robinette*, the officer clocked Robinette driving at 69 miles per hour in a zone with a posted speed limit of 45 miles per hour. He stopped Robinette, obtained his driver's license, and ran a computer check which was negative. He then asked Robinette to step out of the car. At this point, the officer went to his own vehicle and activated his mounted video camera. He returned to Robinette, issued a verbal warning, and returned his license. He next asked whether Robinette was carrying contraband and when Robinette replied he was not, solicited Robinette's consent to search. The search revealed drugs, which the Ohio Supreme Court held should have been suppressed.

¹⁹⁴ *Id.* at 813.

¹⁹⁵ *Id.* at 814.

¹⁹⁶ 519 U.S. 33 (1996).

Certiorari was sought on the representation that the Ohio Supreme Court had held that Robinette's continued presence for the discussion was a seizure rather than a consensual encounter simply because the officer had not admonished him, "[A]t this time you legally are free to go' or by words of similar import." This holding, the Petitioner represented, was articulated in the second of two syllabi issued by the state court with the opinion.¹⁹⁷ Petitioner argued that review should be granted to reaffirm that "when determining whether an encounter is consensual or coerced, the Fourth Amendment requires a review of all the circumstances, not an isolated fact."¹⁹⁸

Robinette opposed review in part on the ground that the state court had relied primarily upon a determination that the detention "exceeded the permissible bounds of an investigative detention," not on an application of "the consensual encounter doctrine."¹⁹⁹ He noted the state tribunal's opinion had stated that the officer's action, beginning with when he ordered Robinette out of the vehicle, was taken "for no reason related to the speeding violation, and based on no articulable facts."²⁰⁰ He did not until his brief on the merits refer specifically to the state court's first syllabus, which was explicitly phrased in terms of subjective motivation:

1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.²⁰¹

¹⁹⁷ Petition for Writ of Certiorari at 3, *Robinette*, 519 U.S. 33 (No. 95-891), 1995 WL 17013677.

¹⁹⁸ *Id.* at 7.

¹⁹⁹ Respondent's Brief in Opposition at 3, *Robinette*, 519 U.S. 33 (No. 95-891), 1996 WL 33413299.

²⁰⁰ *Id.* at 5.

²⁰¹ *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995).

In his merits brief, Robinette referred to this syllabus as stating the state court's "holding," and characterized the second syllabus and its reference to an admonition as imposing only "an advisory requirement upon law enforcement personnel."²⁰² Thus he relied upon the lower court's subjective analysis to argue that the issue posed by Petitioner was in fact not presented.

In the briefing, the attention of the parties and amici focused on the language referring to an admonition and not on any possibility that the state tribunal had improperly relied on the officer's subjective state of mind. At oral argument, however, counsel for Petitioner was pressed on whether syllabus one was an alternative holding on which the state court decision could rest. Petitioner argued confusingly that the two syllabi were interrelated and neither by itself could support the result.²⁰³ She referred once to *Whren*, but several times stated inexplicably but clearly that she regarded syllabus one as a correct statement of the law.

Counsel for the United States acknowledged that syllabus one was "flawed" because it relied on the officer's subjective intention.²⁰⁴ He agreed that the officer in fact ordered Robinette out of the car for the subjective purpose of questioning and video taping him regarding contraband rather than speeding. Nevertheless, he argued, what controlled was that a reasonable officer could under *Pennsylvania v. Mimms*²⁰⁵ have removed him from the car for reasons of safety.²⁰⁶ This was because "the business of [the] traffic stop was not complete," and Fourth Amendment law permits removal of the driver during a traffic stop that did not exceed what was in some objective sense the duration necessary to complete the traffic offense related "business." Later, he agreed

²⁰² Brief for Respondent at 5, *Robinette*, 519 U.S. 33 (No. 95-891), 1996 WL 312162. .

²⁰³ Transcript of Oral Argument at 15, *Robinette*, 519 U.S. 33 (No. 95-891), 1996 WL 587659.

²⁰⁴ *Id.* at 22.

²⁰⁵ 434 U.S. 106 (1977).

²⁰⁶ Transcript of Oral Argument, *supra* note 179, at 23.

that the officer's subjective motivation is "relevant . . . to . . . what a reasonable officer would do," but maintained it is not "dispositive."²⁰⁷

Counsel for respondent Robinette asserted explicitly that the state court's decision turned upon its conclusion that the officer had determined "in his own mind" to only give a warning.²⁰⁸ When pressed, he begrudgingly agreed that the officer's subjective motivation "is not dispositive of the broader issue."²⁰⁹ Counsel defended syllabus one as complying with Fourth Amendment law.²¹⁰ Although this was far from clear, he apparently regarded the state court's reference to the officer's motivation as reflecting only that the state court considered this as one factor in determining that the detention exceeded what under an ultimately objective standard was reasonable in light of its justification.

Before rejecting the Ohio court's requirement of an admonition, the Supreme Court addressed the contention that the state court's result rested independently on the ground articulated in syllabus one.²¹¹ Requoting the Court's use of the *Frank Scott* language in *Whren*, the Court summarily held that the state court erred insofar as it held that the officer's "subjective thoughts" made the continued detention of Robinette "illegal under the Fourth Amendment."²¹²

Functionally, then, *Robinette* addressed the significance of the officer's state of mind in situations in which as a general rule the fact that the officer has made a reasonable traffic stop permits the officer to remove the driver from the vehicle. Although the rationale for the rule is officer safety, a particular exercise of the power conferred by the rule is not rendered unreasonable by

²⁰⁷ *Id.* at 26.

²⁰⁸ *Id.* at 34.

²⁰⁹ *Id.* at 35.

²¹⁰ *Id.* at 43.

²¹¹ *Robinette*, 519 U.S. at 49 (Stevens, J., dissenting) (arguing that the Ohio court's decision could and should be read as dealing not with motivation but rather justification for the continued detention).

²¹² *Id.* . at 38.

proof that the officer was subjectively motivated not by safety considerations but by a desire to facilitate investigation of suspicion of drug activity.

H. The Short-Lived Qualification of Whren: Law Enforcement Conduct Permissible on Less Than Probable Cause

The separation of Fourth Amendment reasonableness and the motivation of officers in *Whren* is apparently subject to one exception.²¹³ Acknowledging "pretext" language in earlier decisions involving inventory searches²¹⁴ and "administrative" searches of licensed premises,²¹⁵ the Court reaffirmed that officers' motivation is relevant to the reasonableness of these law enforcement actions. "[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation," it stated unequivocally, "is not accorded to searches that are *not* made for that purpose."²¹⁶ Summarizing its rejection of attacks based on officers' motivation, Justice Scalia continued: "Subjective intentions play no role in ordinary, *probable-cause* Fourth Amendment analysis."²¹⁷

²¹³ Whether *Whren* purported to insulate objective reasonable law enforcement actions from challenge on grounds of racial motivation is unclear. See *Holland v. City of Portland*, 102 F.3d 6, 10-11 (1st Cir. 1996) (finding *Whren* "strongly implies" that arrests are still subject to equal protection racial motivation challenges, but "does not say what facts would be needed to support such a challenge").

²¹⁴ *Whren*, 517 U.S. at 811 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987)).

²¹⁵ *Id.* at 811 (quoting *New York v. Burger*, 482 U.S. 691, 716-17 (1987)).

²¹⁶ *Id.* at 811-12.

²¹⁷ *Id.* at 813 (emphasis added). This may explain the Court's insistence in *Whren* that as a general matter, traffic stops are reasonable "where the police have probable cause to believe that a traffic violation has occurred." *Id.* at 810. Given the nature and brief duration of stops for issuance of citations, a reasonable argument can be made that Fourth Amendment reasonableness permits such stops on reasonable suspicion. If the Court believed that traffic stops should not be subject to challenge on motive grounds but it was unprepared to divorce motivation from police actions permitted

Conversely, the Court's language obviously suggests, "subjective intentions" are—or at least may be—relevant to Fourth Amendment analysis of law enforcement action requiring less than probable cause. Five years after *Whren*, however, the Court simply ignored the *Whren* opinion's suggestion that its rationale was limited to situations in which Fourth Amendment analysis required probable cause.

This occurred when the Court turned to so-called "probation searches" in *United States v. Knights*.²¹⁸ The Ninth Circuit had held below that California properly applied reduced Fourth Amendment standards to certain searches of convicted defendants on probation. That special treatment, it continued, could apply only to searches identified by the subjective intention with which they were made. Since the search in *Knights* was made for "investigatory" rather than "probationary" purposes, it could not be upheld under these relaxed standards.²¹⁹

In its presentation to the Court, the Government argued that the court of appeals' distinction between types of searches was "flawed" because it ignored that "the proper focus in this area of Fourth Amendment analysis is on the objective justification for the officer's conduct, not on its subjective purpose."²²⁰ *Knights* asserted that the Court had previously categorized probation searches as special needs searches, and—without defending the wisdom of that position—asserted that because the special needs doctrine applied, "an inquiry into purpose is essential."²²¹ The Government did not directly challenge *Knights*' reliance on a special needs doctrine implicating subjective motivation, but simply and without elaboration urged the Court to analyze the search at issue under general Fourth Amendment doctrine and

on less than probable cause, it was required to treat traffic stops as based on probable cause.

²¹⁸ 534 U.S. 112 (2001).

²¹⁹ 219 F.3d 1138 (9th Cir. 2000).

²²⁰ Brief for the United States at 25, *Knights*, 534 U.S. 112 (No. 00-1260), 2001 WL 799254.

²²¹ Brief for Respondent at 3, *Knights*, 534 U.S. 112 (No. 00-1260), 2001 WL 1758051 (quoting *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

to uphold it as based on effective consent.

The Court—without explanation—declined to analyze the search as one within a special needs category defined by the purpose for which the searches are made. Instead, it applied “ordinary Fourth Amendment analysis”²²² but did not accept the Government's suggestion that under this analysis consent alone rendered the search reasonable. The Court's analysis instead considered the totality of the circumstances,²²³ and led the Court to the conclusion that the Fourth Amendment permits the search of a probationer's house on reasonable suspicion.²²⁴ This was present in *Knights*. Since it used ordinary Fourth Amendment analysis, it added, it had no need to examine “official purpose” or—apparently—the actual motivation of the officers who made this specific search.²²⁵

Justice Souter concurred, observing that he would “reserve the question” of whether the bar to consideration of subjective intention in *Whren* extends to searches based only on reasonable suspicion.²²⁶

Knights did note that challenges to searches based on the actual motivation of the individual officers were apparently still available in “some special needs and administrative search [situations].”²²⁷ It apparently held, however, that despite *Whren*, subjective motivation is irrelevant to searches permitted on less than probable cause under general Fourth Amendment analysis. The majority provided no explanation for that position, but simply assumed summarily that this was what *Whren*—on good and sufficient reason—meant.

²²² *Knights*, 534 U.S. at 122.

²²³ *Id.* at 118 (quoting *Robinette*, 519 U.S. at 319).

²²⁴ *Id.* at 121.

²²⁵ *Id.* at 121.

²²⁶ *Id.* at 123 (Souter, J., concurring).

²²⁷ *Id.* at 122.

I. Keith Scott: *Exclusion of Tainted Evidence on Matters Other Than Guilt*

In the Court's 1978 discussion in *Frank Scott*, the Court suggested that officers' states of mind would appropriately be incorporated into the criteria to be used in determining whether a constitutional violation warranted an exclusionary sanction. *Leon*, of course, indicated that the Court was hardly committed to any such approach. This hostility towards the suggestion in *Frank Scott* resurfaced in 1998 when, in *Pennsylvania Board of Probation & Parole v. Keith Scott*,²²⁸ the Court again rejected a motive-based criterion for determining whether the Fourth Amendment exclusionary requirement barred use of tainted evidence for purposes other than proving the guilt of an accused criminal defendant.

At issue in *Keith Scott* was the application of the Fourth Amendment exclusionary rule to proceedings for revocation of a convicted defendant's parole. The state court had recognized that this turned upon whether the incremental deterrence of law enforcement conduct that would be accomplished by application of the sanction here would be worth the costs paid, primarily those costs occasioned by the loss of reliable evidence in administering the parole system. As a general rule, the state tribunal reasoned, the incremental deterrence achieved by this expansion of the sanction would be minimal. Along with a number of other courts, however, it reasoned that officers aware of a suspect's status as a parolee would be significantly deterred from unreasonable conduct if the results of such conduct could not be used in parole revocation proceedings. Thus, it held that evidence obtained in violation of the Fourth Amendment was inadmissible in a parole revocation proceeding if, but only if, the evidence shows that the officer who violated the Fourth Amendment knew, or had reason to know, that the suspect was at the time a parolee.²²⁹

²²⁸ 524 U.S. 357 (1998).

