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Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext

ABSTRACT. Since *Whren v. United States*, Fourth Amendment analysis has failed to appreciate the serious wrongfulness of pretextual police behavior—especially searches and seizures. This is not because a pretext test is impractical or philosophically unsound. Rather, the problem lies in the current focus of our Fourth Amendment analysis, which puts undue emphasis on the individual’s “right to privacy” and insufficient emphasis on responsible police behavior. The state’s investigatory power is held in trust by the police for the people. If we refocus our attention on the idea that the police power must be deployed in a responsible manner in keeping with that trust, we can see clearly what is problematic about pretext.

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INTRODUCTION

Two officers—Good Cop and Bad Cop—are sitting at a highway speed trap. Bad Cop is behind the wheel, and Good Cop is working the radar gun. The two have watched a steady stream of speeders go by, most traveling five to ten miles per hour over the limit. These petty violators are of little concern, however, because the trap is set for someone who will draw a big ticket.

The next car is only traveling sixty-six miles per hour in the sixty-five zone, but it is a luxury SUV with oversized wheels and flashy trim, occupied by four Hispanic youths. Bad Cop peels out behind with the lights flashing. Good Cop protests: “What are you doing? That car was barely speeding!” Bad Cop responds: “Something about those kids in that kind of car looks suspicious to me.” Good Cop replies: “But that is not a reason to pull someone over for *speeding*. In fact, I’m pretty sure the Constitution forbids it.” But Bad Cop gets the last word: “Look, they were speeding, weren’t they? Are you saying it’s wrong to stop a speeder when he’s speeding?”

After the SUV pulls over, Bad Cop gets out, rouses his sleeping drug dog, and brings him along despite the fact that he and Good Cop had failed to use the dog on any of their ten previous stops that day. As Bad Cop informs the driver that he was speeding and asks for a license and registration, he notices that the dog is modestly alerted as it approaches the driver’s side door. Now having probable cause to suspect possession of an unlawful drug, Bad Cop searches the vehicle, finding a small bag of marijuana on the driver and a few pills of ecstasy on one of the occupants. At trial, Good Cop relates the conversation from the “chase” in perfect detail and even produces an audiotape to corroborate. He testifies that although the car was technically speeding, he knows for a fact that Bad Cop would never have stopped the car for speeding—or used the dog—had he not considered its Hispanic occupants somehow “suspicious.”

I hope that the reader will share my intuition that there is something deeply troubling about Bad Cop’s police work in this scenario. He has exercised a powerful prerogative of the police force—the power to arrest a citizen traveling on the public streets and to peer in and around his car—in a manner that arouses a justified feeling of unease. Contained only by the clearly pretextual constraint of “stopping a speeder when he’s speeding,” Bad Cop’s more dubious motives and background assumptions appear free to roam at large. There seems to be something about this kind of police mindset—that liberated space for bad intentions—that should give the individual citizen both a moment of pause and the hope, perhaps, that the Constitution forbids this form of roving pretextual surveillance.

Indeed, this hypothetical poses what could be called the “pretext problem,” in which a power vested in the police for a particular purpose is employed against citizens to accomplish a different, and perhaps dubious, end. The unspoken purpose of Bad Cop’s speeding stop may be racial harassment, or it may be achieving a general law enforcement goal (such as drug interdiction) without the Fourth Amendment hurdles of warrants, probable cause, or even reasonable suspicion. In any event, neither end epitomizes the reason for which the police have been entrusted by the citizenry with the power to seize speeding drivers on public highways. As Good Cop recognizes, what seems to be required is a reason to pull a speeder over *for speeding*, not merely a reason to pull over someone who happens to be a nominal violator of the traffic laws. Otherwise, the traffic laws and other wide-reaching regulatory regimes might become easy vehicles for pervasive police supervision of every moment of waking life. Given the seriousness of the pretext problem, we might very well expect our Fourth Amendment doctrine to lay down some ground rules to avoid ubiquitous employment of pretextual searches and seizures.

Yet our current Supreme Court doctrine takes the side of Bad Cop and denies that police pretext is a Fourth Amendment problem at all. Rather than affirming Good Cop’s restrained approach to the reasons that ought to motivate exercises of the police power, the rule of *Whren v. United States*¹—a case specifically concerned with traffic stops—wholeheartedly affirms Bad Cop’s argument that it is acceptable to pull over a speeder when he is speeding, regardless of the deeper motivation for doing so. *Whren* and its ever-expanding progeny preclude any Fourth Amendment inquiry into the subjective motivations of officers acting at the scene of a stop, search, or arrest.² These cases look only to the objective criteria for a valid seizure or search—in this case, whether the speeder was actually speeding. Indeed, *Whren*’s insistence on an objective rather than a subjective inquiry is so strong that Bad Cop could sit upon the witness stand and profess that he acted on the basis of racial profiling alone, and there still would be no Fourth Amendment violation.³ My aim is to

1. 517 U.S. 806 (1996).

2. See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000). The *Whren* rule is also a favorite of the circuit courts, perhaps because it avoids many potentially difficult pretext claims. Citations to *Whren* for the purpose of dismissing pretext claims are ubiquitous: a Westlaw search returned approximately 5800 citing references indicating positive treatment.

3. It is of course true that selective enforcement of the law on the basis of race is unconstitutional under the Equal Protection Clause. Thus, as the *Whren* Court itself noted, it is not necessarily the case that defendants would be without a remedy in a situation like the one described above. See 517 U.S. at 813. But this answer to the racial profiling example merely misidentifies the problem. The constitutional concern is with pretextual reasons for

convince the reader that this turning of a blind eye to the problem of pretext represents a doctrinal wrong turn.

The argument would be easier if *Whren* were not so well regarded. *Whren* was decided unanimously⁴ and has since been extended unanimously by the Court.⁵ The objective approach at the heart of these cases is rooted in two decades of precedent⁶ and has been confirmed by a decade more. This is because the *Whren* rule has its reasons, many of which resonate deeply with our current ways of describing the protections of the Fourth Amendment.

Perhaps the greatest barrier to adequately addressing the pretext problem inheres in our current conception of the Fourth Amendment as providing an individual “right to privacy.” If we begin with the language of individualized privacy rights, then the problem with pretext becomes much harder to identify. In the speeding scenario, the driver whose car was stopped and searched had “waived” his Fourth Amendment rights by behaving in an objectively improper manner on the road. By speeding on the public thoroughfares, the argument goes, a person knowingly subjects himself to the intervention of the police, whether the violation is glaring or minute. And because the speeder’s *right* to be free from police intervention is *waived* regardless of the actual motives of the officer who makes the stop, the question of police intent is rendered irrelevant by the rhetoric of rights.

The rhetoric of individual privacy rights has also led the Court to apply objective rather than subjective criteria to the question of whether a particular search constitutes an “invasion” of an individual “privacy interest.”⁷ The Justices of the Rehnquist Court all agreed that a particular police action either does or does not invade a space considered private by an individual – his “right

making a traffic stop, not with racial discrimination as such. Note that our intuitive objection would not disappear if the ill motivation were unrelated to race. If the officer only pulled drivers over because they looked suspicious in their expensive foreign cars or urban clothing – that is, for membership in a *particular* and supposedly suspicious class, but not a *protected* class – that too would appear to be inappropriate investigatory behavior, despite the lack of a viable equal protection claim.

4. See *id.* at 807.

5. See *Devenpeck*, 543 U.S. at 147; see also *Bond*, 529 U.S. at 338 n.2 (applying the *Whren* rule to the question of whether an officer’s manipulation of a bus passenger’s bag was an unreasonable search); *id.* at 341-42 (Breyer, J., dissenting) (agreeing with the majority that subjective intentions of law enforcement officers are irrelevant to whether certain behavior constitutes an unreasonable search). The *Bond* Court, though divided on the outcome, was unanimous as to the applicability of *Whren*.

6. See *Whren*, 517 U.S. at 812-13.

7. *Bond*, 529 U.S. at 337.

to be let alone”⁸—on the basis of purely objective factors,⁹ independent of whether the officer intended to be invasive. This belief seems equally entrenched among the Court’s new members.¹⁰ Thus, as with waiver, the extent of an invasion into private space does not vary based on subjective police motives, rendering intent irrelevant to Fourth Amendment analysis from the vantage of the “right to privacy” approach.

These twin concepts of waiver and invasion— which cut strongly in favor of the *Whren* rule because they do not vary with officer intentions— necessarily flow from a conception of the Fourth Amendment that envisions each individual as the possessor of a right to privacy that can be waived or invaded. I call this argument for *Whren* the irrelevance principle: because only the “objective effect”¹¹ of law enforcement behavior is relevant to the questions of whether and how much a right or interest has been invaded, subjective motivations are wholly beside the point. As long as our vocabulary for invoking the Fourth Amendment is heavily laden with the rhetoric of individual privacy rights, *Whren* appears quite impossible to refute.

Thus, it will be necessary to find a way around the barrier created by our language of individual privacy rights if we are to confront the problem with pretext. To that end, I argue for a new vocabulary of Fourth Amendment protections that places a decreased emphasis on the rights of individual citizens and focuses instead on the responsibilities of the actors who wield the state’s powers of investigation and enforcement. My argument is not that the language of rights is completely inappropriate—of course, the Fourth Amendment itself speaks of “[t]he *right* of the people to be secure in their persons, houses, papers, and effects.”¹² Instead, I argue that the language of individual privacy rights directs our attention away from a more general skepticism of an unbridled police power that ought to animate our interpretation of the Fourth Amendment.

