INTRODUCTION
2006 FOURTH AMENDMENT SYMPOSIUM

PROGRAMMATIC PURPOSE, SUBJECTIVE INTENT, AND OBJECTIVE INTENT: WHAT IS THE PROPER ROLE OF "PURPOSE" ANALYSIS TO MEASURE THE REASONABLENESS OF A SEARCH OR SEIZURE?

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The National Center for Justice and the Rule of Law,[1] which is a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. In furtherance of its mission, the Center has established the *Fourth Amendment Initiative*. Perhaps no other amendment has such broad applicability to everyday life as does the Fourth Amendment. The Fourth Amendment is also a very complicated area of jurisprudence and the legal

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landscape is constantly changing as a result of new technology and court decisions. The *Initiative* promotes awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

A central pillar of the *Initiative* is annual symposiums on important search and seizure topics. On March 24, 2006, the Center hosted its fifth symposium on the Fourth Amendment, entitled *Programmatic Purpose, Subjective Intent, and Objective Intent: What is the Proper Role of "Purpose" Analysis to Measure the Reasonableness of a Search or Seizure?* The symposium coincided with the second day of a conference entitled *The Fourth Amendment: Contemporary Issues for Appellate Judges*, sponsored by the Center in cooperation with the National Judicial College, which was attended by approximately 30 appellate judges from as many states. They were joined for the symposium by 110 other attendees, while another 105 persons observed the symposium via the Internet.

This symposium addressed a central question about the reasonableness of a search or seizure: how relevant is the government agent's intent in measuring the propriety of that intrusion? This was not a conference about racial profiling.[2] One could argue, as many have, that racial profiling or pretextual actions that are motivated by race have resulted from the United States Supreme Court's eschewing an analysis of subjective intent. That may be a consequence of the Court's approach–and consequences are important. However, this conference was more concerned with structure: what

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[2] *See* Symposium, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure,* 73 MISS. L.J. 365 (2003) (featuring articles by Professors A. Morgan Cloud, David A. Harris, Tracey Maclin, and George C. Thomas, III).

should be the proper role of governmental intent in assessing Fourth Amendment reasonableness?

There is no easy answer to that question, especially if one considers the Supreme Court decisions addressing it. On the level of individual encounters of the police and citizens, one of the main principles of Fourth Amendment analysis for many years has been the measurement of a police officer's intent by examining the objective aspects of the encounter and not by inquiry into the officer's actual, subjective intent.[3] The Court has asked whether the actions are objectively justified based on probable cause or articulable suspicion of criminal activity known to the police officer; there is no examination of the actual motivations of the officer. Thus, for example, in *Whren,* a stop for a traffic offense was valid even though the police officers making it were seeking to investigate possible drug-related criminality.[4] Similarly, in *Atwater*, the arrest for not wearing a seat belt was considered valid, even though arguably motivated by a desire to harass the driver.[5] As another example, in *Robinson*, the Court found that a search incident to arrest was valid, even though the officer performing the search was not in fear for his safety.[6]

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[3] *See, e.g.,* Whren v. United States, 517 U.S. 806, 813-14 (1996) (collecting cases and rejecting Fourth Amendment challenges based on officers' actual motivations); Brower v. County of Inyo, 489 U.S. 593, 598 (1989) (holding inquiry into subjective intent inappropriate); Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted") (citing United States v. Mendenhall, 446 U.S. 544, 554 n.6 (1980)); Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (holding Fourth Amendment violation is objective inquiry and does not depend on the officer's state of mind); Scott v. United States, 436 U.S. 128, 138 (1978) (examining officers' actions and not his state of mind); United States v. Robinson, 414 U.S. 218, 236 (1973) (finding that for search incident to arrest, it does not matter that officer did not subjectively fear suspect or believe that the suspect might be armed).

[4] *Whren*, 517 U.S. at 813-14.

[5] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding reasonableness inquiry provides no substantive limitation on the ability of the police to arrest for minor offenses that are based on probable cause to arrest).