²²⁹ *Scott v. Penn. Bd. of Probation & Parole*, 698 A.2d 32, 37-39 (Pa. 1997).

The Supreme Court summarily rejected this position. It questionably concluded that police officers, or even parole officers, who know of suspects' parole status²³⁰ can be discouraged from violating such suspects' Fourth Amendment rights by methods other than exclusion of resulting evidence from parole revocation proceedings. Thus, the deterrence effect would be minimal.²³¹ First, and apparently primarily, however, it rejected the state court's approach as "a piecemeal approach" that would unacceptably "add an additional layer of collateral litigation regarding the officer's knowledge of the parolee's status."²³²

The precise basis for the Court's rejection of the limited exclusionary sanction is not clear. Perhaps the objection was to the difficulty—and thus the financial and convenience costs—of resolving claims of unreasonable action when those claims are raised in what is essentially a nonjudicial process. The Court may have assumed that application of the state court's approach would require additional—and hence "collateral"—judicial proceedings to resolve those claims. Nevertheless, the Court's emphasis on the need for inquiries to delve into "the officer's knowledge of the parolee's status" suggests that its opposition was based, in part at least, on the subjective nature of the inquiry that would be necessitated by the state court's formulation of the rule.

Does *Keith Scott* indicate that the Court will only embrace application of the federal constitutional exclusionary sanctions to limited situations upon demonstration that the officers were subjectively aware of the unusual nature of the situation and thus particularly subject to deterrence by exclusion of the evidence as it was eventually offered? To the extent that *Keith Scott* turned on the subjective nature of the inquiry involved, of course,

²³⁰ The Supreme Court treated the holding below as requiring subjective knowledge of the suspect's parole status. In fact, the state court appeared to hold that exclusion would be required if the facts demonstrated that the officer knew or should have known of that status; see *supra* text accompanying note 205.

²³¹ *Keith Scott*, 524 U.S. at 368-69.

²³² *Id.* at 368.

it suggests that such approaches will not be applied elsewhere. Unfortunately, the summary disposition in *Keith Scott* of the state court's effort to finely tune the balance of deterrence versus costs leaves this uncertain.

J. Reaffirmance of Objective Standards for Arrest in Non-Pretext Situations: Devenpeck v. Alford

Whren rejected a subjective component to the analysis applied when an arrest is challenged as a pretext. It would seem to follow, of course, that no subjective component should be applied when a challenge to an arrest does not attribute a nefarious pretext motivation to the officers.

Any doubts were laid to rest in *Devenpeck v. Alford*,²³³ addressing the "closely related offense" rule. That rule, as articulated by some lower courts, applies if an arresting officer announces at the time of an arrest the basis for it. The prosecution can defend the arrest against Fourth Amendment attack on the basis that it was supported by probable cause to believe the suspect committed any offense based on the conduct identified by the announcement. It may not, however, defend it on the basis of probable cause to believe the person committed an offense by other conduct.²³⁴

Respondent *Devenpeck* defended the rule as preventing a party from defending law enforcement action by "go[ing] through every fact, posit conduct that arguably could have provided probable cause, and then treat[ing officers] as if they actually *did* arrest (or search) based on [this] conduct."²³⁵ Permitting this, he commented, "is the height, and nadir, of subjective self-indulgence."²³⁶ The limit imposed by the rule "does *not* depend upon a subjective component." Instead, it "obviates the need for a delicate subjective inquiry, likely to turn on little more than self-

²³³ 543 U.S. 146 (2004).

²³⁴ See *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994).

²³⁵ Brief for Respondents at 9 n.9, *Devenpeck*, 543 U.S. 146 (No. 03-710).

²³⁶ *Id.*

servicing statements and speculation."²³⁷

The case against the rule was made most effectively by the United States as amicus curiae supporting the petitioners. Most significantly, the Government argued, the rule conflicts with the basic Fourth Amendment principle that the validity of law enforcement action under the Fourth Amendment turns on an objective assessment rather than on the officers' states of mind. Even if conduct was objectively justified, the Government continued, the closely related offense rule condemns it on the basis of "bad faith." Devenpeck's emphasis on the role of an objective fact—the officer's statement of the reason for the action—did not change the rule's focus on subjective motivation. Like the argument made by Whren, this was an effort to root out a subjective vice through objective means, and thus as constitutionally unacceptable as Whren's contention.²³⁸

A unanimous eight justice Court accepted the Government's characterization. The closely related offense rule is inconsistent with Fourth Amendment case law because it "makes the lawfulness of an arrest turn upon the motivation of the arresting officer—eliminating, as validating probable cause, facts that played no part in the officer's expressed subjective reason for making the arrest, and offenses that are not 'closely related' to that subjective reason."²³⁹

The submissions in *Devenpeck* make clear the disrepute into which subjective aspects of the Fourth Amendment standards have fallen. The Government's attack on the legal doctrine at issue focused less upon any possible justification it might have than upon whether it could be linked to subjectiveness. The respondent focused desperately on characterizing the position of the lower court as "objective."

The Government even attempted to paint the rule applied by the court of appeals as more subjective, or subjective in a worse way,

²³⁷ *Id.* at 9 (quoting *Trejo v. Perez*, 693 F.2d 482, 486 (5th Cir. 1982)).

²³⁸ Brief for the United States as Amicus Curiae Supporting Petitioners at 12-14, *Devenpeck*, 543 U.S. 146 (No. 03-710).

²³⁹ *Devenpeck*, 543 U.S. at 154.

than other subjective approaches disapproved by the Court. The closely related offense rule, the Government argued, is "impermissibly subjective because it holds that the validity of an arrest turns on the arresting officer's subjective *legal* evaluation of the crimes for which probable cause exists."²⁴⁰

During oral argument, the attorneys were questioned regarding the need for an arrest to be upheld on only those facts known to the officers. They responded that only those facts of which the officer was aware could be relied upon by the prosecution.²⁴¹ The Court in its opinion indicated agreement, noting that "[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest."²⁴² No rationale was offered by the Court.

At oral argument, Justice Stevens had pointed out to counsel for the United States that a rule limiting consideration to those facts known to the officer involves some inquiry into the mental processes of officers in every case. Counsel responded that this rule involves only acceptable inquiry into "what comes into [the officer's] mind, into the brain, his senses." He contrasted this with inappropriate consideration of what is produced as a result of the officer's brain functioning.²⁴³

The Court's analysis in *Devenpeck* considerably oversimplified the problem by assuming that the only relevant matters are facts (which must have been subjective known to the officer) and "the reasonable conclusion" that there is probable cause to believe the person committed an offense (which is an objective inquiry). In fact, between these two are inferences that might be drawn from the known facts, short of a conclusive one, that probable cause exists.

The issue was addressed at oral argument in *Maryland v.*

²⁴⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 216, at 14.

²⁴¹ Transcript of Oral Argument at 10, 16, *Devenpeck*, 543 U.S. 146 (No. 03-710) (oral argument of counsel for the United States as amicus curiae).

²⁴² *Devenpeck*, 543 U.S. at 152.

²⁴³ Transcript of Oral Argument, *supra* note 218, at 22-23.

Pringle.²⁴⁴ The members of the Court questioned counsel for the petitioner on the required manner of determining whether an officer has probable cause to believe a passenger in a car in which drugs were found was in criminal possession of them. Justice Stevens attempted to put to counsel a hypothetical in which both of two passengers were hitchhikers. Counsel pointed out that whether or not a passenger was in fact a hitchhiker is often disputed. Justice Stevens persevered, asking counsel to assume that the officer somehow knew that representation made to the officer about the passengers' status were true. Counsel responded: "[O]f course, . . . you would measure the probable cause by an objective standard and not by the subjective standard of that particular police officer."²⁴⁵

Counsel's contention was apparently that the probable cause analysis must rely on facts known to the officer but is not limited by the inferences actually drawn by the officer. If an officer is proved to have firmly believed that a passenger is a hitchhiker unknown to the driver until minutes before the situation developed, can the prosecution nevertheless argue that a reasonable officer could have, or would have, entertained considerable doubt whether that was in fact the case? In the *Pringle* argument, counsel's comment was not pursued or discussed further. *Devenpeck*, however, ignores the problem that comment identified.

*K. Exigent Circumstances Searches and the Nail
in the Coffin: Brigham City, Utah v. Stuart*

Whether any major Fourth Amendment criteria for determining the reasonableness of law enforcement action has a subjective component seemed to be posed for consideration in *Brigham City, Utah v. Stuart*.²⁴⁶ In addressing the reasonableness of officers' entry into residential premises, the Utah Supreme Court

²⁴⁴ 540 U.S. 366 (2003).

²⁴⁵ Transcript of Oral Argument at 19, *Pringle*, 540 U.S. 366 (No. 02-809).

²⁴⁶ 122 P.3d 506 (Utah 2005), *rev'd* 126 S.Ct. 1943 (2006).

distinguished between an exigent circumstances search and an emergency aid search. The second, it reasoned, imposed less stringent requirements than the first but was distinguished by the officers' motivation: the officers must be motivated by a desire to provide assistance to a person inside the premises they believe to be injured or otherwise in need of assistance.²⁴⁷

The Utah court held that the entry into the premises was not reasonable under either doctrine. The exigent circumstances doctrine did not apply, it appeared to reason, because the information available to the officers did not—apparently as judged under an objective standard—indicate a risk of sufficiently serious harm to any occupant. Why the court regarded the emergency doctrine as inapplicable was less clear. Again, the court was persuaded that the objective component was not met.²⁴⁸ Some language in the opinion indicates that the court alternatively reasoned that the subjective component was not met, apparently because the evidence failed to show that the officers actually rendered any “medical assistance” but instead “acted exclusively in their law enforcement capacity, arresting the adults for alcohol related offenses.”²⁴⁹

Brigham City's Petition for Writ of Certiorari characterized the court below as having held that the emergency aid doctrine did not apply because the prosecution failed to establish the proper motivation on the officers' part²⁵⁰ and put the first question presented for review as whether the emergency aid exception to the Fourth Amendment requirement of a search warrant “turn[s] on an officer's subjective motivation for entering the home?”²⁵¹ The Brief in Opposition acknowledged that “[t]he seminal state

²⁴⁷ The Court did not carefully identify the burden of persuasion on the subjective component, and in fact at times appeared to characterize it negatively: “The search [must] not [be] primarily motivated by intent to arrest and seize evidence.” *Id.* at 513.

²⁴⁸ *Id.* at 514 (“[T]he circumstances known to the officers at the time of entry did not create a reasonable belief that emergency aid was required.”).

²⁴⁹ *Id.*

²⁵⁰ Petition for Writ of Certiorari at 5, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

²⁵¹ *Id.* at i.

appellate case related to the emergency aid exception to the Fourth Amendment," *People v. Mitchell*,²⁵² required that the search "must not be primarily motivated by an intent to arrest a person or seize evidence."²⁵³ It then without explanation asserted that courts applying *Mitchell* have applied its standards "in an objective manner" and "apply an objective standard to the *Mitchell* guidelines." Consequently, "there is no conflict or question left unanswered concerning the objective standards applied by courts throughout the country."²⁵⁴

The Supreme Court granted review²⁵⁵—it later explained—to resolve the differences among the lower courts concerning the Fourth Amendment standards governing warrantless entry by officers in an emergency situation. The Court's description of the lower court decisions cited as illustrating these differences makes clear that they were all related to whether the Fourth Amendment standards included a subjective criterion.²⁵⁶ Beyond question, review was granted on the objective-subjective question.

In briefing the merits, Stuart assumed that the court below had considered the officers' subjective motivation and—quite awkwardly—defended that position. Under *Whren*, Stuart argued, law enforcement action extraordinarily intrusive on privacy interests is subject to Fourth Amendment scrutiny that considers, among other factors, the officers' subjective intent. This is properly done, the argument continued, because a subjective component addresses Fourth Amendment concern regarding law enforcement officers' potential lack of objectivity in determining whether intrusive action is justified.²⁵⁷ Lack of

²⁵² 347 N.E.2d 607 (N.Y. 1976).