The goal is thus not to reject the rhetoric of rights in the Fourth Amendment context but to transcend it. The problem lies not with the word “right” itself but with its focus on the individual who presumably possesses the right and with her individualized perception of whether the right has been

8. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

9. See *supra* note 5 and accompanying text.

10. The Roberts Court appears to unanimously support the *Whren* rule. See *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006) (Roberts, C.J.).

11. *Bond*, 529 U.S. at 338 n.2.

12. U.S. CONST. amend. IV (emphasis added).

waived or invaded. If Fourth Amendment analysis can instead focus on “the people” at large, and on their right to a police force that acts in a manner that is responsible for and responsive to the enormous power it holds in trust for the public, then the problem with pretext should become clear.¹³

Instead of speaking of Fourth Amendment rights that inhere in citizens and that may be invaded or waived, we should conceive of the Fourth Amendment as imposing a responsibility that constrains state actors, requiring them to discharge their powers of investigation in a manner that keeps with the public trust. Much of the existing case law already reads in this power-skeptical way,¹⁴ and the idea of the exclusionary rule certainly stems from a concern with irresponsible law enforcement behavior.¹⁵ Indeed, the power-skeptical vision of the Fourth Amendment may better vindicate our intuitions about the Fourth Amendment and even our individual privacy interests. Thus, although the change that I advocate is semantic in a sense, it is an important change that can lead us to rethink the real-world rules of Fourth Amendment jurisprudence. Reviving the problem with pretext is only the beginning.

This Note proceeds in four parts. Part I introduces the *Whren* rule in its particulars and then examines frequently offered practical defenses for the rule. To respond to these defenses, and to cabin subjective pretext analysis to situations in which it is both possible and theoretically defensible, I limit my suggested approach to cases in which a pretextual motive is a but-for cause of the police intervention. Part II discusses and critiques the irrelevance

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13. Among other reasons to reject rights rhetoric is its tendency to unduly narrow the scope of our analysis. Rights rhetoric hones in on the rights-holder, and although the right so held may continue to function as a restraint upon other parties, our attention is often distracted from the responsibilities that those other parties may bear. Moving skepticism of the police power to the center of our Fourth Amendment vision, rather than treating the power as indirectly constrained by the “right to be let alone,” helps direct our inquiry to the conduct of the state actors. That change promises to trigger further changes in the outcomes of Fourth Amendment interpretation, with a different approach to *Whren* serving as only the first step along the road to a healthier jurisprudence.
 14. See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that an inquiry into the purpose of a drug-checkpoint program is essential for maintaining the integrity of the Fourth Amendment); see also *United States v. Leon*, 468 U.S. 897 (1984) (establishing a good faith exception to the exclusionary rule and thereby acknowledging the relevance of police intentions to Fourth Amendment analysis).
 15. See *Weeks v. United States*, 232 U.S. 383, 391-92 (1914) (stating, in defense of the federal exclusionary rule, that “[t]he effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority,” and fearing “[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures”).

principle's defense of *Whren*. Part III then builds upon this critique to offer a sketch of how a different, power-skeptical vocabulary for Fourth Amendment interpretation might be defended and what exactly it would entail. Part IV uses these theoretical observations to finalize a pretext test and concludes with some thoughts on how the abstract change in interpretive language that I advocate might bear real and practical fruit.

I. THE PRACTICAL POSSIBILITY OF SUBJECTIVE INTENT ANALYSIS

A. *The Whren Rule as a Rejection of the Pretext Problem*

Whren and its progeny broadly condemn any subjective inquiry into the motivations of individual officers. The petitioners in *Whren* unsuccessfully argued that evidence obtained during a traffic stop of their Nissan Pathfinder should have been suppressed because an ordinary officer, acting reasonably, would not have stopped them merely for the purpose of enforcing the traffic laws. They stipulated that the arresting officer did have probable cause to suspect some technical driving violations,¹⁶ but they argued that more than a mere technical violation should be required to justify the seizure. The petitioners, who were black, worried that because it is nearly impossible to comply with all of the traffic laws all of the time, officers would be greatly tempted to use such stops as pretexts for unrelated law enforcement activities such as drug interdiction.¹⁷ The petitioners therefore suggested that the rule should require not only a showing of probable cause to suspect a vehicular violation, but a showing that a reasonable police officer “would have made the stop for the reason given.”¹⁸ The D.C. Circuit had disagreed, noting that the question simply was not whether a reasonable officer *would have* stopped the car for the suspected traffic violation, but whether a reasonable officer “*could have* stopped the car for the suspected traffic violation.”¹⁹ Justice Scalia’s opinion for a unanimous Court held that “could” was the right question to ask.

16. See *Whren v. United States*, 517 U.S. 806, 810 (1996). Some of the violations were of a markedly nebulous character, including failing to give “full time and attention to the operation of the vehicle” and driving “at a speed greater than is reasonable and prudent under the conditions.” *Id.* (quoting D.C. MUN. REGS. tit. 18, §§ 2213.4, 2200.3 (1995)). It appears that one of the material facts bearing on the driver’s failure to give “full time and attention to the operation of the vehicle” was that he was seen committing the cardinal sin of glancing in the general direction of the passenger’s lap. See *id.* at 808.

17. *Id.* at 810.

18. *Id.*

19. *Whren v. United States*, 53 F.3d 371, 375 (D.C. Cir. 1995).

Justice Scalia's language strongly criticized the implied argument in the "would have made the stop" standard that the petitioners proposed—namely, that a traffic stop should be considered invalid if it had been motivated by something other than a desire to enforce the traffic laws. Scalia argued that prior case law actively foreclosed such a pretext analysis, quoting another famous case for the proposition that "[s]ubjective intent . . . alone does not make otherwise lawful conduct illegal or unconstitutional."²⁰ Scalia noted that it was long established 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."²¹ Thus, even though it was the traffic law that provided the legal justification for the stop in *Whren*, the arresting officer could have had the state of mind of a drug officer, not a traffic cop, without rendering the seizure unconstitutional. *Whren* thus announced the broad and now oft-cited rule that "[s]ubjective intentions play *no role* in ordinary, probable-cause Fourth Amendment analysis."²²

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20. *Whren*, 517 U.S. at 813 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). This proposition is very popular in the Fourth Amendment context. See, e.g., *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (holding that the otherwise valid warrantless boarding of a ship by customs officers was not invalid when motivated by an anonymous tip); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (holding that a post-arrest search, ordinarily valid for safety reasons, was not invalid when the officer did not believe it necessary for safety).
21. *Whren*, 517 U.S. at 813 (quoting *Scott*, 436 U.S. at 138).
22. *Id.* (emphasis added). In *Whren*, the petitioners intentionally avoided phrasing their suggested test in terms of subjective motivations or pretext so as to evade the holdings in *Robinson* and *Scott*. They maintained that their suggested test was "objective" because it asked the quasi-objective question of whether a "reasonable" law enforcement officer would have made the arrest "for the reasons given." *Id.* at 813-14. The Court did not consider this move compelling, finding it "plainly and indisputably driven by subjective considerations." *Id.* at 814. Indeed, Justice Scalia derided this so-called objective test as one that would not be able to take into account "*actual and admitted*" pretext even though it was plainly adapted to the end of assuaging the fear of pretextual searches. *Id.* The Court identified many of its reasons for the broad rule against subjective inquiry in its discussion of the failings of the petitioners' "empirical" or "objective" test. See *id.* at 813-16. I would clarify, however, that I fundamentally agree with the Court's argument that the petitioners' suggested test is merely a pretext test under another name, and I believe—again, along with the Court—that a mere pretext test would be preferable in any event. I will therefore not attempt to separate "objective" pretext tests from pretext tests pure and simple. Either subjective motivations count, or they do not.

B. The Practical Possibility of Rejecting Whren: The But-for Cause Limitation

Two kinds of arguments underlie the *Whren* rule: practical arguments about the possibility of subjective analysis and philosophical arguments about its relevance. Before turning to the philosophical arguments, it is necessary to counter two related practical arguments often invoked in favor of *Whren*. The first is that, in the great majority of cases, it will be nearly impossible to know the subjective motivations of individual officers. The second is that, even if the constituent motivations could be known, analysis of intent is unhelpful because human intentions are necessarily complex and impossible to disentangle. This latter argument is particularly compelling, and an adequate response requires narrowing the set of cases to which a pretext test can be workably applied. Thus, I suggest that a principled pretext test should reach only those cases in which an illicit motive is a but-for cause of the seizure or search.

The initial argument for the *Whren* rule is straightforward: human purposes cannot be divined by mere mortals, and in the absence of mind readers, it would be futile for courts to attempt to discover what motivated the past actions of individual officers. In large part, the only way to know what motivates a person to undertake certain actions is to ask her, and officers are loath to admit their own bad intentions, even if they do exist. Thus, a virtue of the *Whren* rule is that it saves the courts from a pointless inquiry that could only end in officers' asserting their virtue, with trial courts forced to take them at their word.

This argument is true as far as it goes, but that is not very far. In the first place, situations will certainly arise in which there is some direct evidence of individual actors' subjective purposes. An officer might express views in other situations that impugn his motives in previous or subsequent seizures. Or, like *Bad Cop*, an officer may disclose his secret purposes to coworkers or to third parties willing to testify at trial.²³ In other situations, an officer's motives can be ascertained from surrounding circumstances or from patterns of behavior. If an officer makes a speeding stop of a car traveling slower than the rest of traffic or exhibits a pattern of pulling over only certain minorities, we may rightly refuse to trust his intentions in particular cases. Not unlike the model of strict scrutiny suggested by Justice O'Connor in the equal protection context, scrutiny of police behavior in general can be used to "smoke out" illicit

23. This is not as unlikely as it may seem. People routinely express, and often foolishly record, otherwise secret subjective motivations that make their behavior incriminating. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (recounting direct evidence of impermissible subjective considerations in an employment decision).

purposes in particular instances.²⁴ Moreover, there is certainly a problem with a doctrinal rule that produces hypothetical horrors—such as Bad Cop’s testifying openly to his own racial profiling without any consequence—even if they are unlikely. Thus, although the inquiry required for a subjective motivational test will not often be a simple or easy process that produces crystal-clear results, this does not necessarily imply that the inquiry is not worth making.