[6] United States v. Robinson, 414 U.S. 218, 235 (1973) (holding that a search

Despite the many Supreme Court opinions rejecting an inquiry into subjective intent, numerous lower courts persist in using it. Illustrative is *Brigham City v. Stuart*,[7] where police officers responded to a house based on a complaint of a loud party. Upon arriving at the scene, they observed, through the window on a screen door, four adults in the kitchen restraining a juvenile. The juvenile broke free at one point and hit an adult in the face. As the adults continued to attempt to restrain the juvenile, the police entered the house. The Supreme Court took the case to resolve a split in the lower courts on the role of subjective intent in the application of the emergency doctrine. Two federal appeals courts and six state supreme courts had found no role for subjective intent and believed that the sole measure of reasonableness was whether a reasonable police officer would have believed there was an emergency. On the other hand, three federal appeals courts and thirteen state supreme courts had based the reasonableness of an entry on whether the officers were actually motivated to render aid. Resolving that issue, the Court in *Brigham City* unanimously rejected inquiry into subjective intent.[8]

On the other hand, in justifying departures from the individualized suspicion or warrant preference models, the Court has often relied on the premise that the governmental intrusion was not made to enforce a criminal law but was for some other purpose.[9] Yet, this non-criminal purpose analysis has been at least blurred in other cases.[10] The Court, in an at-

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incident to arrest was an exception to the warrant requirement and, given its historical pedigree, "reasonable" within the meaning of the Fourth Amendment, requiring no additional justification).

[7] 126 S. Ct. 1943 (2006).

[8] *Id.* at 1948.

[9] *See generally* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness,* 2004 UTAH L. REV. 977 (discussing the various ways in which the Court measures reasonableness).

[10] *See, e.g.,* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990) (permitting use of roadblocks to enforce the criminal law prohibition against drunk driving); New York v. Burger, 482 U.S. 691, 712-13 (1987) (permitting suspicionless search of an automobile junkyard pursuant to a statute regulating

tempt to distinguish between similar suspicionless intrusions, has recently relied on the "programmatic purpose" of the intrusion, which looks not to the subjective intent of the individual officer, but to the purpose of the higher ups who designed the program.[11] Thus, for roadblocks, which are suspicionless stops with most–if not all–of the same objective characteristics, the Court has reached different results based on differing motivations. In *Edmond,* where the roadblock was used to investigate drug crimes, and hence the primary purpose was characterized as advancing crime control, the stop was impermissible.[12] In *Lidster,* where the roadblock was used to solicit information from citizens concerning a hit and run accident at that location, the stop was pronounced valid.[13] In *Sitz,* where a roadblock was used to detect drunk drivers, the Court found that the primary purpose was to promote highway safety and, hence, the stop was reasonable.[14]

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vehicle dismantlers and observing that a state may enforce its criminal law goals through the regulatory process).

[11] City of Indianapolis v. Edmond, 531 U.S. 32, 45-46 (2000); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 81-86 (2001) (distinguishing between ultimate goal and immediate purpose for search and concluding that close examination of the immediate purpose of drug testing of pregnant patients is "indistinguishable from the general interest in crime control" and not a special need).

[12] 531 U.S. at 42. The *Edmond* Court asserted that, although subjective intentions play no role in ordinary probable cause analysis, "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion." *Id.* at 45-46. The Court emphasized that the purpose inquiry "is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene." *Id.* at 48. Although recognizing "the challenges inherent in a purpose inquiry," the Court maintained that lower courts could "sift[] abusive governmental conduct from that which is lawful" and that "a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar." *Id.* at 46-47.

[13] Illinois v. Lidster, 540 U.S. 419, 421 (2004) (upholding roadblock to seek information about recent crime in area).

[14] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (balancing "the State's interest in preventing drunken driving, the extent to which [the checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon [stopped] motorists" in upholding the intrusion).

The complexity of Supreme Court jurisprudence is further illustrated by the sometimes expressed concern with subterfuge; thus, an inventory search of a vehicle cannot be used as a pretext for an exploratory search.[15] As a final example, in national security cases, Congress and the courts sometimes focus on actual intent, with the permissibility of identical actions turning on whether the primary purpose or a purpose of the search is for national security or for the investigation of ordinary crimes.[16]

Do all of these parts really fit together? Is the present structure workable? Is it consistent with the underlying pur-

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[15] Colorado v. Bertine, 479 U.S. 367, 371 (1987); South Dakota v. Opperman, 428 U.S. 364, 370-71 (1976). The search must be pursuant to a routine administrative policy and not part of an investigation. *Bertine*, 479 U.S. at 376-77 (holding police may search canister inside pouch contained in backpack inside locked vehicle either at roadside or at impoundment lot); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (holding police may search arrestee's bag and containers therein, rather than sealing the bag for storage pending owner's release); *cf.* Michigan v. Thomas, 458 U.S. 259, 261-62 (1982) (when officer found contraband during inventory search, search of remainder of vehicle permissible based on probable cause to believe it contained additional contraband). The function of an inventory search is to protect the owner's property, to protect the police against false claims for stolen or lost property, and to protect the police and others from potential danger. *Lafayette*, 462 U.S. at 646-47; *Opperman*, 428 U.S. at 369. Although the Court "purports to require standardized criteria to guide the officer's discretion," the Court actually permits officers conducting inventory searches a great deal of discretion. Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 543-44 (2002).