²⁵³ Brief for Respondents at 4-5, *Brigham City*, 126 S. Ct. 1947 (No. 05-502).

²⁵⁴ Brief in Opposition to Petition for Writ of Certiorari at 3, *Brigham City*, 126 S. Ct. 979 (No. 05-502).

²⁵⁵ *Brigham City v. Stuart*, 126 S. Ct. 979 (2006).

²⁵⁶ *Brigham City*, 126 U.S. at 1947.

²⁵⁷ Brief for Respondents, *supra* note 230, at 4-5.

objectivity is a concern not limited to emergency searches, of course. Stuart's argument nevertheless made no effort to explain why in this context but not others this consideration supported a subjective component.

The National Association of Criminal Defense Lawyers filed an amicus brief addressing the matter at more length.²⁵⁸ Inquiry into officers' subjective motivation is appropriate, the Association argued, when a search is supported on the basis of a Fourth Amendment rule that requires at most objective reasonable suspicion of an emergency situation. The absence of any requirement of an objective basis for believing criminal "wrongdoing" has occurred, it suggested, leaves the power to search so subject to abuse as to require the extraordinary step of inquiry into the officers' subjective "primary purpose." No effort was made to explain why reasonable suspicion to believe an emergency exists is less effective in limiting law enforcement discretion than reasonable suspicion to believe criminal activity is afoot.

Petitioner Brigham City, supported by the United States as amicus curiae, argued that there was no basis for treating the search at issue in *Brigham City* differently than other law enforcement action evaluated for reasonableness on purely objective standards. Brigham City acknowledged that subjective considerations might be appropriate in evaluating the reasonableness of purely suspicionless searches, such as inventory searches or checkpoint vehicle stops, apparently on the ground that the lack of any requirement of focused information justifies breaching the general prohibition against subjective standards. Emergency aid searches, it argued, require reasonable

²⁵⁸ Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondents at 9-17, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

A discussion critical of the quality of criminal defendants' representation before the Court singled out Brigham City as a case in which the advocacy caused concern among the defense bar. Tony Mauro, *Help Offered for High Court Criminal Cases: But Will Defense Lawyers Swallow Pride and Accept It?*, LEGAL TIMES, May 8, 2006 at 1. It described the amicus brief as "read[ing] like a merits brief." *Id.*

suspicion although not probable cause. Thus they do not present the same need for a standard with a subjective requirement.²⁵⁹

The United States mounted a broader attack against subjective components in Fourth Amendment standards, arguing that the reasons for disfavoring subjective requirements generally applied in the *Stuart* situation. Even when law enforcement involves extraordinary intrusions upon specially protected Fourth Amendment interests, it argued, Supreme Court case law establishes that adequate protection against unreasonable intrusions is provided by objective standards demanding a showing of facts known to the officer that support a reasonable belief.²⁶⁰ It challenged whether the objective requirement for emergency aid searches is in fact less demanding than what the Fourth Amendment requires for other searches.²⁶¹ But in any case, it stressed, Fourth Amendment reasonableness is assured by an objective standard requiring known facts making it objectively reasonable for an officer to believe that an immediate need for assistance exists.²⁶²

In addition, the United States argued, subjective components "necessarily import variability and instability into the law."²⁶³ Officers are denied guidance from case law. Concern regarding judicial review of their motivations will lead to hesitation by officers in the field, which "could lead to serious and sometimes fatal consequences."²⁶⁴

Further, it stressed that adding a subjective component to a Fourth Amendment standard does not reduce the infringement upon privacy resulting from the officers' action.²⁶⁵ Finally, this

²⁵⁹ Brief for Petitioner at 16-20, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

²⁶⁰ Brief for the United States as Amicus Curiae Supporting Petitioner at 17, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

²⁶¹ *Id.* at 18-19 n.18 (asserting that the emergency aid rule may require "probable cause" to believe that an emergency need for assistance exists).

²⁶² *Id.* at 17.

²⁶³ Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 236, at 19.

²⁶⁴ *Id.* at 20.

²⁶⁵ *Id.*

additional requirement would in fact “[do no] constitutional work.” Cases applying a standard with a subjective component and finding emergency entries unreasonable do not rely exclusively on findings of improper motive, but such findings “trail after” determinations that the searches were unreasonable for some other reason.²⁶⁶

The matter was nearly ignored in oral argument, which focused on whether the facts met an objective standard. Counsel for Stuart made no effort to defend the lower court's apparent reliance on the officers' motivation. When counsel for Brigham City spoke in rebuttal, Chief Justice Roberts called his attention to the question raising the subjective motivation, and commented, “I . . . haven't heard much about that this morning. How is that presented on these facts?” Counsel responded that the state court's reliance on the officers' motive was contrary to repeated holdings of the Court, and quickly moved to other matters.²⁶⁷

The unanimous opinion of the Court, written by Chief Justice Roberts, indicated that the justices saw the argument for a subjective component as undeserving of serious consideration or discussion. Characterizing Stuart's argument as that the entry was unreasonable because “the officers were more interested in making arrests than quelling violence,” the Court gave it short shrift.²⁶⁸ Its cases—including *Whren* and *Scott*—have “repeatedly rejected” the approach on which Stuart's argument was made. “It therefore does not matter . . . whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.”

²⁶⁹ The Court went further to announce unequivocally that what is in the mind of the officer conducting a search is never relevant to the Fourth Amendment reasonableness of the search: “An action is ‘reasonable’ under the Fourth Amendment,

²⁶⁶ *Id.* at 21-22.

²⁶⁷ Transcript of Oral Argument at 53, *Brigham City*, 126 S. Ct. 1943 (No. 05-502).

²⁶⁸ *Brigham City*, 126 S. Ct. at 1948.

²⁶⁹ *Id.*

regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively*, justify [the] action."²⁷⁰ This, the Court strongly hinted, was the case even with regard to inventory searches²⁷¹ and despite its earlier language suggesting pretext motivation would invalidate such action.²⁷²

Clearly the Court granted review in *Brigham City* with some expectation that whether the Fourth Amendment reasonableness of emergency searches had a subjective component posed a meaningful issue. Upon full consideration, and perhaps in light of the respondent's failure to meaningfully address the issue, the Court decided that the issue was not a serious one. It rejected it by citing its longstanding emphasis on objective criteria and restating Fourth Amendment doctrine in apparently absolute terms—the subjective state of mind of the officer is never relevant to the Fourth Amendment reasonableness of a search or seizure.

L. Summary

Any effort to make sense from the Supreme Court's case law requires some organization of the issues. As Professor LaFave recognizes, if the Supreme Court's case law dealing with officers' perceptions and motivations involves a single problem, it certainly covers distinguishable manifestations of that single problem.²⁷³

²⁷⁰ *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)) (emphasis added).

²⁷¹ The reasonableness of some searches or seizures, it noted, permits an inquiry into "programmatically purpose." This is the case with suspicionless checkpoint stops. *Id.* (citing *Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000)). It added a "see also" citation to the leading inventory search case, *Florida v. Wells*, 495 U.S. 1 (1990). The inquiry into programmatic purpose "is directed at . . . the purpose behind the *program*" and "has nothing to do with discerning what is in the mind of the individual officer conducting the search." *Id.*

²⁷² See *supra* text accompanying note 183.

²⁷³ LAFAVE, *supra* note 11, § 1.4 (distinguishing "manifestations" of "the question . . . whether a 'bad' intent or motivation by the searching or seizing police officer should be taken into account so as to bring about the exclusion of evidence").

He usefully suggests separating out those in which defendants' claims are based on officers' unexecuted intentions to act unlawfully.²⁷⁴ This, of course, is *Painten*, in which the basic claim was that the officers' knock on the door was a search or a seizure, and an unreasonable one, because of the officers' intention to—if necessary—enter and search without Fourth Amendment grounds.

Professor LaFave also suggests separating what he calls “pretext” cases,²⁷⁵ in which officers consciously rely on a facially valid legal theory but the defendant challenges this reliance as motivated by a different consideration that could not itself support the officers' action. Amazingly, the Court has not addressed this either, although *Whren* makes clear that such challenges could not succeed under the Court's loose reading of its prior discussions.

With regard to what remains, Professor LaFave's analysis²⁷⁶ might usefully be expanded and somewhat redirected. He considers what Fourth Amendment law permits to be used as the basis for an attack on the constitutionality of officers' action.²⁷⁷ In most cases, however, the prosecution will have the initial burden of establishing the reasonableness of the officers' actions given Fourth Amendment standards. Sound analysis, then, suggests that analysis should focus less on possible grounds for challenging evidence as inadmissible and more on what the prosecution must show upon such a challenge to establish the reasonableness of a search or seizure.

Fourth Amendment reasonableness might require that the acting officers were aware of: (1) the facts; (2) the legal theory on which the prosecution later supports the actions; (3) the criterion

²⁷⁴ LAFAVE, *supra* note 11, § 1.4(b).

²⁷⁵ LAFAVE, *supra* note 11, § 1.4(e).

²⁷⁶ LAFAVE, *supra* note 11, §§ 1.4(c) (“mistaken belief grounds for action lacking”), 1.4(d) (“wrong legal theory relied upon”). Professor Burkoff has suggested distinguishing among: (a) actions taken on the basis of insufficient factual observations; (b) those undertaken under “a mistaken notion of the law”; (c) those made “with a latent bad intent”; and (d) “bad faith” actions. John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. Rev. 70, 85 (1982).

²⁷⁷ LAFAVE, *supra* note 11, § 1.4 (titling it “The Scott ‘Bad Faith’ Doctrine”).

employed under that legal theory; and (4) the result of applying that criterion to the facts of the case.

In *Devenpeck*, there seemed to be some question whether Fourth Amendment law required proof that the officers were aware of the facts later relied upon to establish the reasonableness of the search. Yet as early as 1925 the Court's discussions suggested this was the case. *Devenpeck*, of course, reaffirmed this.

Despite this consensus that the prosecution can support police action only on the basis of facts known to the officers, the Court has, since *Mapp*, been hostile to suggestions that awareness of more might be required. By the time *Devenpeck* was submitted to the Court, the Government was persuaded that the Court was particularly hostile to any suggestion that reasonableness might be affected by officers' subjective *legal* conclusions.

Jones, of course, appeared to require awareness of # 2 and thus to demand proof of officers' legal analyses—in that context, proof that the officers had known about and relied upon the legal rule permitting entry to locate and arrest a person subject to arrest. But the issue did not really surface again until *Royer*, in which the Court summarily assumed that the prosecution need not prove officers were even aware they had seized the suspect or needed grounds to do so to support their actions as a seizure based on probable cause. *Robinette* held that the reasonableness of an extended traffic stop and the officer's removal of the driver from the vehicle did not require proof that the officer acted on the basis of a legal theory related to the actual grounds for the stop. *Devenpeck* made clear that the reasonableness of an arrest for an offense does not require proof that the officer subjectively believed this offense was the basis for the stop or that the facts met the criterion under this theory—probable cause to believe this offense was committed.

What stands out in this history is the complete lack of attention to the basic issue. The parties never focused upon it and the Court never identified it. In none—absolutely none—of the cases was a careful argument in support of a subjective approach made. *Frank Scott* came the closest. But Scott made only a general argument that a system of legal regulation by deterrence

needs to take into account the subjective basis on which those regulated have acted.

The result is that the proposition uncritically accepted by all in *Jones*—that the officer must have acted on the basis of the legal theory relied upon later by the prosecution—has become so disfavored that parties before the Court do all in their power to avoid the taint of any association with subjectivity.

Finally, the Court's decisions in toto reflect an implicit recognition that purely objective standards for reasonableness are awkward to formulate and discuss. Often the Court uses common sense and convenient terminology—reasonable beliefs, for example—that assume both subjective and objective components. When pressed by the situation to use objective terminology, it often simply avoids formulating the standard. *Leon*, for example, never explicitly articulates the purportedly objective standard that the prosecution must meet to render admissible evidence otherwise inadmissible.²⁷⁸

More important for purposes of Fourth Amendment litigation, the Court's discussions leave unclear how courts should approach application of so-called objective standards, as for example probable cause. Since 1813 in *Locke*, the Court has often referred to facts or circumstances which “warrant” a belief.²⁷⁹ But does this mean the courts should ask whether a reasonable officer would in fact have formed that belief or only whether the facts provide sufficient support that a belief, if formed, would not be arbitrary? If the question was whether an actually held belief

²⁷⁸ The Court did say—in a footnote—that the question is “whether a reasonably well trained officer *would have known* that the search was illegal despite the magistrate's authorization.” *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (emphasis added). But this question is posed only to determine whether the exception does *not* apply. As an initial matter, must the prosecution show such an officer *would have* believed the search permissible or only that such an officer *could have* reached such a conclusion? The Court failed to address this.