To completely answer this objection, it is helpful to note that we can set a relatively low level for the defendant’s burden of proving impermissible pretext. Indeed, the sheer difficulty of subjective intent analysis that advocates of *Whren* helpfully identify only counsels against setting the bar too high if we intend for any pretext claims to prevail. This does not make the defendant’s showing a simple one—as I will argue, an adequate pretext test will require the claimant to make the difficult showing that an impermissible motive was a *but-for* cause of the law enforcement action. Yet this too will counsel against setting the burden of proof too high. Thus, I conclude that, in light of the but-for cause requirement, only a preponderance of the evidence or “more likely than not” standard should apply. Ideally, this low bar will show judicial receptivity to pretext claims despite the fact that, in the end, the defendant’s showing will be far from easy.

The second practical objection to subjective intent analysis is more potent. It argues that subjective analysis is not difficult but, rather, entirely pointless because human motivation is a complicated philosophical question, and actions are typically the product not of a singular purpose but of mixed motives that vary in their complexity. As a matter of philosophical theory and psychological reality, every police action is the product of countless motivating factors, ranging from the existence of a compelling level of probable cause to an officer’s mood. Some of these subjective motivations might predominate over others, yet surely none is *the* motivating factor. Subjective analysis is thus a waste of time, certain to produce nothing but a long laundry list of motivations—only some of which can be considered illegitimate—with the relative contribution of each being a philosophical imponderable at best.

This is a strong objection that requires narrowing the set of cases in which an inappropriate subjective motivation can render a search or seizure unconstitutional. It is certainly true that human motivations are complicatedly mixed. If I compliment my boss’s new shoes, it may be because I honestly believe a compliment is merited, because I think she is feeling blue and needs cheering up, because I want a job-related benefit in return, because of a sexual

24. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

attraction, or because of all these reasons and more. It is probable that even I cannot say for sure what exactly motivated my action. I may be able to identify contributing motivations, but I would likely struggle to give them numerical values, such as a “percent of total motivation,” or even to rank them. This suggests a very serious problem for a subjective motivational test, for such a test is predicated on the ability to discover the intentions behind a search and decide whether they are constitutionally acceptable. If we cannot disentangle our intentions, then a focus on bad intentions may lead to suppression of evidence when there were, in fact, good intentions sufficient to justify the action notwithstanding the bad intentions. In this case, our analysis would be making constitutional problems out of red herrings.

The answer is to require that inappropriate motivations²⁵ be a *but-for cause* of the seizure or search, and to place the burden of proving such causation on the defendant who is moving to suppress. Under such a test, the defendant must show that it is more likely than not that absent any improper motives, the search or seizure would not have happened at all. In other words, the evidence should only be suppressed if the defendant shows that improper intentions were, in the context of all the other motives, *necessary* contributing factors to the officer’s action. If the other motivations would have been sufficient, then the defendant’s suppression motion must be denied. The but-for cause requirement does not deny the reality of mixed motivation; rather, it suggests an analytical tool for dealing with that reality.

As an example, consider again the compliment concerning my boss’s new shoes. Although my motives may be mixed, we can at least inquire into whether I would have given my compliment under different conditions. For instance, if I am in the habit of giving insincere compliments to realize friendly or romantic intentions, my desire to accurately express my appreciation of the shoes is unlikely to have been a necessary motive. Moreover, if another coworker was wearing the identical shoes and I failed to compliment her, we might deduce that a motive specific to my boss was a necessary cause of the compliment. It is indeed a difficult inquiry to find which motives (or combinations thereof) are but-for causes precisely because it is counterfactual—it asks what would have happened if certain motives had been lacking—but it remains possible to look to various background facts to analyze whether a search or seizure (or compliment) would likely have occurred absent

25. No substantive difference is intended among the terms “bad,” “illicit,” and “inappropriate” in describing officer intentions, and all are used interchangeably throughout this Note. Moreover, “good intentions” does not refer to anything other than intentions that are not “bad” or “inappropriate” unless otherwise noted. It remains to say, of course, which motivations are “inappropriate”—an issue addressed *infra* Part IV.

those motives. If suppression is limited to cases in which the improper motive really was a necessary cause, and not just a contributing cause, we can avoid the risk of suppressing evidence based on bad intentions when sufficient good intentions actually exist.

The but-for cause limitation does not make the process of subjective inquiry any easier, but it does provide a means of disentangling the web of human motivations into individually meaningful strands. The argument that proving subjective motivation will be challenging for any claimant is conceptually distinct from, and far less damning than, the argument that all human action is the product of mixed motives that simply cannot be disaggregated.²⁶ The but-for cause test is meant to respond only to this latter point, and it does so by providing a helpful heuristic for making sense of the reality of mixed motivation. Various evidentiary standards could be used to allocate the difficult burden of actually proving that the illicit motivation was a but-for cause of the police action, and my proposed preponderance standard is intended as a concession to the difficulty of proving that a subjective motive really was a but-for cause of police action. Still, the but-for cause element is the indispensable analytic tool that allows us to break apart the motives for human action and to subject possible bad motives to constitutional scrutiny.

In a sense, then, the but-for causation requirement helps to solve a standing-like issue associated with the question of subjective motivations. As discussed below,²⁷ many commentators maintain that bad motivations cause no harm—an invasion of privacy is an invasion of privacy, and its harmfulness is unchanged by what the invader thinks he is doing or why he is doing it. If, however, the bad motivation is a but-for cause of the invasive police action, then we can certainly see the link between the improper intention and a harm done to the defendant. When the but-for cause condition is met, it is emphatically not the case that the invasion would have been the same absent the bad intention, because (by hypothesis) without the bad intention the invasion would not even have occurred. When a defendant can prove but-for causation by the requisite standard, it cannot be the case that a bad motivation is practically unknowable or wholly unrelated to the harmfulness of police action.

26. It bears noting that, contrary to the assertions of many defenders of *Whren*, subjective inquiries are decidedly common elements of criminal law. Every crime has a mens rea element, and some—such as hate crimes—may require very complicated and nuanced showings. Far from being somehow anomalous, the use of available evidence to assess likely subjective mental states is a relatively routine task for judges and juries.

27. See *infra* Section II.A.

Possible objections to this but-for test remain on account of *its own* impracticality. On the one hand, some may worry that the burden of proof on the defendant is too high; on the other, some may worry that merely subjecting law enforcement to such a searching inquiry will unduly burden legitimate police work. Neither concern should be fatal.

While it appears that the but-for test places a heavy burden on defendants, it is not a greater burden than they can bear. Defendants need only satisfy a preponderance of the evidence standard, which means that in cases like *Whren*—involving persuasive but indirect evidence of problematic intent—a judge could still draw the necessary inferences and hold that the defendant has carried his burden. If a defendant claims multiple ill motivations, he does not need to show that each is a but-for cause of the search, but only that it is more likely than not that the search would not have happened in their combined absence. It is true that this will often have to be proven by proxy through circumstantial evidence—whether sufficient good motives existed will, in close cases, likely be a question of weighing evidence of unusual law enforcement action against the credibility of officers who claim good intentions for their actions. Officers may often win in this balancing act. Yet suppression is a serious remedy, and though but-for causation may be difficult to show even by a mere preponderance, it is not too much to ask the defendant seeking suppression to show that this is a situation in which ill motivations really mattered.

At the same time, it is not too much to ask the police to answer such claims. Courts might often decide claims of pretext that have little merit on the papers, preventing officers from being forced to take the stand to defend their integrity. Courts could also require some objective indication of unusual treatment at the hands of the police—in our initial example, this might be pulling over a relatively slow speeder or using the drug dog for the first time that day—before allowing complete discovery or the subpoena of officers.²⁸ Furthermore, the set of impermissible motivations is relatively narrow,²⁹ and government motions at the early stages are thus likely to prevail. In the end,

28. It is of course true that a complete showing capable of passing the but-for cause bar may often require discovery and subpoenas. However, there is no reason that courts should depart from the quite ordinary practice of refusing to go beyond the papers if the defendant has not stated with particularity any grounds for believing himself subject to a pretextual search or alleged any specific facts to support such a showing. Acknowledging the availability of a pretext claim will not throw open the door to discovery any wider than it already is—which is quite wide. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) (establishing broad disclosure requirements for the prosecution).

29. *See infra* Part IV.

however, pretext claims are not so different from other kinds of Fourth Amendment claims that require officers to take the stand to defend their actions. Thus, the argument of a unique burden on law enforcement in the case of pretext claims itself appears to be a pretext for a more philosophical objection to a subjective inquiry into officer motivations.