[16] Debra Livingston, Professor, Columbia Law Sch., Presentation at Fourth Amendment Symposium at the University of Mississippi School of Law: Purpose Analysis and the Wall Between the Law Enforcement and Intelligence Communities (Mar. 24, 2006) (examining the role of purpose analysis in building up the wall between the law enforcement and intelligence communities). After that presentation, Professor Livingston was nominated for the United States Court of Appeals for the Second Circuit and understandably withdrew from contributing an article.

pose of the Fourth Amendment? Is there a better structure?[17]

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[17] I have previously discussed my views on this. *See* Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness,* 2004 UTAH L. REV. 977. Purpose analysis, whether measured at the programmatic level or by plumbing the mind of individual officers, is a problematic approach. *Id.* at 1024-26. For example, nothing in the *Edmond* Court's analysis would prevent Indianapolis from simply re-labeling its program and conducting the same screening for drugs as an incident of an otherwise permissible checkpoint, see 531 U.S. at 47 n.2 (asserting that the Court "need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics"), which is to say that the distinction between a criminal law enforcement purpose and other purposes is illusory. *See* Camara v. Mun. Court of San Francisco, 387 U.S. 523, 531 (1967) (recognizing that most regulatory laws are enforced by criminal process); Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public,* 1989 SUP. CT. REV. 87, 89, 114-16 (rejecting distinction between regulatory enforcement and criminal law enforcement as "chimerical and irrelevant"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 411 (1988) ("[T]he penal-regulatory distinction misses [the] point that whatever the inspection's purpose, [it] still invades the individual's privacy."). Even if viable, such a distinction is unwise: "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530. Intrusions may be performed to determine whether a building meets fire safety codes, whether a motorist is intoxicated, whether automobile parts are stolen, or whether a child's welfare is being maintained. *See* Sodal v. Cook County, 506 U.S. 56, 69 (1992) ("What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all."). The fact that the intruder may be there for a relatively benign purpose should carry no weight in assessing the reasonableness of the governmental intrusion. Nor does it matter whether the intent is subjective to the individual officer or whether the purpose inquiry is made at the programmatic level. Indeed, such a distinction is particularly ironic in light of the search and seizure practices that motivated the Framers of the Amendment: suspicionless intrusions approved of at the "programmatic level," that is, writs of assistance and general warrants issued by executive officials to find illegally imported goods and authors and publications critical of the government. While I agree with the view that reasonableness must be assessed based on the facts known to the governmental agent, in assessing those facts the Court should employ objective criteria, such as probable cause or articulable suspicion or, where applicable, a warrant. In situations where *necessity* mandates that the government intrude in the absence of such criteria, the Court should employ a test that utilizes fixed, neutral, and objective criteria to measure reasonableness. *See* Clancy, *supra*, at 1026-41.

These are but a few of the questions that one might consider.

The Center believes that the symposium–and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at that event–significantly further the Center's mission and, more importantly, make significant contributions to the understanding of Fourth Amendment principles. The Center, and I personally, wish to thank the leading legal scholars who participated.

In *The Reasonable Policeman: Police Intent in Criminal Procedure,* Professor Craig Bradley examines police mental states across a variety of situations, considers how the Court has dealt with those situations, and seeks to determine if a better approach is available. Professor Bradley observes that "issues concerning police intent are present in virtually every Fourth Amendment case"[18] and "there is no such thing as a purely objective Fourth Amendment inquiry."[19] A significant portion of his article focuses on probable-cause based and reasonable-suspicion based situations and he carefully examines the state of mind required for such intrusions. For example, for probable-cause based actions, he observes that it must still be established that the facts were known to the officer. In such situations, he maintains, the appropriate inquiry is whether the police have a reasonable and good faith belief in the facts that objectively constituted probable cause. Similarly, he finds a role for an examination of the officer's subjective state of mind when probable cause is in issue and when the police make mistakes. More generally, he asserts that when the police have probable cause or reasonable suspicion, it is necessary that they "believe" in the truth of the evidence. He comes out differently, however, for protective actions by the police, such as frisks. In those situations, Professor Bradley maintains, police protection weighs heavily and he has "no

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[18] Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 372 (2006).