²⁷⁹ *E.g.*, *Maryland v. Buie*, 494 U.S. 325, 326 (1990) (indicating a sweep is permissible on facts “which . . . would warrant a reasonably prudent officer in believing the area . . . harbors an individual posing a danger”); *McCray v. Illinois*, 386 U.S. 300, 304 (1967) (“facts and circumstances . . . sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense”).

was objectively reasonable, the judicial inquiry would almost certainly be the second.²⁸⁰ But the Court's insistence on using awkward purportedly objective terminology obscures the matter.

II. RECONSIDERING A PARTIALLY SUBJECTIVE APPROACH TO REASONABLENESS

As the last section demonstrates, the Supreme Court has addressed the possible role of officers' awareness to Fourth Amendment standards in a number of contexts. These include the criteria for determining whether law enforcement conduct is within Fourth Amendment scrutiny, whether conduct subject to scrutiny is reasonable, and whether unreasonable conduct requires suppression of some evidence arguably derived from unreasonable searches or seizures.

What stands out is the lack of any focused attention on whether, in any of these situations, a subjective component of some or all Fourth Amendment standards is consistent with, or suggested by, principles of Fourth Amendment law. This section attempts an analysis of whether in the second context—standards for determining whether conduct constituting a search or seizure is reasonable—Fourth Amendment standards should include a subjective component.

Any analysis must be preceded by formulation of a general approach to determining reasonableness and formulation of a specific possible a Fourth Amendment standard containing a subjective component. This is addressed first.

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But in reviewing a warrant, a court should ask only whether the record contains a substantial basis for the issuing magistrate's conclusion that probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). If this deference is a reward to law enforcement for using the preferred warrant process, review of police action taken without a warrant should be more rigorous. This in turn would probably require more than inquiry into whether on the facts a reasonable officer could have formed the belief.

*A. A Framework for Defining
Fourth Amendment Reasonableness*

Precisely how the courts should determine whether a particular factor—such as the officers' subjective state of mind—is a component of Fourth Amendment reasonableness is not entirely clear. Perhaps a case can be made that the very nature of the Fourth Amendment prohibition against unreasonable searches and seizures requires this. This possibility is explored in part C that follows.

More likely, however, the matter should turn on whether and to what extent this factor—the officers' subjective mental states—impact those considerations the Supreme Court's case law identifies as relevant to reasonableness. Such an approach is developed in this section in general terms. Specific aspects of the analysis are then addressed in more details in parts D through H below.

The Court has made clear that as a general matter, Fourth Amendment reasonableness turns on assessment of two considerations. First, is the extent to which law enforcement activity intrudes upon interests protected by the Fourth Amendment, such as privacy, personal liberty, and the interest in possession of property protected by the prohibition against unreasonable seizures of physical things. Second, is the degree to which the law enforcement activity is needed for the promotion of legitimate governmental interests.²⁸¹

Also, it is clear the analysis must include the costs of treating something as part of reasonableness. To the extent that treating reasonableness as incorporating something that will result in more law enforcement conduct being held unreasonable in the context of exclusionary rule litigation, the loss of evidence is important. Whether incorporating it will increase the difficulty of resolving challenges to the admissibility of evidence and, thus, the time required for this, is significant.

In addition, it is relevant whether treating something as

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E.g., United States v. Knights, 534 U.S. 112, 118-19 (2001).

affecting reasonableness will be functional. It is also relevant whether, to the extent that Fourth Amendment law provides remedies, this will in fact appropriately compensate those who have been wronged and harmed. Most important, since Fourth Amendment law is largely preventive rather than remedial, will it reduce the incidence of this in law enforcement action. If officers' subjective states of mind are made part of reasonableness whether in fact this will result in officers acting less often with the wrong states of mind.

Finally, the substance of Fourth Amendment law is sometimes appropriately influenced by systemic considerations. These are in turn properly influenced by what, given the nature of and remedies for Fourth Amendment requirements, will best serve the function of encouraging law enforcement conduct complying with those requirements. "Bright line rules," for example, may mean that some unreasonable intrusions upon protected interests escape condemnation by the law. But because law enforcement officers can be encouraged to understand and perhaps comply with them, those rules may in the long run best serve the objective of minimizing unreasonable searches and seizures.²⁸²

Whether officers' subjective states of mind should be incorporated into Fourth Amendment reasonableness, then, best requires consideration of whether those states of mind affect the intrusiveness of or the legitimate need for law enforcement conduct, the costs and potential effectiveness of incorporating it, and the impact of such incorporation on systemic considerations, including the general effectiveness of Fourth Amendment law as enforced primarily by the exclusionary sanction in criminal litigation.

²⁸²

See *Oliver v. United States*, 466 U.S. 170, 181-82 (1984) (discussing open fields).

*B. A Proposed Subjective Component for
Fourth Amendment Reasonableness*

A major impediment to discussion is formulating an appropriate standard for such discussion. Generalization may be difficult. In fact, the Supreme Court's failure to address the matter carefully may be due in part to the difficulty of putting to the Court the basic principle.

A standard must, of course, make some conceptual sense. Also, however, it must be realistic in terms of what information can be developed in litigation with reasonable accuracy and efficiency.

It seems clear that analysis must be based on those facts known to the officer. Even current law requires that, although this position seems to have been accepted without careful consideration. It is common ground, then, that Fourth Amendment reasonableness has some sort of a subjective component. The real question is how broadly should that component be defined.

1. A Possible Formulation

For discussion purposes, a proposal can be framed as follows: In determining whether a search or seizure is reasonable, the prosecution should be limited to those general legal theories that were actually and subjectively within the analysis of the officers at the time of the search or seizure.

An officer's analysis might, of course, include several legal rationales. An officer might conclude that an arrest is permissible because the officer has probable cause to believe the subject committed both crimes A and B. Nothing would be accomplished by limiting an officer to a single rationale. So, in this case, the officer's analysis would entitle the prosecution to defend the arrest as for either crimes A or B.

Suppose, on the other hand, the officer considered that the arrest might be justified on the basis of probable cause to believe the subject committed both crimes A and B, but then concluded that the evidence supported only an arrest for crime B. The

prosecution should be limited to defending the arrest as one for crime B. Thus, the officer's analysis must in some sense include actual reliance on the legal theory later asserted by the prosecution, even though it need not be exclusive reliance.

If this approach is too inflexible, some leeway could be provided by applying here the approach taken by the inevitable discovery case law: The prosecution can support a search or seizure on the basis of a legal theory not part of the officer's subjective analysis upon proof that had the officers not proceeded on the legal theory they did, they would have considered the other theory, decided it applied, and acted on it.²⁸³

In either case, the requirement so formulated would not be on its face an impractical one for law enforcement to meet. Professor LaFave's claim that a subjective component to Fourth Amendment standards would require police officers to act "with all the knowledge and acuity of constitutional lawyers"²⁸⁴ is simply not a valid one.

2. Applying the Formulation to Arrests

For an arrest, then, analysis should start with the facts known to the officer. Courts should ask whether the officer acted on the basis of a conclusion that those facts met the standard applicable to the situation. The officer must have had a practical notion of the legal standard—here, in the arrest context, probable cause.

So, in *Devenpeck*, if an arrest for taping was not permissible, the question would be whether, had they not had that option, the officers would in fact have arrested for an offense arising from their belief that Alford had and had used wig-wag lights. Most likely not. They may well have concluded they had probable cause, but that an arrest was nevertheless not permissible or

²⁸³ To the extent that the distinction between substantive Fourth Amendment law and Fourth Amendment exclusionary penalty law is important, this would best be treated as part of exclusionary penalty law. The general rule would, of course, be part of substantive Fourth Amendment law defining reasonableness.

²⁸⁴ See *supra* text accompanying note 12.

appropriate.

In *Royer*, the first question would be whether, if the officers had not decided that Royer was effectively consenting to their requests, they would have recognized that they were detaining him and that their information met the legal standard applicable to brief field stops. If that is answered affirmatively, the second question would be whether they would have recognized that their movement of him to the secluded room was permissible only on a higher standard and that their information by that time met this higher standard.

The *Royer* record suggests that the officers may not have been stimulated to analyze the situations in this manner and thus would not have engaged in that reasoning even if they were aware of facts amounting to probable cause. The prosecution would not be able to meet its burden and the detention would be unreasonable despite the fact that properly prepared officers could have—and perhaps would have—accurately concluded that this was the equivalent of an arrest but it was permissible on the information they had developed.

3. The Traditional “Pretext” Situation

If the approach outlined above is taken, this would not change the result in traditional pretext situations such as *Whren*.

In these cases, as in *Whren*, the evidence generally shows the officers were aware of the legal justification for their action later relied upon by the prosecution. They knew facts meeting that standard, and they acted in reliance on their conclusion that the facts met the standard. The fact that they did this on this rationale for a further reason that was not within the rationale of the traffic laws is irrelevant to this analysis.

This is appropriate. Whether law enforcement action should be unreasonable because it was a pretext in the traditional sense is really a question quite distinct from whether Fourth Amendment reasonableness should require subjective reliance by officers upon the legal theory later offered in defense of the officers' actions.

C. Appropriately Motivated Police Conduct as a Conceptually Necessary Fourth Amendment Goal

A case can perhaps be made that the nature and context of the Fourth Amendment right to be free from unreasonable searches means that reasonableness under the Amendment necessarily involves proper subjective motivation. The Oregon state constitutional formulation of probable cause as containing both a subjective and an objective component is defended by Oregon Court of Appeals Judge Rex Armstrong²⁸⁵ in conceptual terms that can readily be made into a Fourth Amendment analysis.

Judge Armstrong finds the conceptual basis for a subjective component in the applicability of the constitutional requirement of reasonableness to all branches of government. Courts have an obligation to determine the reasonableness of law enforcement action before those courts permit the evidentiary use of the fruits of that action. Police officers have a similar obligation to determine the reasonableness of their conduct before they engage in that conduct:

Officers cannot conduct a search that they have failed to determine is one that they are authorized to conduct any more than judges can uphold a search that they have failed to determine is one that the officers were authorized to conduct. . . . [P]olice officers are legally obliged to comply with [the constitutional requirement of reasonableness] when they search or seize property. They can fulfill that obligation only if they consider the effect of [the requirement of reasonableness] on their actions *before* they act.²⁸⁶

He sees this as following from more general principles of legality:

[This] analysis gives effect to the oft-stated principle that we are a government of laws and not of people. It does that by seek-

²⁸⁵ See State v. Helow, 15 P.3d 103, 108-09 (Or. Ct. App. 2000) (Armstrong, J., dissenting).

²⁸⁶ *Id.* at 109 n.2.

ing to ensure that those who enforce the law are guided by it when they act, thereby giving effect to the indisputable principle that a police officer should not, in fact, use her authority as an officer to conduct a search that she does not believe that she has authority to conduct. In other words, it says to officers that they are to act in the belief that the law authorizes their actions, rather than in the belief that they should act and let someone else, most commonly a judge, decide later whether they acted lawfully.²⁸⁷

The Supreme Court's objective emphasis, this analysis suggests, focuses too strongly on judicial review of law enforcement action. Wholly apart from whether officers' actions survive judicial review for reasonableness in some sense, reasonableness as applied directly to the officers inherently demands that the action be motivated by a perception that the action is within the authority of the officers under the limited power given them by the law.

D. Intrusiveness of Law Enforcement Conduct

If—as seems likely—the matter is not conclusively settled by the conceptual nature of Fourth Amendment reasonableness, analysis must turn to the balancing analysis outlined above. The best way to begin is to ask whether the Fourth Amendment intrusiveness of law enforcement conduct is affected by the officers' motivation or state of mind.