II. RIGHTS RHETORIC AND THE ARGUMENT FOR THE IRRELEVANCE OF SUBJECTIVE INTENT

Although *Whren* and its progeny rely to some extent on the practical difficulties of subjective intention tests, the strongest argument advanced for their exclusive focus on the “objective effect[s]” that officer actions have on the “privacy interests”³⁰ of defendants is that subjective intentions are simply irrelevant to the questions of whether and how far an individual right to privacy was invaded. Thus it is noted in a variety of cases—including traffic stops and related arrests,³¹ border searches,³² regulatory inspections,³³ and excessive force suits³⁴—that the invasiveness of a particular police action does not vary with the officer’s state of mind. The case law also exhibits a fascination with the ways in which a defendant might waive his own privacy interests, which also would not vary with the subjective mindset of an investigator.³⁵ Out of these cases emerges the most basic principle of *Whren*’s approach, which I call the “irrelevance principle”: that a secret motivation (i.e., *why* the privacy invasion happened) is irrelevant to the real-world questions of *whether* a defendant had a privacy interest and *how much* it was invaded. Because only the latter variables matter in the rights-oriented calculus, and

30. *E.g.*, *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312-13 (1978).

31. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004) (“Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.”).

32. *See, e.g.*, *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (finding that a suspicionless documentation check of a boat was not affected by the agents’ motive of drug interdiction).

33. *See, e.g.*, *Barlow’s, Inc.*, 436 U.S. 307.

34. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[T]he ‘malicious and sadistic’ factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is ‘unreasonable’ under the Fourth Amendment.”).

35. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 122 (2001) (holding that when a probationer has agreed to search conditions, warrantless searches based on individualized suspicion are valid, without regard to whether a probationary purpose motivates the search); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *California v. Ciraolo*, 476 U.S. 207, 214 n.2 (1986).

because their values vary according to objective facts wholly independent of motive, subjective motivation is no concern of the Fourth Amendment.

A. Isolating the Irrelevance Principle

Consider first some of the waiver-related cases. *California v. Ciraolo*³⁶ concerned a police flyover of a fenced-in yard for the purpose of confirming an anonymous tip that it housed marijuana plants. The question was whether the defendant could assert a reasonable expectation of privacy in his backyard given its obvious exposure to search from above. The Court answered an emphatic “no” because “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.”³⁷ The Court seemed to believe that because “a passing aircraft” or “a power company repair mechanic on a pole overlooking the yard” might have seen the plants, the defendant could not complain that the police spotted them on an intentionally investigatory flyby.³⁸ The lower court had adopted a subjective rule, holding that while the defendant’s aerial exposure would make a truly inadvertent discovery by a “routine patrol” flight legitimate, an intentional search from above was beyond the pale absent a warrant.³⁹ The Supreme Court, however, rejected that argument, citing the irrelevance principle: “[W]e find difficulty understanding exactly how respondent’s expectations of privacy from aerial observation might differ when two airplanes pass overhead at identical altitudes, simply for different purposes.”⁴⁰

Here we have a clear invocation of the irrelevance principle on the question of *whether* the defendant had an unwaived privacy interest. Because what mattered were his interests or “expectations,” and because they did not change with the pilot’s purpose, the existence of an investigatory intention was considered irrelevant. Having voluntarily exposed the yard, the defendant had no right to privacy in it that he could assert. The defendant could object if the flight was unusually low to the ground but not on the basis of why it was in the air.

A second example is provided by *Bond v. United States*,⁴¹ which concerned both *whether* there was a privacy interest and *how much* it was invaded. In *Bond*,

36. 476 U.S. 207.

37. *Id.* at 213 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

38. *Id.* at 214-15.

39. *People v. Ciraolo*, 208 Cal. Rptr. 93, 97-98 (Ct. App. 1984).

40. *Ciraolo*, 476 U.S. at 214 n.2.

41. 529 U.S. 334 (2000).

a border patrolman squeezed the defendant's bag while it was in the overhead compartment of a public bus. Some Justices found the touching overly invasive, even for a bag stored in an overhead compartment where the defendant knew other passengers might handle it. All agreed, however, that an exploratory motive on the part of the officer was irrelevant to the questions of whether any unwaived privacy interest existed and how invasive the squeezing was. Chief Justice Rehnquist, writing for the majority, explicitly applied the irrelevance principle, stating that "the issue is not [the officer's] state of mind, but the objective effect of his actions."⁴² Justice Breyer's dissenting opinion expanded upon the majority's language:

Of course, the agent's *purpose* here—searching for drugs—differs dramatically from the intention of a driver or fellow passenger who squeezes a bag in the process of making more room for another parcel. But in determining whether an expectation of privacy is reasonable, it is the *effect*, not the purpose, that matters.⁴³

The argument here is that a squeeze is a squeeze, regardless of the motivations of the squeezer. It would thus work an unjustifiable harm to law enforcement to allow a defendant who had generally permitted public manipulation of his bag to object only to squeezing for law enforcement purposes.⁴⁴ As the majority held, a defendant could object if the scope of the physical manipulation was uniquely invasive, but that variable—the "how much" question, the one that mattered—was seen as wholly independent of why the manipulation occurred.

The case law is replete with further examples of the irrelevance principle as applied to the question of how great an invasion has been worked by a government action. In the regulatory search context, the Court held in *Marshall v. Barlow's, Inc.* that "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards."⁴⁵ *Barlow's, Inc.* actually limited the capacity of government officials to make warrantless regulatory searches, because it acknowledged that an

42. *Id.* at 338 n.2.

43. *Id.* at 341-42 (Breyer, J., dissenting) (citing *id.* at 338 n.2 (majority opinion)); *Whren v. United States*, 517 U.S. 806, 813 (1996); and *United States v. Dunn*, 480 U.S. 294, 304-05 (1987)).

44. *See id.* at 342 (observing that "this Court's previous cases suggest" that the added protections afforded by "a Fourth Amendment rule that turns on purpose . . . would not justify the harm worked to law enforcement").

45. 436 U.S. 307, 312-13 (1978).

intrusion is not made any better (or worse) for the individual by the existence of a regulatory rather than a criminal-investigatory motive. The irrelevance principle is thus sufficiently sharp to cut both ways: good motives do not ameliorate invasions any more than bad motives exacerbate them. A search is a search, a seizure is a seizure, and a squeeze is a squeeze, subjective motivations aside.

Indeed, the law continues to follow and enlarge the irrelevance principle. In *Brigham City v. Stuart*,⁴⁶ the Court considered whether an officer's intentions were relevant to the reasonableness of his warrantless entry to provide aid in a purported emergency. The government's brief urged the Court to apply the *Whren* rule in this context as well, arguing explicitly from the irrelevance principle:

[The costs of a subjective inquiry] are not offset by any discernible constitutional gain in having the lawfulness of entries turn upon later-litigated subjective purposes. If the objective circumstances point to an emergency and officers enter to assist, *the infringement on privacy is identical* regardless of the subjective state of mind of the individual officers

[Preventing] pretextual claims of an emergency basis for entry . . . is already served by the requirements that an impending threat to life or safety *objectively* exist, and that the scope of the entry and search be circumscribed by the exigencies which justified its initiation.⁴⁷

The government's argument was not only that the infringement on the privacy interest was unaffected by the officer's motivation, but that the existence of a purported emergency—the exigency that provided the justification for the entry—was unaffected by motivations as well. In other words, if there is a real emergency, then the police really ought to intervene, and the limitation of warrantless searches to cases in which “an impending threat to life or safety objectively exist[s]” ought to assuage our fears of pretext. The Court accepted this reasoning in its entirety, quickly dismissing all arguments from subjective motivation in light of the irrelevance principle as stated in *Whren*.⁴⁸ The logic is simply that police mindsets alone do not create real-world facts about police

46. 126 S. Ct. 1943 (2006).

47. Brief for the United States as Amicus Curiae Supporting Petitioner at 20-21, *Brigham City*, 126 S. Ct. 1943 (No. 05-502) (emphasis added) (internal quotation marks omitted) (quoting *Horton v. California*, 496 U.S. 128, 139-40 (1990)).

48. See *Brigham City*, 126 S. Ct. at 1948 (citing *Whren*, 517 U.S. at 813).

action or conditions at the scene of emergencies. Thus, the costs, benefits, and ultimate need for police action all can and will be established solely by reference to objective facts.

The cases go on in this way,⁴⁹ but the point is sufficiently clear: if our concern is with the invasion of individual privacy interests or rights, then it is very hard to see how an otherwise valid search or seizure changes at all with the subjective intentions of the actor. This is because subjective intentions are *secret*—they have no necessary manifestations or objective effects in the real world on the individual citizen who is searched or seized. It is intuitively very difficult to see why we should allow such secret motivations to change the character of actions the contexts and effects of which are already adequately revealed by the plain and objective facts of the case at hand.

And indeed, pursuing a subjective intent test *does* mean leaving the intuitive safety of the objective approach behind. Police actions would have to be judged in connection with their authors, so that seemingly good actions taken for bad reasons could become bad actions in the final analysis. Our intuitions may struggle with the subjective approach so phrased. Yet through a subtle change in vocabulary, I believe it is possible to see how, in the Fourth Amendment context, the subjective motivation behind an action by the police really can and does matter.

B. Combating the Irrelevance Principle

Let us begin by noting that the but-for cause limitation introduced above partly answers the argument from the irrelevance principle. Under this limitation, the defendant can only win on her motion to suppress if she can prove that it is more likely than not that she would not have been searched or seized in the first place absent an illicit law enforcement motive. As noted above, this requirement ensures that the motive has had at least one serious practical effect on an individual in the real world, given that harm clearly arises when an individual experiences an invasion of privacy that would otherwise not have occurred. Hence, in cases that would meet the but-for cause test, *Whren's* strong rejection of motivational analysis cannot be predicated on the broad assertion that subjective intentions have *no* effects in the real world. In other words, subjective intentions are not *so* secret that defendants such as those in *Whren* itself are not occasionally harmed by them.