[19] *Id.*

difficulty allowing an automatic frisk, even if the police do not believe the suspect to be armed, at least when the case involves a crime where it is objectively reasonable to suspect that a weapon might be involved."[20]

The second article, by Professor George Dix, entitled *Subjective "Intent" as a Component of Fourth Amendment Reasonableness,* offers a comprehensive examination of the Court's "general hostility to subjective components of Fourth Amendment law."[21] He views the Court's treatment in its opinions of the role of subjective intent as "minimal" and therefore examines the briefs of the parties in many of the important cases to examine considerations "not fully reflected in the Court's explanations."[22] After making that survey, Professor Dix concludes that there has been a "complete lack" of a "careful argument in support of a subjective approach."[23] He further observes that "the Court's decisions in toto reflect an implicit recognition that purely objective standards for reasonableness are awkward to formulate and discuss"[24] and that the Court often uses terms that "assume both subjective and objective components."[25] He believes that the Court's discussions "leave [it] unclear how courts should approach [] so-called objective standards."[26] Professor Dix then proposes possible roles for officers' awareness in a variety of situations and begins by observing that the analysis of reasonableness must be based on facts known to the officer. He then examines a series of ways in which subjective intent could be utilized and the possible justifications for such approaches. Professor Dix believes that the "strongest case for broadly defined subjective components"[27] in measuring reasonableness is the recognition that

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[20] *Id.* at 368.

[21] George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 375 (2006).

[22] *Id.* at 376.

[23] *Id.* at 442.

[24] *Id.* at 443.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 458.

the Fourth Amendment "is essentially a regulatory regime"[28] and that 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."[29] Professor Dix believes that this requires consideration of the actor's state of mind. After examining the merits of several models on how best to formulate the reasonableness inquiry, he examines the costs of a partially subjective model, including Oregon's experience with doing so. On balance, Professor Dix concludes, Fourth Amendment standards should contain a subjective component.

In *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule,* Professor Andrew E. Taslitz focuses on one aspect of the debate over intent, offering an interesting perspective on the Court's treatment of the underpinnings of the good faith exception to the exclusionary rule. A central thesis is that the exclusionary rule, as interpreted by the Supreme Court, serves in part the "function of condemning the institutional *moral* culpability of the police."[30] Given that underlying rationale, the Court's focus on deterrence "seems incomplete."[31] Implicit in the Court's opinions on good faith, he finds, is an additional focus on "the moral culpability of the police and the expressive function of their conduct"[32] that is not identical with the traditional understanding of the goals of deterrence. When the Court first adopted the good faith exception, he asserts, the Court focused more on "the institutional aspects of police wrongdoing"[33] and "saw the institution of the police as akin to a separate legal person."[34] Professor Taslitz sees an analo-

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[28] *Id.*

[29] *Id.*

[30] Andrew E. Taslitz, *Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 MISS. L.J. 483, 485 (2006).

[31] *Id.* at 486.

[32] *Id.* at 488.

[33] *Id.* at 530.

[34] *Id.*

gy to principles of corporate liability, which he believes "sheds light on the Court's approach to good faith and suggests refinements"[35] to that doctrine. Corporate liability principles is a familiar area of the law where the "idea of distinctive personalities responsible for individual wrongful acts of those in their employ are reflective of a broader organizational moral culpability"[36] and, hence, offers lessons. By looking at the police departmental decisionmaking process in the same manner as one does in analyzing corporate liability, it can be determined if the officer's actions reflect the basic beliefs of the department. Acceptance of this analogy, Professor Taslitz maintains, "would lead to greater judicial intrusiveness into policing by creating stronger incentives for police departments to discourage the Fourth Amendment violations of individual officers"[37] but would also give the "police wide discretion in going about this task, and police compliance would give them a safe harbor for avoiding the shoals of the exclusionary rule."[38]

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[35] *Id.* at 486.
[36] *Id.* at 530.
[37] *Id.* at 489.
[38] *Id.*