Precisely what determines the Fourth Amendment intrusiveness—and particularly the degree of intrusiveness—of law enforcement conduct is unclear, in part because of ambiguity as to what interests are protected by Fourth Amendment law. The Court's case law defining searches has made clear, and perhaps overly emphasized, that the amendment protects an interest in informational privacy. Decisions defining seizures of property make clear that it also protects an interest in security of possession. Other cases considering claims of seizures of the person

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Id. at 109.

establish that it protects an interest in freedom of movement.

Yet the Court's cases make clear that the amendment, sometimes at least, protects other and considerably more subtle interests. At least applied to persons who have no desire to change positions, the provision's protection against unreasonable seizures of the person recognizes and protects an interest in being free from undesired encounters with law enforcement officers.²⁸⁸ Careful reading of the Court's analyses suggests that other and even more subtle interests are at least implicitly recognized as constitutionally relevant.

Several commentators have attempted to identify and define such nonprivacy interests protected by Fourth Amendment law at least as applied to some types of law enforcement activity. William Stuntz, for example, has argued that the provision protects "dignity interests."²⁸⁹ He does not define these interests with great precision, but clearly he envisions these interests as turning in part upon suspects' unpleasant responses to police activity. A police officer invades these dignity interests, he argues, by publicly accosting someone and treating that person as a suspect;²⁹⁰ this action invades the protected dignitary interest in part because of what the suspect perceives as its unjustified stigmatizing effect.²⁹¹

Sherry Colb has developed a similar and more detailed approach, arguing that the Fourth Amendment protects against "targeting"²⁹²—"being singled out from others through an exercise

²⁸⁸ Florida v. Bostick, 501 U.S. 433, 436 (1991) (asserting that bus passenger is seized by officer's approach and efforts to question if a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter).

²⁸⁹ William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1021 (1995).

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1065 (asserting that in a street encounter, what the officer learns in an informational privacy sense is less important than other considerations, probably "some combination of the stigmatizing nature of the encounter and the police officer's use of force").

²⁹² Colb, *supra* note 164, at 1491 (explaining that targeting involves a Fourth Amendment harm distinct from privacy invasion).

of official discretion that is not based on an adequate evidentiary foundation."²⁹³ She argued that this is harmful in a Fourth Amendment relevant manner because of its impact on the suspect, who experiences a unpleasant emotional reaction to the law enforcement action.²⁹⁴

Neither Stuntz nor Colb makes a particularly persuasive case that Fourth Amendment case law, at least with any consistency, in actual fact recognizes the interests they see as protected by the provision. Nevertheless, no one can read extensively in that case law without concluding that the provision protects some interests beyond those in information privacy, possession of property, freedom of movement, and freedom from unwanted encounters with law enforcement officers. Specifically, the manner in which searches and seizures are made clearly implicates interests protected by the Fourth Amendment even when that manner does not result in officers obtaining further private information, imposing additional limits upon the suspects' ability to control their property or to move their persons, or increase the number or even the duration of unwanted encounters with officers.

It is fair to conclude that the degree of Fourth Amendment intrusiveness of law enforcement conduct is at least sometimes affected by the adverse emotional impact of that conduct on those subjected to it.²⁹⁵ Officers' states of mind might affect, in two quite different ways, the extent to which those subjected to law enforcement conduct constituting a search or seizure have an adverse emotional reaction to that conduct.

²⁹³ *Id.* at 1487.

²⁹⁴ She explains the impact of targeting:

The additional harm to Z [whose home has been searched without probable cause] is that he is left wondering, "Why me? Why have the police singled me out when they lacked an evidentiary basis? Why didn't they search someone else instead or as well? What gave them the gut feeling that I am a criminal?"

Id. at 1486.

²⁹⁵ *E.g.*, Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 445, 452-53 (1990)

(explaining that reasonableness of checkpoint stops is affected by the subjective intrusiveness of such stops, which means the "fear and surprise engendered in law-abiding motorists by the nature of the particular stop").

1. Subject's Contemporaneous Perception

Clearly intrusiveness is affected by the manner in which the subjects of law enforcement conduct perceive it at the time, and the resulting emotional impact on those subjects. It is conceivable that officers' motivation would affect the manner in which the officers' actions are contemporaneously perceived in a way that would increase their Fourth Amendment intrusiveness.

This is possible, of course, only if subjects know officers' states of mind. Undoubtedly officers sometimes communicate their motivation, or at least part of it, perhaps pursuant to local nonconstitutional requirements. Certainly the Fourth Amendment could not give significance to officers' states of mind only when for fortuitous reasons they were communicated to the subject. As *Devenpeck* noted in the context of arrests, such a requirement could be expected to simply persuade officers to withhold any statement of the reasons for their actions.

The Fourth Amendment might be read as requiring, insofar as possible, that officers provide those subjected to searches or seizures with the legal rationale for the officers' actions. At oral argument in *Devenpeck*, Justice Souter commented that he believed the Fourth Amendment required officers making an arrest to inform the person arrested of the basis for the action.²⁹⁶ The Court noted only that it had never held this to be constitutionally required.²⁹⁷ It was not asked in *Devenpeck* to make any such holding and it showed no enthusiasm for reaching the issue on its own initiative.

The Court could, of course, conclude that suspects often enough learn of the bases relied upon by officers who search or detain and thus the impact of such knowledge can properly be considered in formulating the constitutional standard.

To the extent that subjects know of the rationale relied upon by

²⁹⁶ Transcript of Oral Argument at 20-21, *Devenpeck v. Alford*, 543 U.S. 146 (2004) (No. 03-710).

²⁹⁷ *Devenpeck*, 543 U.S. at 155.

officers in searching or detaining, does it affect those subjects in a manner and to the degree required for the impact to be of Fourth Amendment significance? It is possible. A resident might recognize that an officer searching on the basis of third party consent is relying upon consent from someone known by the resident to have no authority to give such consent. Generally, however, this is probably not so. Whatever determines the impact of the search, it is unlikely to be the perceived legal rationale for the search.

At this point, it is important to distinguish the traditional pretext problem. A subject given a facially valid legal justification by the officer who recognizes that in deciding to act on that rationale the officer gave significant weight to the subject's skin color may be affected in a constitutionally significant manner. As noted earlier, however, this situation is not addressed by that aspect of reasonableness under discussion.

A requirement that officers in fact have relied on the legal justification later offered by the prosecution can probably not be justified as reducing the intrusiveness of the searches and detentions. Barring the prosecution from later relying on a different justification cannot be justified by the value of such a bar in encouraging police to become aware of and communicate to subjects the legal justification for the police action as a means of minimizing the intrusiveness of that action.

2. Subject's Subsequent Perception

Fourth Amendment intrusiveness to some extent seems to depend on how the subjects of law enforcement action perceive their situations after the law enforcement action has ended. The impact of a police search of a residence, for example, may continue after the officers leave. The residents' sense of violation may actually increase as the residents have time to mull the situation over. Increased anxiety regarding future possible searches might similarly increase. The effect of having one's residence searched at night might increase the next evening as dusk approaches.

In some situations, this post-search impact will be the only one.

Police search of a subject's residence, for example, is highly intrusive even if the subject does not learn of it until after it is completed and the officers gone. This is because of the emotional impact of knowledge that one's privacy has been penetrated. In part, it is because a prior penetration makes a person less confident of the security of privacy in the future.

Police action might be rendered more intrusive in this way by the situation under consideration here. Those subjected to law enforcement actions might be offended in a constitutionally-relevant manner and degree by knowledge that the prosecution can defend the police action on a ground not in fact relied upon by the officers in taking that action.

Consider the resident whose home is searched pursuant to what the resident recognizes at the time as legally ineffective consent. In later litigation, suppose the prosecution is permitted to defend the search as one based on exigent circumstances. The resident may feel again wronged by the law's acceptance of a rationale for the police action that was neither given or extant at the time of the search. If so, does this significantly increase the constitutional intrusiveness of the police action?

To the extent that subjects feel wronged by this state of affairs, do they feel wronged for a reason of Fourth Amendment significance? Most likely, the offense taken is based on a perception that the government has a duty to be forthright and consistent with those of its citizens it acts against. It should be confident before a search that the search is justified and why it is justified, and it should later consistently defend what it did. The government's switch to a new justification casts doubt on whether its decision to search in the first place was "fair" in some sense, and on whether it is treating its citizens with fair consistency.

This may be artificial. Those who seek legal relief from the consequences of police action may give little weight to these considerations. Any offense at the government's inconsistency may pale into constitutional insignificance when compared to the subjects' dismay that the government has been able to acquire evidence of their guilt, and their fear of the consequences of

provable guilt of an offense.

Further, any offense may not be entitled to Fourth Amendment significance. Particularly if the intrusiveness of police action is only minimally affected by the officers' states of mind, citizens may have no legitimate claim to protection against the government switching grounds for its action. There may simply be nothing really unfair about the government defending police action on a legal basis differing from that on which it was actually taken.

E. "Need" for Law Enforcement Conduct

Perhaps subjective motivation affects the extent to which law enforcement behavior legitimately promotes the governmental interest in effective and efficient law enforcement. This might be the case on a case-by-case basis or on a more general level.

If action—such as Alford's arrest—turns out to be supportable on grounds different than those the officer taking the action had in mind, the *legitimate* law enforcement need for that activity is arguably quite fortuitous. In some sense, the government has a need to avoid any adverse effects from action already, whether those are the loss of evidence obtained by the actions or the cost of civil liability for the actions. But that interest may not be a legitimate one if it is not planned or intended.

The need for law enforcement conduct most likely turns on the planned nature of it. It seems incongruous to regard law enforcement as having a need to benefit from the unplanned, and thus fortuitous, actions of officers.

To put the proposition another way—the government has a *legitimate* interest only in having law enforcement action *designedly* lead to apprehension, prosecution, conviction, and punishment of guilty persons.

Of course, inevitable discovery suggests otherwise. We give the government the advantage of even the purely fortuitous facts if others would have obtained the information or items properly. We do not deny the government this advantage even if the officers relied upon the rule in intentionally ignoring Constitutional limits.

Why should legitimacy require planning and conscious anticipation? Maybe because in the long run, that best serves the objectives of having only justified action taken.

F. Systemic Considerations

Reasonableness of law enforcement conduct is sometimes influenced by considerations of primarily systemic significance. These are considerations related to the effectiveness of legal rules in effectively discouraging the targeted behavior, rather than case-by-case considerations of such factors as intrusiveness and the need for the specific law enforcement conduct.

The reasonableness of the search of an arrested person, for example, is dramatically influenced by the Court's perception that law enforcement conduct in this context is unlikely to be effectively controlled by a rule that requires case-specific demonstrations of the likelihood that an arrestee will have weapons or destructible or concealable evidence on the person. Any such rule, if actually followed, would discourage searches that are in fact needed. Implicitly, the Court seems to concede, law enforcement officers would recognize the unrealistic nature of the Fourth Amendment requirement and in actual practice apply some other "extra-legal" criterion. A Fourth Amendment rule imposing limits on the scope of searches incident to arrest but permitting them whenever an arrest is made, in other words, most effectively serves to reasonably limit privacy intrusions of this sort that follow arrests.

The strongest case for broadly defined subjective components of Fourth Amendment reasonableness requirements is a similarly systemic one. It is fairly simple: The Fourth Amendment is the basis for what is essentially a regulatory scheme. It should identify and provide a disincentive for unacceptable law enforcement conduct but not penalize such conduct where doing so would not serve to prevent future misconduct. Doing this effectively requires consideration of the actors' states of mind. We generally evaluate and sort conduct in part by the state of mind with which that conduct is performed. A legal regulatory scheme

that purports to identify and prevent certain conduct without regard to the states of mind with which the actors engage in that conduct is simply bound to fail. It cannot accurately identify the target behavior or provide an adequately honed penalty for targeted behavior.²⁹⁸

A legal scheme that ignores a vitally important aspect of the behavior it purports to regulate cannot command the respect of those it tries to influence. It is difficult to see how conscientious law enforcement officers can have anything short of contempt for a system that litigates the acceptability of police stops of automobiles without regard to the actual legal reasons for which those stops are made.

Fourth Amendment law should identify when law enforcement officers have acted as constitutional standards demand and when they have not. If we want officers to actually analyze situations pursuant to the framework established by Fourth Amendment law, Fourth Amendment law should reward them when they have done that and be willing to penalize them when they have not.