49. See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 153-55 (2004); *United States v. Knights*, 534 U.S. 112, 122 (2001); see also *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983).

The analysis of *Horton v. California*,⁵⁰ yet another case invoking the irrelevance principle, makes clear how the but-for cause limitation would operate to allow suppression only when subjective motivations actually had a practical effect. In *Horton*, the majority held that if evidence of criminality not specified in a warrant is discovered in plain view during a warrant-authorized search, it can be seized regardless of whether the discovery was inadvertent.⁵¹ Thus, if officers have a warrant to search an office for stolen property, they may seize illegal firearms found in plain view, even if they suspected that they would find firearms all along and still did not seek a specific warrant for them.⁵² The irrelevance principle was again invoked to justify this rule. The reasoning was that the warrant sets the precise scope of the places to be legitimately searched; thus, a subjective inadvertence requirement would have no added benefit to the defendant's privacy interests because it would "in no way reduce the number of places into which [the police] may lawfully look."⁵³

Justice White's opinion in *Coolidge v. New Hampshire*, quoted at length by the *Horton* Court, provided a compelling hypothetical:

Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. . . . [T]here is surely no difference between these two photographs: *the interference with possession is the same in each case*⁵⁴

Justice White had a strong point here: the officers in the hypothetical are where they are supposed to be and doing what they are supposed to do. If the objective facts are all the same, are we really to believe that the invasion of privacy or possessory interests is somehow worse when discovery of the picture is anticipated? That is, indeed, a strange assertion, because the defendant could point to no practical, real-world effect created by the anticipation that one of

50. 496 U.S. 128.

51. *See id.* at 138 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.").

52. *See, e.g., id.* at 142.

53. *Id.* at 141 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 517 (1971) (White, J., concurring in part and dissenting in part)).

54. *Id.* at 139 (quoting *Coolidge*, 403 U.S. at 516 (emphasis added)).

the photographs would be found. Anticipated or not, the invasion is identical and would have occurred regardless of the officer's subjective beliefs. Hence, as White argued in *Coolidge* and as the Court agreed in *Horton*, the inadvertence requirement must be a distraction from the real issues.

Yet Justice Brennan's dissent endeavored to limit the reach of *Horton*'s anti-subjective principle by convincingly invoking something like the but-for cause limitation. As Brennan wrote, "[T]his decision should have only a limited impact, for the Court is not confronted today with what lower courts have described as a 'pretextual' search."⁵⁵ By "pretextual," Brennan meant those searches in which an officer justifies his actions on one basis even though "he is really interested *only* in seizing evidence relating to another crime, for which he does not have a warrant."⁵⁶ If the officer is interested only in searching for evidence unrelated to the warrant, then the search itself would not have occurred but for this motivation, and the motive has plainly generated a real-world effect. If the officer in *Horton* had obtained a valid warrant to search for the firearms "only" to effect a search for the pictures (a search for which he would otherwise have been unable to get a warrant), it is true that he *could* have validly searched the home for the firearms, but not that he *would* have done so. The illicit desire to circumvent the warrant requirement in pursuit of the pictures would in that case have been a but-for cause of the search "for" the firearms.⁵⁷

There is no difference between *Whren* and *Horton* with respect to Brennan's argument. Both cases assert that because subjective motivations do not affect the scope of the invasion—which is limited by objective requirements such as warrant particularity or probable cause—those secret intentions are irrelevant to the analysis. Brennan answered, correctly, that in the narrow set of cases in which a defendant can prove that the warrant-based search or the traffic enforcement stop would not have happened but for the goal of circumventing the Fourth Amendment's requirements, there is of course a real-world effect generated by the subjective motivations of the officers. In these

55. *Id.* at 147 (Brennan, J., dissenting).

56. *Id.* (emphasis added).

57. As Brennan himself put it, the proffered reason for the search in such a scenario would be pretextually offered in "a deliberate attempt to circumvent the constitutional requirement of a warrant" and for that reason "cannot be condoned." *Id.* at 148. Interestingly, Brennan identified two states whose courts had rejected a broad subjective inadvertence requirement but had nonetheless held that truly pretextual searches were invalid. Despite *Whren*'s apparent eschewal of this logic, these state cases have not been overruled. *See id.* (citing *State v. Bussard*, 760 P.2d 1197, 1204 n.2 (Idaho 1988); and *State v. Kelly*, 718 P.2d 385, 389 n.1 (Utah 1986)).

cases, the officers' motivations are not irrelevant to the scope of the invasion—they are the cause of the invasion itself.

It is in the response to this argument that the central role played by the rhetoric of individual privacy rights becomes apparent. The supporter of the objective approach will reply that all this talk of but-for causation misses the point because the real question is not whether the officer *would* have executed the search or seizure, but whether he *could* have. This argument that a search is valid whenever it could have been legitimately executed seems to flow inexorably from the very concept of an individual right.

The argument for *Whren* from the concept of privacy rights begins with the idea that what the individual has is a right to his privacy. If we believe that this right fails to exclude the investigatory powers of the government from a given private space under certain conditions—say, from a car during a speeding stop—then we are committed to the proposition that, under those circumstances and with regard to that particular space, the right to privacy simply does not trump the state's power.⁵⁸ And if the right to privacy does not trump, then under those conditions it must be permissible to invade the given space by search or seizure no matter what the subjective reason.

In trying to give the argument for *Whren* from privacy rights its strongest phrasing, I can be accused of eliding the possibility that the “conditions” that make the right to privacy inoperative in a particular case might conceivably include the mindset of the police officer. Yet this seems inconsistent with the notion of a right to *privacy*, if not inconsistent with the notion of rights *per se*. Privacy involves shielding a thing, or a space, from view—not shielding it from someone who has a particular motive. Indeed, the very notion of a privacy right seems to train our attention on the rights-holder's complete insulation from public scrutiny, while a motive test would instead focus on the potential invaders of the individual's privacy and their reason for prying. There is, no doubt, a way to phrase this Fourth Amendment “right” to include as relevant the mindset of police officers who search or seize the citizenry, but it would stretch words beyond their meaning to continue to call it a “right to privacy.” And because words can only be stretched so far, the force of this linguistic inelasticity will ultimately constrain the way we apply our Fourth Amendment rights.

One can see, for instance, how the language of privacy rights seems inevitably to train our attention on the individual rights-holder rather than the

58. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi, 191-92 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*] (discussing a theory of rights as trumps); Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* (Jeremy Waldron ed., 1984) (same).

police. Saying that the individual citizen does not have a “right” to be free from searches under certain conditions necessarily implies that when the invasion of the right is unchanged *from the perspective of the citizen*, the outcome of a suppression hearing should be the same as well. This rights focus all but precludes an inquiry into the character of the decision that police officers make to intervene, because the character of that decision—as distinct from its effects—is a secret to the citizen or rights-holder and is therefore irrelevant. This rights-rhetorical constraint on Fourth Amendment analysis is the root of the *Whren* problem. As I note in the next Section, however, the case law does show some ambivalence about whether this strong rights rhetoric has completely captured Fourth Amendment law.

C. *The Non-Rights Rhetoric of (Some) Current Case Law*

Although rights rhetoric and broad anti-subjective rules are quite prevalent in search and seizure law, the cases often fail to fully enact the privacy-rights-oriented view of the Fourth Amendment. In many instances, the concern of the Court is not solely the objective invasion of a right, but the constitutional responsibilities of law enforcement officers. Numerous cases, in fact, stand for the proposition that the motivational causes of police behavior can sometimes matter deeply, although it takes some parsing to perceive this strand in the law.

Consider *City of Indianapolis v. Edmond*,⁵⁹ the lone case decided since *Whren* to validate a motivational inquiry of any kind. In *Edmond*, the city had adopted a checkpoint program under which stops and drug dog “sniffs” would be conducted at random along the highway in an effort to solve an “intractable” narcotics problem.⁶⁰ The city sought to justify the random stop under the *Whren* doctrine,⁶¹ noting that the Court had upheld random searches to detect illegal immigration,⁶² to remove drunk drivers from the road,⁶³ and to check vehicle licenses and registrations.⁶⁴ Yet the Court struck down the program precisely because it was concerned that the *purpose* of the program differed

59. 531 U.S. 32 (2000).

60. *Id.* at 42.

61. The city stipulated that its purpose was drug interdiction and argued, from *Whren*, that this purpose was irrelevant. *See id.* at 41, 45.

62. Brief for Petitioners at 6, *Edmond*, 531 U.S. 32 (No. 99-1030); *see United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

63. Brief for Petitioners, *supra* note 62, at 5; *see Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

64. Brief for Petitioners, *supra* note 62, at 11; *see Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (stating this in dicta).

from those other cases insofar as it reflected nothing more than a general interest in crime prevention and evidence gathering.⁶⁵ If suspicionless searches could be justified merely by the desire to uncover criminal wrongdoing, reasoned the Court, then there would be little content to the Fourth Amendment, which exists precisely to limit the means by which police can pursue that very objective.⁶⁶

This ruling cannot be squared with *Whren*—at least not on the privacy-rights-oriented logic of the irrelevance principle. The doctrine clearly holds that suspicionless stops are justified in certain circumstances. Meanwhile, within the paradigm of the irrelevance principle, the scope of the invasion worked by a suspicionless stop is supposed to be unchanged by its purpose, whether it is to look for immigrants, drunk drivers, unlicensed operators, or drugs. In each case, the time, inconvenience, and discomfort associated with the police contact is likely to be the same. How, then, can the defender of *Whren* defend *Edmond*? Having always argued that the scope of the invasion of the right to be let alone does not change with the purpose, the objective approach will struggle to explain *Edmond*'s assertion that a suspicionless stop is acceptable for some purposes but not for the purpose of general law enforcement.⁶⁷

Even the probable cause cases that I have discussed only incompletely adhere to the irrelevance principle. *Devenpeck v. Alford*,⁶⁸ for instance, invoked the irrelevance principle in holding that an arrest was valid if supported by probable cause even if the officer cited an insufficient reason at the time of the arrest. As the opinion put it, "Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."⁶⁹ Although this principle forecloses an inquiry into an officer's motives, or even into his articulated reasons, it plainly requires an inquiry into the officer's *state of mind*.

65. See *Edmond*, 531 U.S. at 41-42.

66. *Id.* at 42.

67. The defender of the objective approach might argue that the different outcome is explained by the fact that the invasiveness of the stop has increased with the addition of a drug-sniffing dog, but the doctrine actively forecloses this argument. In *Illinois v. Caballes*, 543 U.S. 405 (2005), the Court held that a dog sniff is simply not a search for Fourth Amendment purposes because it detects only possession of unlawful drugs, and no one has a right to privacy in possessing unlawful drugs. Because *Caballes* is also rooted in a rights-based view, it ensures that the argument from rights cannot distinguish *Edmond* from *Whren*. The scope of the invasion in *Edmond* was therefore no different from other checkpoint search schemes that the Court had upheld; nothing changed save the purpose of the search, and yet the Fourth Amendment outcome was different.

68. 543 U.S. 146 (2004).

69. *Id.* at 155 (emphasis added).

Under this rule, it is not the existence of facts supporting probable cause that makes an arrest valid; it is the fact that an officer actually knows them. An officer cannot, for example, make an arrest on the mere suspicion of unlawful behavior in the hope that prior evidence of criminality amounting to probable cause will eventually emerge. But, of course, the invasion of the right to be let alone is not in any way modified by the knowledge of the arresting officer: what objective effects are manifested by a knowledge state? Nor is the case for waiver any stronger, because bad actors ostensibly waive their privacy rights through wrongful action, not through the police's *perception* of wrongful action.⁷⁰ The knowledge requirement in probable cause cases is much like the purpose requirement in *Edmond*—it concerns itself with the basis for police action rather than the objective effects of such action on the right to privacy; it focuses on police responsibility and is thus somewhat divorced from pure privacy rights rhetoric.

Consider also *United States v. Leon*,⁷¹ which established a good faith exception to the exclusionary rule when officers rely on a defective warrant as the basis for their search. *Leon* clearly treats exclusion as a deterrent—a prophylactic rule intended to implement Fourth Amendment protections—rather than as a logical product of the Fourth Amendment itself.⁷² Whatever one thinks of that principle,⁷³ its application to produce a good faith exception strongly militates against the rights rhetoric and irrelevance principles of *Whren*. Application of a good faith exception suggests that two officers, taking exactly the same actions and invading the right of privacy in exactly the same manner, can generate different Fourth Amendment outcomes solely on the basis of their subjective mental states. An experienced officer who knows that a warrant is facially problematic might create a case for suppression while a rookie relying on a magistrate's judgment would not. We may therefore say that in *Leon* the Fourth Amendment outcome is detached from the objective effects of police action and can vary solely with secret, subjective mindsets. By acknowledging that the invasion of the right can itself be irrelevant to the outcome, *Leon* helps to prove the ultimate point—that Fourth Amendment

70. If only police perception of wrongdoing constituted waiver, then the Fourth Amendment would be a protection for the brilliant criminal but not the bumbling one. But there is no right not to be discovered. See *Caballes*, 543 U.S. 405. The right is only to keep innocent conduct private from the police.

71. 468 U.S. 897 (1984).

72. See *id.* at 905-06.

73. For a discussion of this question, see Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983).

doctrine is fundamentally concerned with the regulation of police behavior in the exercise of investigatory powers and not solely with the question of privacy rights and their invasion or waiver.

Indeed, another piece of doctrine that seems at odds with the irrelevance principle and the individual-rights-based approach it embodies is the warrant requirement itself. After all, a warrant is nothing but a piece of paper secured *ex parte* and often executed without the knowledge of the citizen who is to be searched. The existence of a warrant affects neither the existence of a privacy right or interest in the thing to be searched or seized, nor the scope of the invasion worked by the police action. If the focus is really on the privacy right of the individual—understood as the individual's interest in minimizing government surveillance over those things that he has chosen to keep private—then the warrant requirement makes absolutely no sense.

The defender of the irrelevance principle might respond by saying that a search warrant actually represents a waiver of the privacy right, because its probable cause requirement shows that an individual has exposed himself to police intervention through probable involvement in unlawful activity. Yet the doctrine proves this argument unavailing. Current Fourth Amendment law requires that the police actually *get a warrant*, not merely the existence of facts that would support a warrant if submitted to a neutral magistrate.⁷⁴ Indeed, the cases are emphatic on this point: mere technical violations of the procedure for securing a warrant can render a search invalid, even if there is no dispute that the factual predicates for a valid warrant were satisfied.⁷⁵ This suggests that something apart from the actions or waivers of the person to be searched underlies the warrant requirement—that is to say, something other than rights rhetoric is necessary to account for the paradigmatic fact that the Fourth Amendment requires a warrant at all.

The case law is thus far from uniform in endorsing either the objective approach of *Whren* or the unilateral focus of the irrelevance principle on the objective invasion of privacy interests held by individual citizens. The doctrine embodied by *Edmond* and *Leon* (and even the lingering knowledge requirements of *Whren* and *Devenpeck* themselves) shows a latent concern with officer motivations and mental states. At the same time, the proceduralism inherent in the warrant requirement reveals a set of Fourth Amendment concerns not contemplated at all by *Whren's* focus on the privacy interests of individuals. The concern of the warrant requirement is a concern with *how* the

74. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 450-51 (1971).

75. See *id.* (invalidating a warrant issued by a state attorney general although he acted as a magistrate, because he was inadequately neutral).

police may do their work—it imposes certain limitations on the ways in which they may pursue their law enforcement ends. The focus is on the police rather than on the individual subject to their power; it is on the *responsible* exercise of state authority rather than on the invasion of an individual privacy right or interest.

The key idea of the law enforcement responsibility view is that the Fourth Amendment is *power-skeptical*. Indeed, the exclusionary rule itself is a power-skeptical rule concerned with generating the correct set of incentives for institutional actors rather than with vindicating Fourth Amendment rights after the fact. The *Edmond* rule is also a power-skeptical rule and was self-consciously justified as such by Justice O'Connor. Even the knowledge requirement lingering in *Whren* itself, and the proceduralism of the warrant requirement, only make sense on this view: they serve to forbid police from playing fast and loose with constitutional protections and prevent law enforcement guesses justified only *ex post* by the discovery of unlawful behavior. These cases are not about the rights of individuals as such; instead, they show a manifest fear of an overreaching police state.

We are faced, then, with a choice between two distinct lines in the Fourth Amendment case law—one that affirms that the touchstone of the Amendment's protections is the individual's right to privacy, and another that affirms that it is the constraint of irresponsible law enforcement. It is a choice among foci: we may place the searched citizen at the center, or we may replace him with the searching state actor. Although the choice is in some respects semantic, we can choose to speak in terms that are protective of individual privacy rights or in terms that are skeptical of the general powers of the police. In the next Part, I argue that the latter, power-skeptical terms do greater justice to the purposes that the Fourth Amendment ought to serve.

III. A NEW VOCABULARY OF RESPONSIBILITY FOR THE FOURTH AMENDMENT

A. *The Language of Responsibility as a Substitute for the Language of Rights*

Now that I have noted that the current case law already shows a latent focus on police responsibility, what remains is a defense of this power-skeptical way of speaking about Fourth Amendment protections against the ardent individual-rights rhetoric of cases like *Whren*. This defense does not amount to advocating a wholesale reinterpretation of Fourth Amendment doctrine. Indeed, the fact that much of the case law already speaks in power-skeptical terms indicates that nothing so grand is required. Instead, I am simply trying to complete the substitution of this vocabulary for all Fourth Amendment

inquiry, so as to focus our attention on police behavior itself rather than on its effect on the “rights” of individual citizens. This vocabulary should serve to make clear that because the police hold the power of investigation in trust for the people, it is a serious transgression for them to violate that trust intentionally through pretextual circumvention of the Fourth Amendment’s requirements, even if they could have rightfully taken the same action for a different motivating reason.

To begin, I want to acknowledge that there is a well-recognized reflexivity between state powers and individual rights that may make my point appear merely semantic. Because a right can be conceived of as a barrier that cannot be crossed by exercises of state power, it is often asserted that when there is a right there is no state power, and vice versa.⁷⁶ This view sees the right of the individual and the power of the government as reflexive because they are perfect opposites, with the individual right serving as an independent check on the domain of state power.⁷⁷ Another view, principally advanced by Richard Fallon, sees reflexivity between rights and powers because they are really the same thing—that is, judgments about the relative strength of various individual and collective “interests.”⁷⁸ Rights on this view are not independent and prior to powers, but rather represent historically contingent judgments about where the power of government ought to end so as to achieve an ideal balancing of the interests at stake.⁷⁹ In either case, however, individual rights and governmental powers tend to represent mutually exclusive categories, with the boundaries of the one describing the boundaries of the other. For that

76. This notion has been famously expressed under the name of “rights as trumps.” See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 58, at 191-92.