It seems common ground that we want officers to know the general law that governs their behavior. We want them to become aware of the relevant facts and then to apply the law to those facts and decide what if any intrusive action the facts and the law permit. We should provide an incentive for them to do this, and a disincentive for acting intrusively without doing it. This is most directly pursued by requiring the prosecution to later, in litigation, support intrusive police actions on those legal theories the officers applied to the facts of which they were aware, and concluded provided a legal justification for their conduct.

²⁹⁸ Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 MISS. L.J. 553, 626 (2004) ("arguing . . . for the relevance, even centrality, of intentions in any regime directed at regulating the police").

1. Available Models

How Fourth Amendment reasonableness would best be formulated from a systemic perspective might be informed by two quite different models used for judicial review in other contexts.

a. Administrative Review Analogy

Administrative law, and specifically judicial review of administrative decisions, might serve as a basis for the Fourth Amendment standard under which courts, in a sense, review the conduct of law enforcement officers.

Many courts—including the United States Supreme Court—review the actions of administrative agencies only on the bases on which those actions were actually taken. The “well-established rule” is that “an agency's action may not be upheld on grounds other than those relied on by the agency.”²⁹⁹ A reviewing court is not to “accept appellate counsel's post hoc rationalization for agency action.”³⁰⁰ Generally, those grounds are to be ascertained from the record made by the agency. Although inquiry into the mental processes of administrative decision makers “is usually to be avoided,” the Court has held that a federal district court reviewing administrative action may, if necessary, require those decision makers to testify as to the bases for their action.³⁰¹

This administrative law approach was initially justified primarily on grounds that courts lacked technical authority to make (and then affirm) discretionary decisions that administra-

²⁹⁹ Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 420 (1992).

³⁰⁰ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962).

³⁰¹ Citizens to Preserve Orerton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

tive schemes entrusted to agencies.³⁰² Nevertheless, it is clearly now based in large part and perhaps primarily upon a perception that effective judicial review of administrative agencies' discretionary decision-making requires that review be of the decisions actually made and the actual reasoning used to make those decisions, not "*post hoc* rationalizations" offered to bring decisions within, what in retrospect appear to be, the most advantageous legal doctrines.³⁰³ This approach permits review of agencies' reasons for action—although generally under the fairly lax arbitrary and capricious standard. One leading treatise characterizes this "judicial review of the agency reasoning process [as] the most important aspect of judicial review of agency action at present."³⁰⁴

Modern law enforcement may be regarded as closely akin to administrative agencies, and judicial enforcement of legal requirements by exclusionary sanctions can be regarded as a form of judicial review of officers' administrative-like decisions. If this aspect of criminal procedure law seeks to achieve effective judicial oversight and review of those decisions, the administrative law model suggests that review on the basis of the actual rationales for police actions would be most effective in accomplishing that.

Exclusionary sanction review of police action is, of course, different from judicial review of administrative agency action in ways that might render the administrative model unsuitable in the Fourth Amendment context. Fourth Amendment law is designed less as a basis for complete judicial oversight of law

³⁰² SEC v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (finding administrative action is valid only if it rests on the agency's exercise of judgment, and for courts to make those decisions would invade "the domain which Congress has exclusively entrusted to the agency").

³⁰³ Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199 (1969) (asserting *Chenery* rule is sound if the requirement of a "reasoned decision" is an important tool for curbing arbitrary action).

³⁰⁴ RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKAIL, *ADMINISTRATIVE LAW AND PROCESS* 353 (4th ed. 2004). The authors, however, later express their own preference for only limited review, that is, review for grossly inadequate reasoning. *Id.* at 403.

enforcement decisions than one for broad outer limits on police behavior. Yet judicial review of administrative decision making is similarly designed to leave considerable and largely unreviewed decision making authority in the hands of those subject to review.

Ascertaining the actual rationales for police decisions is arguably more difficult than determining the grounds on which administrative decisions are actually made. Law enforcement decisions, unlike those of administrative agencies, do not occur in a situation encouraging, or sometimes even permitting, contemporaneous articulation of the basis for decisions. Judicial review of administrative agency action often occurs during the administrative process. Thus remands to agencies for articulations of the bases for actions still in the process of being taken or implemented is possible.³⁰⁵ Exclusionary sanction review occurs entirely after the fact. Thus there is no opportunity to permit police to provide during-the-process articulations of the bases for actions taken.

Given the opportunity in administrative procedure for remands for reconsideration, judicial review may function less as review than as a means of encouraging agencies to reconsider the merits of their decisions in light of redefined permissible objectives.³⁰⁶ Again, the strict after-the-fact nature of exclusionary sanction review means that it cannot work in a similar fashion. To the extent that the administrative law approach is desirable or acceptable because the administrative process permits during-the-fact inquiries into subjective rationales and after-the-fact reconsideration, it may not be appropriate for the much different review conducted by means of exclusionary sanction law.

³⁰⁵ See *id.* at 403 (asserting that courts often leave agency action in place but remand cases for agency to address deficiencies in reasoning).

³⁰⁶ Friendly, *supra* note 303, at 207-08 (stating that *Chenery* rule serves to permit courts to require agencies to rethink their decisions).

b. Appellate Judicial Review Model

Fourth Amendment law might draw not from the administrative model but instead from the approach often used in judicial appellate review of lower court actions.

In this context, trial courts are often affirmed on any possible bases that support the actions taken, even if the appellate records make clear that the trial courts did not act on those bases.³⁰⁷ If trial courts can be affirmed on grounds they did not rely on, and of which they were blissfully unaware, why cannot police officers' actions be held reasonable or otherwise acceptable if, on review, grounds on which those officers could have acted acceptably can be developed? Why, in other words, should not police officers be viewed as lower courts rather than administrative agencies for purposes of review?

The rule was supported by an early Wisconsin case in these terms:

[Affirming a trial court order on the ground that it is right regardless of the reasons given] tends to put a finish upon litigation when any other [course] would often needlessly re-open matters to further contests, leading to further large private and public expenditure and waste, without any reasonable probability of reaching a more just termination of the matter.³⁰⁸

Treating law enforcement decisions like trial court decisions may similarly sacrifice no chance for "more just" results. It avoids a cost even higher than that of further expensive contests, since in the suppression context the matter cannot be reopened but the prosecution is simply deprived of evidence with no chance to salvage that evidence by having the matter analyzed correctly

³⁰⁷ *E.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 295-302, 306-12 (1990) (upholding state judgment reversing conviction because harmless error did not apply because, although harmless error rule did apply, the record failed to establish that the error was harmless).

³⁰⁸ *Harris v. Welch*, 134 N.W. 1041, 1044 (Wis. 1912).

the second time.

The appellate review "rule," however, may be nothing more than an awkward fiction, unsupportable on principle.³⁰⁹ It may be invoked primarily to enable appellate courts to affirm where they are persuaded that error occurred but did not determine the outcome below and where the appellate tribunals are unable or unwilling to defend affirmances on harmless error grounds. If the appellate review approach is a dishonest fiction, of course, the case for expanded use of it is considerably weakened.

In any case, the rule is not unqualified.³¹⁰ One of its limits arguably demonstrates that its underlying principle is inapplicable to exclusionary sanction policy. A number of courts have recognized that an appellate court should not affirm a trial court on a basis not in fact relied upon by the trial court if that basis involves the exercise of discretion and the record fails to make clear that the trial court, if compelled to exercise that discretion, would reach the same result it actually reached on other

³⁰⁹ An early Missouri discussion of the rule nevertheless stressed the wisdom of trial judges explaining the rationales for the decisions and of the provision of those explanations to the appellate courts. *Hanel v. Freund*, 17 Mo.App. 618, 621-22 (Mo. Ct. App. 1885) (stating that trial judges' explanations are "in many cases of essential aid to us").

³¹⁰ The Supreme Court has refused to apply the general rule where the trial court's failure to address the ground relied upon by the appellee on appeal unfairly deprived the appellant of an adequate opportunity to "respond." *Giordenello v. United States*, 357 U.S. 480, 488 (1958) (refusing to hold arrest, held valid as one pursuant to warrant by trial court, as valid warrantless arrest, where this would deprive appellant of fair opportunity to cross-examine officer or introduce evidence on warrantless arrest theory); *see also*, *People v. Gorak*, 242 Cal. Repr. 307, 311 (Cal. Ct. App. 1987) review denied (affirming on theory not relied upon below only upon a determination that appellant could not have introduced any evidence that would have "defeated" the theory); *State v. Montoya*, 937 P.2d 145, 149-50 (Utah Ct. App.1997) (finding due process permits appellate court to affirm on ground not relied upon below only if record contains sufficient and uncontroverted evidence supporting that ground to place one on notice that the prevailing party might rely on the ground on appeal). Seldom or never will persons affected by law enforcement conduct be able to make any reasonable contention that judicial review on grounds not relied upon by the officers deprived them of opportunities there at the scene.

grounds.³¹¹ An appellant is entitled, in other words, to actually have the benefit of the trial court's exercise of discretion, not just to a record that would support an exercise of discretion. Thus, action below is properly upheld on a basis not relied upon below only if that basis is one that clearly would have been relied upon by the decision maker below, had the basis been considered by that decision maker. If the appellate review rule is proper only if so qualified, it arguably cannot be regarded as appropriate for law enforcement situations.

Seldom will the courts be able to reliably conclude that officers, properly motivated, would have decided to act as they did on other grounds.

Most perceptions of judicial review of law enforcement conduct recognize that law enforcement officers' decisions are largely discretionary ones. Those who encounter law enforcement officers are thus entitled to have officers properly exercise that discretion. Judicial review via the exclusionary sanction should recognize this and encourage the exercise of discretion of the

³¹¹ *E.g.*, United States v. Ross, 9 F.3d 1182, 1189 n.7 (7th Cir. 1993), *vacated on other grounds*, 511 U.S. 1124 (1994), *rev'd on other grounds*, 40 F.3d 144 (7th Cir. 1994) (refusing to uphold revocation, discretionary with district court, on grounds other than those given by district court where record failed to make clear that district judge believed those grounds alone warranted revocation); Snyder v. Am. Legion Spenard Post No. 28, 119 P.3d 996, 1001 (Alaska 2005) (finding rule does not ordinarily apply to discretionary rulings, except where it is clear on the record that the trial court would have exercised its discretion in a manner upholding the judgment actually reached on other grounds); Wagner v. Strickland, 908 So. 2d 549, 551 (Fla. Dist. Ct. App.2005) (refusing to affirm dismissal on ground not relied upon below because record contained nothing indicating trial court was inclined to exercise its discretion under that ground in favor of dismissal); People v. Peach, 280 Cal. Repr. 584, 589 (Cal. Ct. App. 1991); State v. Hobbs, 801 P.2d 1028 (Wash. Ct. App. 1990). *Cf.*, State v. Hines, 496 N.W.2d 720, 724 (Wis. Ct. App. 1993) (asserting that if trial court failed to properly exercise its discretion, it will nevertheless be affirmed if the record establishes that it would have been affirmed if it had properly exercised that discretion).

A criminal defendant's constitutional right to have the issue of liability determined by a jury means that a conviction cannot be upheld on appeal under a theory proper in the abstract but not submitted to the trial jury. McCormick v. United States, 500 U.S. 257, 270 n.8 (1991) (distinguishing *Arizona v. Fulminante*, 499 U.S. 297 (1990), discussed in note 280).

proper basis. Such encouragement is best provided by an approach that upholds officers conduct when discretion has been exercised on the appropriate basis and an acceptable result reached, not when officers make decisions that would be upheld if reached by appropriate consideration. Judicial review of law enforcement conduct most closely resembles appellate judicial review of discretionary trial court decisions, which, the more insightful case law recognizes, are not subject to affirmation on the basis of a record that would support a decision made after the proper exercise of discretion.

2. Professor LaFave's Extreme Position

Professor LaFave opposes subjective components to Fourth Amendment standards. He discusses it at greatest length in what he calls "[w]rong legal theory relied upon" situations.³¹² His opposition is based in large part³¹³ on his conclusion that regarding police action as unreasonable because officers failed to adequately reason out the propriety of their actions makes little or no difference. In support, he argues that had the officers done what the law seeks to have them do—consciously analyze the situation correctly—they would have done precisely the same thing they did, except on the basis of the correct legal theory. He concludes:

³¹² In these situations "the officer's 'underlying intent or motivation' simply reflects that he picked the wrong legal theory—claiming the arrest was for offense *A*, as to which probable cause was lacking, instead of offense *B*, as to which grounds for arrest were present." LAFAVE, *supra* note 12, § 1.4(d).

This is an unfortunate way to describe the situations, because it assumes that officers have a "legal theory" and the only problem is that it may be the wrong one. This leaves out the possibility that officers may have had no legal theory whatsoever.

³¹³ He also regards Fourth Amendment standards with subjective components as demanding that officer "act . . . with all the knowledge and acuity of constitutional lawyers." *See supra* text accompanying note 12. While some subjective requirements might demand something of this sort, this is not a valid objection to all possible such standards; *see supra* text accompanying note 12.

Suppression for police reliance on the wrong theory even when there exists an alternative valid theory would prevent unconstitutional searches only if, absent such an extension of the exclusionary rule, it may be assumed police will conduct arrests and searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of which they are presently unaware. That assumption, in my judgment, is fanciful.³¹⁴

He sees no need for the Fourth Amendment to attempt to modify law enforcement conduct where in retrospect there is a theory on which that conduct would be upheld.

On a functional level, LaFave's position rests on an assumption that if an officer has formed a theory that permits the officer to act, Fourth Amendment law cannot realistically hope to encourage the officer to make more certain that the theory is the appropriate one and that it in fact permits the officer to act.

This is really an expanded good faith rule, which LaFave takes to its logical objective extreme: Officers who act in good faith on a legal theory have done all that can be expected or demanded. They so often act in actual good faith on a legal theory that the law will not inquire whether this was so in particular cases. The Fourth Amendment's function is therefore adequately served if the officers' action is supported by a showing that a reasonable officer could or would have formulated and acted on a motivation that the courts would later accept.

Professor LaFave is probably correct in part. To the extent that the nuances of Fourth Amendment law trickle down to officers making the decisions, there may be little or no risk that those officers will respond by consciously acting in a way that seems illegal to them in reliance on lawyers' ability to develop a legal theory supporting the action.

What is more likely is that officers will simply place even less emphasis on their need to legally analyze situations. If Fourth Amendment law actually conveys a message to those in the field, it may be one of encouragement to act on impulse or intuition

³¹⁴LAFAVE, *supra* note 11, § 1.4(d), at 124.

and let the lawyers sort out the legalities later.

More generally, the lack of a subjective component to Fourth Amendment standards may to some extent contribute to a general attitude on the part of law enforcement that Fourth Amendment law is so uncertain, unrealistic, and perhaps even illegitimate that it can with reasonable confidence simply be disregarded. This cannot help but further increase the already considerable difficulty of persuading law enforcement that Fourth Amendment rules should be respected because doing this is the right thing to do.

LaFave's basic mistake, however, is that he assumes there is no important Fourth Amendment reason to worry about police conduct that under some current theory of Fourth Amendment law would be held reasonable by the courts.

In fact, Fourth Amendment substantive and procedural law has considerable slippage. It does not purport to identify and penalize all instances of law enforcement conduct in fact improper. Almost certainly, we rely in large part on the good faith of officers making decisions in the large majority of cases in which there will be no formal legal scrutiny of their actions. Where Fourth Amendment scrutiny does occur, almost certainly it only identifies and penalizes the most egregious cases.

Professor LaFave's analysis ignores the potential value of Fourth Amendment law in stimulating proper analysis of situations by law enforcement officers themselves.

This will certainly make a difference in some cases. *Devenpeck* makes this clear. Whether or not the courts would have upheld the arrest as one for an offense related to the use of wig-wag headlights, the record strongly suggests that the officers—quite reasonably—would not in fact have made it on that basis.³¹⁵

³¹⁵

Transcript of Oral Argument at 11-12, 26-27, *Devenpeck v. Alford*, 543 U.S. 146 (2004) (No. 03-710).

3. Professor Burkoff's Moderate Position

Professor John Burkoff³¹⁶ addressed the issue using as an example what the prosecution might be required to prove to justify as reasonable a search of premises as based on probable cause to believe burning marijuana was in those premises, in turn based on the smell coming from the premises. He would require that the officer actually smell the odor and subjectively recognize it was burning marijuana. But he would not require proof that the officer subjectively believed that his identification of the odor as marijuana met the applicable legal standard for determining the reasonableness of the search.³¹⁷

Why? Because "there is no improper police conduct warranting deterrence."³¹⁸ If in fact identification of the smell as marijuana is under the law sufficient for a search, there is no legitimate Fourth Amendment interest served by penalizing officers who act on this basis even if they subjectively believe they are acting in violation of the applicable legal standard.

But this just misses the mark. The real question is *whether* important Fourth Amendment interests are served by penalizing such conduct because it was not motivated by an actual perception that the facts legally justified it. Systemic considerations suggest important Fourth Amendment interests might be served.

³¹⁶ John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982).

³¹⁷ *Id.* at 84-85.

³¹⁸ *Id.* at 93.

4. Appropriately Motivated Police Conduct as a "Practical" Fourth Amendment Goal

The case that reasonableness inherently makes properly motivated law enforcement conduct a necessary goal may not be persuasive. If this is a desirable but not conceptually necessary goal of Fourth Amendment law, it is important to consider how feasible and desirable such a goal might be.

Under current practice, some law enforcement conduct is certainly and by design not the result of officers' case-specific applications of a general standard. Rather, it is a developed but largely intuitive response to a particular situation.

In other situations, law enforcement conduct appears to be the result of developed reasoning—leading quickly to one result for one reason. Should the law seek to encourage officers to do more? For example, in *Devenpeck*, should the law seek to encourage officers like Devenpeck once they have decided to arrest on one basis to continue "thinking" or "worrying" about other possible grounds on which the arrest might be based?

Perhaps the realities of some aspects of law enforcement mean that some activities by officers simply cannot be the result of conscious analysis and consideration. The time frame in which they must be taken simply precludes this. To the extent that this is the case, of course, any effort by Fourth Amendment law to force conscious analysis and consideration is bound to fail.

Perhaps where conscious analysis is a mechanically attainable goal, it is not a desirable one because of the costs that would be incurred by success. The delay and indecision that would result might well make officers' actions less effective in apprehending offenders, preventing crimes in progress from being completed, or assuring the safety of the officers as they perform their tasks.

The two considerations are certainly related. To the extent that officers perceive conscious analysis and consideration as endangering their safety, for example, they are quite likely to resist it to the degree that it becomes a functionally-impossible goal.

Lawyers generally think that legal education and experience

conditions them to “think like lawyers,” and that this is a good thing. It may be for lawyers but not everyone. The case for a subjective component of Fourth Amendment reasonableness may reflect a misperception—generated largely by lawyers—that everyone should be pressed to think as much as possible like a lawyer.

The case for this was made in *Robinson*, although by the time the issue reached the Supreme Court the issue had apparently dropped out of the case. In *Robinson*, the officer testified regarding his state of mind when he searched Robinson: “I just searched him. I didn't think about what I was looking for. I just searched him.”³¹⁹

The en banc District of Columbia Court of Appeals first remanded the case to the trial court for a further factual hearing on issues the court concluded were raised on appeal but not sufficiently put before the trial court. On remand, the trial court was to address the scope of the search made in this case “and whether departmental practice or regulations require the arresting officer in every case to search the person of the arrestee thoroughly and completely at the point of arrest in order to assure the safety of both.”³²⁰

On remand, the Government produced Sergeant Dennis C. Donaldson, an experienced police officer and instructor in the Training Division of the Metropolitan Police Department, to testify regarding police practices and training. He was asked whether there any training was done as to whether an officer who makes an arrest should ponder the alternative possible reasons for making a field search. He responded in the negative, stating: “The time area is critical and if the officer tried to reason now I am searching for this and now I am searching for that we feel he would be subjecting himself unduly to risk of injury.”³²¹

He explained that this meant that an officer is trained to locate

³¹⁹ United States v. Robinson, 471 F.2d 1082, 1089 (D.C. Cir. 1972).

³²⁰ United States v. Robinson, 447 F.2d 1215, 1221-1223 (D.C. Cir. 1971) (en banc).

³²¹ Brief for the United States-Petitioner at 20-21, *Robinson*, 414 U.S. 218 (1973) (No. 72-936), 1973 WL 173865.

and seize items that are potential weapons and evidence without carefully considering whether in fact there are. As an example, he offered that officers are trained to take ballpoint pens without trying to decide whether specific suspects will use them against officers, use them against themselves, or whether they are evidence. "We just teach them to react and take it."³²² The prosecutor, summarizing his understanding the Government's testimony, explained to the trial judge:

[A]n officer on the street, once he makes an incustody arrest does not stop to ponder the various purposes that might be conjured up later by some lawyer for making the arrest and search. He is taught at the academy that he has the right to make a thorough search once the subject is placed in custody The officer doesn't stop and conduct the mental gymnastics of trying to think maybe he has a weapon he can use against me, maybe he has something that he can harm himself with or maybe he has some evidence on him and, therefore, I am going to make the search for these three reasons [T]here just isn't time for officers to pause and think about the purposes. They are taught to react They are taught that there are three purposes for searching but the academy does not attempt to tell the officer to stop and think about these various purposes when he must react very quickly to a particular situation.³²³

Although the Government did not explicitly make this point in *Robinson*, it was clearly arguing that field arrest situations by their nature did not permit the sort of intellectual scrutiny that the Government saw *Robinson* as arguing the law should encourage and perhaps demand.

Quite likely, the *Robinson* majority agreed. This may well explain why the Court so strongly and unnecessarily stressed that in the search incident to arrest context, the reasonableness of a search does not depend on the officer's subjective

³²²*Id.* at 21.³²³

Appendix, at 91-92.

motivation.³²⁴

If this is persuasive in the *Robinson* situation, how many more law enforcement decisions may by their nature make subjective reasoning an unrealistic objective?

To the extent that this is in fact the case, perhaps the problem can be handled by limiting any requirement of proper motivation to those situations in which case specific justifications are required. In *Buie* sweep situations, for example, no case specific justification is required for examination of locations immediately adjoining the arrest where concealed persons might be located.³²⁵ Reasonableness then might impose no requirement of proper motivation, beyond awareness that an arrest or other action sufficient to trigger the right to search has been taken. But a broader sweep of the premises requires at least an objective for fearing harm from others on the premises. In addition, reasonableness might properly require a showing that a sweep was in fact motivated by actual concern of this sort.

G. Costs of a Partially Subjective Standard: Expeditions into the Minds of Police Officers

Opponents of incorporating subjective standards into Fourth Amendment law have stressed the costs of applying Fourth Amendment standards requiring consideration of the states of mind of the officers whose actions are challenged. They have made almost a mantra of Justice White's *Painten* warning that such expeditions into the minds of police officers would constitute "a grave and fruitless misallocation of judicial resources."³²⁶

The basic concern is that such inquiries would always or at least usually be timeconsuming and further would seldom produce accurate results. This is on its face a strained argument as applied to criminal litigation, given that the substantive standards for criminal liability are based on the assumption that it is both appropriate and possible to inquire into the minds of

³²⁴ *Robinson*, 414 U.S. at 235-36.

³²⁵ See *Maryland v. Buie*, 494 U.S. 325, 337 (1990).

³²⁶ See *supra* note 52 and accompanying text.

those accused of crime. There is no obvious reason why expeditions into the minds of police officers should be any more difficult or expensive than those into the minds of offenders.

Further, the Supreme Court's case law itself provides little support for the claim. None of the cases involved a careful and structured effort to determine the precise state of mind of the officers involved. Certainly the Court could not say that its own cases demonstrate the futility of expeditions into officers' states of mind.

Perhaps more fruitful conclusions could be drawn from the experience of the Oregon courts, in which inquiries into officers' states of mind have been required since at least the Oregon Supreme Court's holding in 1986 that under the state constitution the requirement of probable cause has a subjective as well as an objective component.³²⁷ The reported decisions indicate that the subjective components of the state constitutional requirements have been the subject of extensive litigation. A considerable number of those decisions appear to turn on conclusions by trial or appellate courts—or both—that officers acted without the necessary subjective states of mind. While generalization is risky, such determinations appear to be less common in recent years.

Amazingly, not until 1997 did the Oregon Supreme Court make clear that the prosecution could show that officers acted with the required subjective states of mind by means of evidence other than the explicit testimony of the officers themselves. In *State v. Belt*,³²⁸ the court held that circumstantial evidence—specifically in *Belt* the officer's conduct after receiving information—could permit an inference that the officer subjectively suspected the suspect of having committed an offense.³²⁹

³²⁷ See *supra* note 9 and accompanying text.