77. This view of rights as absolute and prior to state power can be natural law-oriented, *see, e.g.*, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (following Locke), but need not necessarily be so. A positivist could maintain that once rights are enacted into the law of the land, they then function as constraints on the exercise of governmental power and have priority in the question of whether it might be good to exercise power in a manner inconsistent with the right. *See, e.g.*, RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) (arguing that enforcement of the Constitution as a set of prior moral principles is consistent with democracy); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (advancing the notion of rights as trumps while still recognizing the text of the Constitution as the sole legitimate source of rights within the American system).

78. *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 360 (1993) (arguing that rights and powers are interdependent insofar as both are “mediated by the concept of interests”).

79. *See id.* at 363-64 (“[W]ithin our constitutional practice, rights depend pervasively on judicial assessment of the appropriate scope of government power. To think of rights as conceptually independent constraints on government power is generally mistaken.”).

reason, it may seem irrelevant whether a particular constitutional boundary is described as a right or as a limit upon power. Yet this descriptive ambiguity is problematic and may have consequences regardless of its apparently semantic character.

Fallon has a convincing argument that our rights discourse often fails to perceive the animating role played in our system by skepticism about governmental powers and the actors who wield them. Though I do not share his sanguinity with regard to the balancing of interests,⁸⁰ I do find crucial his insight that rights often only begin to take shape through a consideration of the legitimate reach of powers, rather than vice versa.⁸¹ As he put it:

[O]ur current constitutional practice commonly invokes the conceptual apparatus of rights as its means of identifying governmental action that is *ultra vires* in the classic sense—action beyond the scope of delegated power because it is unconnected to the purposes for which power was delegated. The rights generated in this way are no less real than other rights. In cases involving such rights, however, it should be clear that rights do not form an independent limit on government power. Rather, anxiety about abuse of power generates rights.⁸²

Applying this insight to Fourth Amendment analysis, I agree that we might seriously confuse our jurisprudence if we speak of a limitation on police action as one rooted in rights rather than in skepticism of governmental power in the first instance. What we are most likely to miss is the sense in which power-skepticism is *purposivist*. Concerns about individual rights proper tend to be objective—that is to say, if a person really has an individual right to privacy, we might concern ourselves solely with the objective questions of whether such a right exists under conditions indicating possible waiver and whether and how much that right has been invaded. Yet skepticism about governmental power naturally contains what Fallon described as the *ultra vires* concern—that is, a problem with exercises of power disconnected from the reason why the power

80. See *id.* at 372 (“If I am correct that both individual rights and governmental powers must be defined by reference to interests, and that these interests are often conflicting and must be balanced against each other with a view to practical consequences, the outer boundaries of judicial authority, and especially the power and responsibility of the Supreme Court, are necessarily broad. Critics sometimes claim that constitutional argumentation in terms of interests or values, not limited to enumerated rights, wrongly invites judges to substitute their personal values for those of the Constitution. On the model of rights that I have offered, this criticism collapses.” (footnote omitted)).

81. See *id.* at 360-65.

82. *Id.* at 365 (footnote omitted).

was granted. If our rhetoric obscures the power-skepticism at the root of certain constitutional provisions, then it will fail to impose upon state actors an adequate responsibility not to intentionally ignore the purposes for which great power was (and emphatically was not) granted to them. It will, instead, give them the free rein that *Whren* currently provides to pursue enforcement through pretextual behavior as long as they are careful not to invade the scope of any individualized rights.

It bears stating, however, that even Fallon's point is semantic in some sense. The language of rights is very expansive. It is possible, of course, to incorporate power-skepticism directly into a rights-oriented vocabulary by saying something like "citizens have the 'right' to be free from irresponsible exercises of the police power." In this way, it would be possible to harmonize the language of rights with the language of responsibility, and to that extent it is unnecessary to reject rights rhetoric in order to accept the shift in terminology that I am advocating. As I said at the outset, the point here is to transcend some of the distortions caused by rights rhetoric, not to reject the language of rights altogether. I am not arguing that every mention of Fourth Amendment rights is an evil to be stamped out. What I am arguing is that power-skepticism and police responsibility should move to the forefront in our Fourth Amendment vocabulary, and rights rhetoric should move to the back. This move should have at least the rhetorical effect of helping to isolate the purposivism of the Fourth Amendment and Fallon's ultra vires problem.

Having noted what changes might be wrought by our adoption of a power-skeptical vocabulary for the Fourth Amendment, there are three main reasons why that vocabulary seems more appropriate than the rights-oriented alternative. First and foremost, there is the text itself and its reasonableness standard, which seems more in tune with a police responsibility orientation than with an individual rights orientation. To call an action such as a search or seizure "unreasonable" seems to contemplate that the action was inappropriate in light of the officer's *reasons* for taking it. But this is just the sort of inquiry that the *Whren* rule and its irrelevance principle ask us to reject in favor of an exclusive focus on the objective effects of the officer's actions. The Amendment's textual bar on unreasonable searches and seizures cries out for an analysis of the reasons a search or seizure was undertaken, and that analysis is only available if we reject the individual privacy rights rhetoric of *Whren*.

A second reason to see the Fourth Amendment as a power-skeptical provision is that much of the doctrine has evolved in this direction. One current centerpiece of Fourth Amendment law, the exclusionary rule, is plainly

tailored to serve as a deterrent to unreasonable police conduct⁸³ and is thus concerned not with corrective justice vis-à-vis the rights of particular individuals, but with the creation of a structural limitation on the exercise of governmental power across all cases.⁸⁴ Additionally, James Whitman has argued that what makes the American conception of the right to privacy distinct from European conceptions is its fascination with *governmental* intrusions rather than protection of private life or private information for its own sake.⁸⁵ Whatever we might think about how the Framers intended the Fourth Amendment to operate,⁸⁶ it is quite clear that, through the exclusionary rule, it has come to embody a skepticism of law enforcement agents' capacity to exercise their enormous investigatory powers with responsibility and reserve.⁸⁷ That skepticism, which is currently displaced by our rights rhetoric, really ought to sit front and center.

Another benefit of switching focus from rights to powers in Fourth Amendment jurisprudence is that it avoids the somewhat uncomfortable rhetoric of "balancing our rights." If our Fourth Amendment rights can routinely be balanced away in the face of compelling state interests—and, on our current terminology, they certainly can be—then there is at least a sense in which they are not really rights at all.⁸⁸ Instead, they are something like Fourth Amendment or privacy "interests" that, rather than serving as trumps, are merely there to be balanced against other interests. This leads to a further problem of unequal balancing. Because in many cases the comparison will be between the privacy interests of an *individual* and the law enforcement interests

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83. See *United States v. Leon*, 468 U.S. 897, 906 (1984); see also Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 253-78 (1988).
84. See Fallon, *supra* note 78, at 367 (analogizing the exclusionary rule to overbreadth doctrine and other rules of standing, which, by allowing *ex ante* rather than *ex post* litigation, do not serve to correct actual invasions of rights but instead serve "to keep government tolerably within the limits of its constitutional powers").
85. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1202-11 (2004).
86. Akhil Amar has famously argued that the exclusionary rule and warrant requirement are contrary to the original understanding of the authors of the Fourth Amendment. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).
87. For one comprehensive account of the emergence of this concern through worries about totalitarianism, see Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193 (1998). Antitotalitarianism as the chief organizing principle of the "right of privacy" is famously associated with Jed Rubenfeld. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).
88. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 58, for this conception of rights as absolute trumps.

of the *collective*, the bias of a rights-oriented balancing may be toward validating ever-expanding exercises of state power. Thus, the ubiquity of Fourth Amendment rights-balancing may erode the very concept of a right as a theoretical matter and may also tend toward underprotection against abuses of state power as a practical matter.

A power-skeptical vocabulary for the Fourth Amendment does not necessarily free us from the difficulties of balancing certain constitutional values against each other, but it does free us from the discomfiting idea of balancing our rights. First, by understanding most Fourth Amendment balancing as a value judgment concerning the proper reach of governmental power, we insulate any rights that we truly consider unbalanceable trumps—like, say, the right to a jury trial in criminal cases—from the encroachment of balancing analysis. Second, once we see the Fourth Amendment as concerned with abuse of governmental power rather than with invasion of individual rights, we will stop making the mistake of balancing individual interests against collective interests. We will see that the goods to be gained through limits on the investigatory power are as much collective goods as are the benefits to be gained by the investigations themselves.⁸⁹ Though it is true that we are talking about a highly conceptual and abstract change in approach, such a change promises both to bring special emphasis to those instances when we invoke our rights rhetoric and to restore some balance to our balancing.

In addition, a power-skeptical approach to the Fourth Amendment will not necessarily devolve into balancing in every instance. Indeed, the unique contribution of a power-skeptical view is that it allows us to absolutely condemn those actions that Fallon described as “ultra vires in the classic sense.”⁹⁰ When police officers—and to a certain degree, legislators and regulatory bodies—use a law enforcement prerogative as a pretext to achieve a different and dubious purpose, their use of power is strictly “beyond the scope of delegated power because it is unconnected to the purposes for which power was delegated,”⁹¹ and it should be condemned in every case. Effective limitation of the abuse of investigatory powers requires that each means of

89. Fallon has pointed out that we already accept this proposition in some constitutional contexts. For example, we often allow those engaging in unprotected conduct—and so without a claim to a right—to assert the First Amendment rights of others and to argue that a statute sweeps too broadly. This and other exceptions to typical standing doctrine are not designed to “protect the well-being, agency, or even dignitary interests of a litigant,” but they do “ensure systemically adequate deterrence of abuse of official power.” Fallon, *supra* note 78, at 367.

90. *Id.* at 365.