³²⁸ 932 P.2d 1177 (Or. 1977).

³²⁹ *Id.* at 1180 (finding officer's conduct in approaching suspect whom complainants said had solicited them for sex in exchange for money, where no evidence provides a contrary explanation for that conduct, supports the inference that the officer subjectively believed the suspect committed a crime).

Although the case law disclaims reliance upon “magic words” in the prosecution's testimony, the appellate opinions suggest some emphasis upon the terminology chosen by the testifying officers. In *State v. Dowdy*,³³⁰ for example, the question was whether the officer, before tests on a white powder were run, subjectively concluded it was in fact a controlled substance. Upholding a trial court finding that the officer did not form that belief, the court of appeals noted that the officer in his testimony never said that at that point he believed the white powder was a controlled substance. It rejected the prosecution's argument that testimony that any experienced police officer would have reached this conclusion compelled the inference that this officer must have done so.³³¹

Whether an officer had probable cause before administering sobriety tests was at issue in, among other cases, *Winroth v. DMV*.³³² The officer testified he was not sure he had probable cause until after the suspect had performed the tests, although he also stated that if the suspect had refused to take the tests he would have thought the suspect had something to hide and “probably would have arrested him.” The court of appeals concluded this testimony failed to show that the officer in fact determined he had probable cause and thus grounds for an arrest. Under the testimony, the suspect never in fact refused the tests and thus the testimony did not establish that the officer in fact made that subjective determination.³³³

Where an officer is shown to have failed to act on what the prosecution claims later was a decision that permitted action, the Oregon courts have found the lack of the required subjective mental state. In *State v. Meier*,³³⁴ the officer observed Meier with a notebook containing notations that might have been records of drug sales. He approached Meier, obtained his name, and asked for consent to search Meier's nearby car. Meier refused. The

³³⁰ 844 P.2d 263 (Or. Ct. App. 1992).

³³¹ *Id.* at 265.

³³² 915 P.2d 991 (Or. Ct. App. 1996).

³³³ *Id.* at 995.

³³⁴ 929 P.2d 1052 (Or. Ct. App. 1996).

officer withdrew but remained nearby, anticipating that Meier would drive off and planning to then arrest him for driving on an suspended license. When Meier did not drive off, the officer contacted Meier's parole officer who authorized the officer to take Meier into custody. The officer never testified he believed he had probable cause to believe Meier engaged in drug trafficking. The court of appeals concluded the prosecution had failed to justify the detention as an arrest based on probable cause to believe Meier committed a drug offense violation.³³⁵ It explained:

[T]he officer's conduct demonstrated that he did not believe he had probable cause to arrest. On defendant's initial refusal to consent, the officer withdrew and watched from a distance, hoping to conduct a search by arresting defendant for a traffic offense. When defendant did not leave and the officer learned of defendant's parole status, the officer contacted the parole officer in order to proceed. Those were not the actions of someone who subjectively believed that he had probable cause to arrest on a drug or weapons charge.³³⁶

All in all, the Oregon appellate case law does not demonstrate that the state's expeditions into officers' states of mind is "a grave and fruitless misallocation of judicial resources." It does suggest that search and seizure standards with subjective components pose difficult problems for courts. Nothing, however, indicates that these problems are any worse or more frequent than other complex fact questions raised by search and seizure law.

The Oregon case law does suggest that in busy trial court litigation, the parties and the court seem to have some difficulty identifying and focusing in upon subjective considerations. Trial judges appear reluctant to make specific findings of fact that identify and resolve what on appellate review become significant matters of contention. This, of course, complicates appellate review.

³³⁵ *Id.* at 1052-55.

³³⁶ *Id.* at 184.

H. Costs of a Partially Subjective Standard: Blurring of "Bright Line" Rules

Interjecting a subjective element into Fourth Amendment reasonableness, the United States argued in *Brigham City*, would—at least in the context of emergency entries—“necessarily import variability and instability into the law.”³³⁷ This, in turn, would reduce the value of case law in providing guidance to officers and invite offensively inconsistent applications of the law.³³⁸

Precisely how the addition of a subjective component to a Fourth Amendment standard would have this effect was not developed by the Government. In the abstract, at least, no incremental ambiguity is added by inserting a subjective component, if that is carefully defined. If an officer understands the objective component of probable cause, for example, it is unlikely that an officer would fail to understand what is meant by a requirement that the officer conclude that probable cause exists.

Perhaps the problem is uncertainty as to what objective manifestations of a state of mind are required to assure that the prosecution will later be able to persuade a court that the state of mind actually existed. The officer in *Meier*, discussed in the last section, might for example be left unclear as to what he is required to do if he decides that probable cause exists but nevertheless wishes to also pursue some other alternative, such as detention for violating a parole condition.

Quite likely, however, the real source of complaint is not the subjective nature of the new component. If the objective component demands only a showing that a reasonable officer could have formed a particular belief, the addition of a subjective component demanding proof that the officer actually did form this belief increases the burden on the prosecution. But this increase comes from the movement from a “could have” standard

³³⁷ Brief for the United States as Amicus Curiae Supporting Petitioner at 19, *Brigham City v. Stuart*, 122 P.3d 506 (Utah 2006) (No. 05-502).

³³⁸ *Id.*

to a "did" one, not from an objective standard to a partly subjective one.³³⁹

III. CONCLUSION: GIVE SUBJECTIVITY A CHANCE

On balance, and despite the increasing hostility of the Supreme Court to this position, Fourth Amendment standards should contain an initial subjective component. When in litigation the prosecution defends law enforcement conduct as reasonable, it should be limited to those general legal theories it can prove were actually and subjectively within the analysis engaged in by the officers in deciding to take that action.

This is not because the nature of reasonableness somehow conceptually requires that officers have been motivated by the legal grounds later relied upon in litigation. Nor it is because officers' analyses significantly impact the intrusiveness of the searches and seizures. Rather, it is because such a definition of reasonableness is likely to further the effectiveness of Fourth Amendment law, including the exclusionary sanction, in preventing law enforcement conduct that unjustifiably intrudes upon Fourth Amendment protected interests.

There is virtual agreement that Fourth Amendment law should encourage officers to behave constitutionally by condemning their conduct as unreasonable when they fail to so behave. There is similar agreement that this means the prosecution should be able to defend the admissibility of evidence only on the basis of those facts subjectively known to the officers. Clearly we are agreed that we should use Fourth Amendment law to encourage officers to fully develop their subjective knowledge of the facts that would support intrusive action by them.

No court or commentator has provided a satisfactory rationale for stopping there. We seem to be agreed that ideally officers should have some subjective knowledge of the law defining when

³³⁹ In *Brigham City*, the Government urged a standard that would require only a showing that the facts support a reasonable belief. *Id.* at 17. This is essentially a "could have" standard.

they can—in Fourth Amendment terms—reasonably act intrusively. And we seem to be agreed that ideally officers should apply this known law to the known facts and act only after deciding that this application indicates their actions would be reasonable.³⁴⁰ Why not make clear to officers that they must know the law as well as the facts and have the ability to apply that law to the facts we demand they know?

The absurdity of what passes for analysis was obvious in *Devenpeck*, when the Government argued that for some unspecified reason Fourth Amendment law could acceptably consider what information goes into officers' minds but could not look to what comes out of their minds.³⁴¹

Professor LaFave fears that requiring knowledge of the law is too ambitious and will unrealistically demand that police officers act in the field like constitutional lawyers presenting argument to exalted appellate courts. This potential problem can be avoided by requiring only awareness of the general legal theory. Basic concepts of probable cause and reasonable suspicion should not be beyond the capacities of officers. If they are, those concepts need to be revised.

Since Justice White's warning in *Painten*, there has been a widespread assumption that case-by-case inquiry into officers' states of mind would be impractical. It will be difficult and often produce inaccurate findings. In any case, it will take too long to be worth the cost.

There is absolutely nothing to support this assumption. Common sense suggests it without support. Modern substantive culpable mental state requirements for conviction of offenders have not clogged the courts. There is nothing to suggest that law enforcement officers are more inscrutable than those who commit antisocial acts.

³⁴⁰ The reasonable officer who is the benchmark of an objective criterion is one with "a reasonable knowledge of what the law prohibits." *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)); *accord, id.* at 922 n.23 (stating that inquiry is "whether a reasonably well trained officer would have known that the search was illegal").

³⁴¹ See *supra* text accompanying note 243.

Officers may be tempted to take liberties with the truth in their testimony. Some may give in. Some undoubtedly do now in litigation applying so-called objective standards. Nothing suggests that police perjury would be worse under a system applying standards with a subjective component.

The Supreme Court itself has acknowledged that ascertaining what a reasonable officer would know or believe in a specific situation is probably more difficult than ascertaining what a specific officer knew or believed.³⁴² Quite clearly, the Court itself has at least sometimes rejected Justice White's colorful but unsupported *Painten* warning.

Would such an approach make any difference? It might. Or at least there is little reason to fear that this would make any less difference than other positions the law embraces as a matter of Fourth Amendment doctrine.

What about costs in terms of loss of reliable evidence of offenders' guilt? There is really a strong argument that society has no legitimate interest in being able to benefit from information acquired only because law enforcement officers mistakenly judged the constitutional reasonableness of their planned activity. Any such loss may be an appropriate one.

But the problem can be minimized by adopting the second part of the proposal set out earlier: The prosecution can defend the reasonableness of law enforcement action on the basis of a legal theory not within the officers' own subjective analysis of the situation if it establishes the applicability of a version of inevitable discovery. To do this, it must show that had the officers not proceeded on the legal conclusion they actually relied upon, they would have considered the other legal theory, decided it applied, and acted in reliance on that theory.

Any such approach would have to be developed and applied with sensitivity to the risk that as applied to some types of law

³⁴² Whren v. United States, 517 U.S. 806, 815 (1996) (finding that "it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act").

enforcement activity it pursues an unrealistic objective. In some contexts, Fourth Amendment law may simply be unable to realistically demand that law enforcement action be the product of officers' relatively careful application of the law to the known facts.

Where this turns out to be the case, Fourth Amendment law should be carefully molded to accommodate this. Essentially this is what was done in *Robinson*. The Court clearly concluded that the realities of law enforcement practice meant that officers could not be expected, on a case-by-case basis, to consider whether the basis for the arrest gave rise to enough reason to fear the presence of weapons or destructible evidence to justify an incidental search.³⁴³ This was easily accommodated by making the reasonableness of a search of an arrestee's person turn simply upon the occurrence of an arrest. Since Fourth Amendment law required no case-specific facts indicating the presence of weapons or evidence, there was no basis for arguing that officers should have to subjectively regard the search as necessary to locate such weapons or evidence.

Arguably the Court has taken the same approach to removal of occupants during a traffic stop. Given how critical the decision to remove the occupants from a vehicle may be to the safety of the officers, Fourth Amendment law arguably cannot realistically demand that officers be required to consider in each individual case whether objective standards for removal of occupants are met. This was resolved in *Pennsylvania v. Mimms*³⁴⁴ and *Maryland v. Wilson*³⁴⁵ by holding that Fourth Amendment law required for such action only that a reasonable traffic stop had occurred. No objective case-specific justification for the removal is required, and hence the officers need not be shown to have subjectively relied upon any case-specific justification.

The Supreme Court appears to assume that law enforcement officers will learn and comply with basic Fourth Amendment law. It has, however, been unwilling to define Fourth Amendment

³⁴³ See *Robinson v. United States*, 414 U.S. 218, 235 (1973).

³⁴⁴ 434 U.S. 106 (1977) (concerning driver).

³⁴⁵ 519 U.S. 408 (1997) (concerning passenger).

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reasonableness so as to require case-by-case consideration of whether officers have in fact done this. A Fourth Amendment approach to reasonableness that embraced a subjective component would demand that courts examine whether officers are living up to the Court's implied expectations. This might well have the not-insignificant benefit of calling the courts' attention to Fourth Amendment requirements or analyses that simply cannot be understood and applied by officers and thus need to be modified.

Brigham City probably reflects that the Supreme Court will not consider such an approach even in areas where other Fourth Amendment restrictions are minimal. But state courts considering whether to follow this same approach as a matter of state law should note the manner in which this Fourth Amendment law developed. There are good reasons why search and seizure standards should have subjective components and the Supreme Court has never given those fair consideration.