91. *Id.*

achieving a certain law enforcement purpose be confined to its proper end. Traffic stops should *be* traffic stops, because if they were really just a tool for achieving drug interdiction, our jurisprudence, and most likely our legislatures, would adopt markedly different and more limiting rules for them. We are inclined to grant broad search and seizure powers in contexts in which the societal stakes are high and the damage to the individual low—say, in regulatory enforcement contexts—but if those powers are pretextually deployed so as to disconnect them from the purpose for which they were granted, then the effective check on abuse of power is lost. Thus, while rights rhetoric pushes us powerfully toward ignoring claims of pretext, power-skepticism treats pretext cases as the easiest cases to condemn. This is no surprise. If we move concern with the abuse of power to the center of our conception of the Fourth Amendment, we can expect bright-line, non-balancing rules against pretext precisely because it is a major form of government abuse.

A power-skeptical vocabulary for the Fourth Amendment helps to dissolve the irrelevance principle that grew out of our rights rhetoric and to move pretext cases from outside the Amendment's purview to the very heart of its protections. It does so by replacing the language of individual privacy rights with the language of police responsibility and by changing focus from the searched to the searcher. But a final question remains. If, as I have suggested, we change our focus from the searched to the searcher, then we become unmoored from the ultimate beneficiaries of the Fourth Amendment protections—that is, individual citizens themselves. If the Fourth Amendment is not there to protect our individual privacy, then what is it there for? In short, if it is not for the sake of individual privacy that we care about responsible law enforcement behavior, then why do we care at all?

B. Why Fourth Amendment Responsibility Matters

The challenge now is to understand the purpose of the Fourth Amendment's protections without adverting back to the language of individual privacy rights that I have been trying to reject. This entails adopting a theory of the Fourth Amendment that turns on something other than the interest of individual citizens in keeping prying eyes out of private affairs. What sorts of interests—if not privacy interests—merit the focus on responsible law enforcement behavior that I have been advocating?

I believe that the Fourth Amendment exists not merely to secure our persons, houses, papers, and effects from prying eyes, but to enact and maintain a certain kind of relationship between citizens and the awesome power of the state and its police force. That relationship is one of trust—a sort

of fiduciary duty that runs from the police to the citizenry that granted them their unique powers in the first place.⁹² The enforcement agents of the state fill a wide variety of roles in society. Their purposes range from investigating crime and arresting wrongdoers to monitoring parolees, inspecting for regulatory violations, helping citizens in distress, enforcing automobile violations, and directing traffic. Different powers are granted to the police to meet these different ends, and keeping the trust between the state and its citizens means confining each power to its appropriate purpose. Otherwise state surveillance and authority begin to become more pervasive than they should be. Police powers free to roam untethered by their intended purposes can become licenses for serious misconduct—not only invasions of privacy, but harassment of minorities and suppression of social and political dissent. The Fourth Amendment is more than a collective “Do Not Disturb” sign; by allowing citizens to trust that law enforcement powers are put to the right ends, it stands as a bulwark against totalitarianism.⁹³

I am not arguing, of course, that traffic cops may only enforce traffic laws and not drug laws, or that the regulatory agents must ignore plain evidence of criminal wrongdoing that is outside their ordinary purview. If, for instance, police notice health code violations while assisting a choking victim at a restaurant, they should certainly act on them. The issue is, instead, with police responding to a report of a choking victim *because* they know that there are criminal drug violations to be found at the relevant restaurant. Inadvertent discovery does not raise the specter of the use of police powers outside their intended purpose as a technique of pervasive social control. But lying in wait to use a regulatory power as a means of circumventing the warrant requirement is another matter.

One obvious benefit of this view is that it makes sense of the fact that the Fourth Amendment is subject to the state action doctrine. If the point of the Fourth Amendment were to ensure privacy as such, then it would have to create a right enforceable not only against states, but against other invaders of our privacy as well. One may counter that the state is uniquely capable of invading our privacy and so the Fourth Amendment concerns itself with the most essential threat, but this just may not be true. Employers, peers, and the media are all threats to individual privacy that rival—and perhaps surpass—the state in their capacity to expose our private lives. An end-state, privacy-based

92. This vision is in many respects similar to the one adopted by Scott Sundby in his article on the Fourth Amendment and “reciprocal trust” between citizens and the state. See Scott E. Sundby, “*Everyman*”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

93. See *supra* note 87 for sources on the Fourth Amendment as an antitotalitarian principle.

theory that the Fourth Amendment is meant to ensure a safe space for private life just cannot explain the state action requirement in the way that a power-skeptical theory clearly does.

The best response to this argument might be that we have constitutionalized a rule against *state* invasions of privacy because the legislature can be trusted to protect our rights against private parties, but not against the government. On this view, the reason for the Fourth Amendment is our concern that a legislature will enlarge the powers of law enforcement unless a super-legislative rule constrains its authority to do so. This is, however, merely a restatement of the power-skeptical view of the Fourth Amendment—only here it is applied to legislatures rather than to individual law enforcement officers. Yet treating power-skepticism as a unified theory, we must be concerned not only with legislative attempts to enlarge the police powers available for investigatory and law enforcement purposes, but with police attempts to enlarge their own powers by taking them beyond their intended purposes. These executive officers seem no more trustworthy than our elected representatives—perhaps less so.

This view of the Fourth Amendment as protecting a certain relationship between the collective citizenry and the police is faithful to a text that protects “the people” from totalizing and pervasive government influence just as surely as it protects the houses and effects of individual persons. Akhil Amar’s historical research has made plain that references in the Constitution to the rights of “the people” imply *collective* rights—that is, rights protecting the interest of the citizenry at large in certain outcomes or limitations on government power.⁹⁴ This is not to say that individual interests are left unprotected by the text, only that the phrasing puts the rights of “the people” at the center of the Amendment’s protections. And Amar has described perfectly the collective interest that the Fourth Amendment protects:

[I]n talking the familiar talk of individual rights, we must be wary of anachronism and must not automatically assume that the right was essentially countermajoritarian. . . . [T]he Fourth Amendment evinces at least as much concern with the agency problem of protecting the people generally from self-interested government policy as with protecting minorities against majorities of fellow citizens. A self-dealing and oligarchic government, after all, could threaten rights of the people

94. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 64-68 (1998).

collectively by singling out certain persons—opposition leaders . . . for example—for special abuse.⁹⁵

Note Amar’s use of the term “agency” to describe the relationship between the people and the police. This is an explicit endorsement of the view that the police hold their powers in trust for the people and that the collective right provided by the Fourth Amendment serves to keep the people’s agents or trustees from abusing those powers to self-serving ends. It seems that the best interpretation of the text and history of the Fourth Amendment shows equal—if not greater—concern with securing freedom from totalitarianism than with securing an individualized right to privacy.⁹⁶

The antitotalitarian, power-skeptical conception of the Fourth Amendment also explains quite well one of the paradigm Fourth Amendment cases: the problem with general warrants. Whether one believes that the Fourth Amendment enacts a warrant requirement or not, it is plain from the face of the text that it does not allow warrants that fail to meet the limiting constraints of probable cause and particularity. Indeed, there is a strong case to be made that the Amendment was enacted specifically to respond to the problem of overbroad warrants issued by nonneutral government officials for the purpose of harassing dissidents.⁹⁷ The problem with general warrants was that they cut government and police power loose, rendering officers immune from suit even if they were putting their powers to impermissible ends.⁹⁸ They could give “government henchmen absolute power to ‘round up the usual suspects,’ rousting political enemies.”⁹⁹ In short, general warrants were an evil because they constituted a complete license to the police to use their powers in a manner that was ultra vires in the classic sense.

95. *Id.* at 67-68.

96. As Amar does not appear to agree with the warrant requirement or the exclusionary rule, it is difficult to assess whether he would agree with the pretext problem. *See, e.g.,* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 3-31 (1997) (critiquing the so-called warrant requirement, the probable cause requirement, and the exclusionary rule).

97. *See id.* at 67. Amar cites the famous English case of *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.), as establishing the unlawfulness of general warrants. In that case, George III used general warrants to harass John Wilkes, who had used the press to criticize the King. The case was well known in the colonies, and Amar believes it to be the basis for the Fourth Amendment’s clear limitations on when warrants may issue and on what grounds. *See* AMAR, *supra* note 94, at 65-67, 74; AMAR, *supra* note 96, at 10-17.

98. *See* AMAR, *supra* note 94, at 72-73.

99. *Id.* at 73.

This is exactly the problem that the power-skeptical, antitotalitarian conception of the Fourth Amendment is so well suited to address. The principal problem with the *Whren* rule is that it transmogrifies the traffic law into the twenty-first century equivalent of the general warrant—police can stop whomever they want on the road, and for whatever reason, as long as they can claim probable cause to suspect some minor, technical violation of the traffic laws. Indeed, because the police get the benefit of qualified immunity if they are ever sued for violating Fourth Amendment rights, it would be necessary in order to recover to show that a police officer's perception of probable cause was obviously wrong.¹⁰⁰ Few claimants could clear that hurdle. The idea of the Fourth Amendment as protecting only individualized privacy rights fails to perceive this reincarnation of the general warrant because, from the standpoint of the individual speeder who is stopped, there is no difference between a stop motivated by the fact that he was speeding and a stop motivated by some more dubious purpose. Considering the wider lens of “the people” at large, however, it is clear that the relationship between the citizenry and its trustee police force has changed for the worse when the public roadways provide unassailable opportunities for the police to pursue self-serving action. The rights rhetoric of *Whren* is the new general warrant.

Finally, it bears noting that this antitotalitarian theory of the Fourth Amendment responds to the justified concerns of panopticism that attend a legal regime as sweeping and comprehensive as ours. The law is all around us, and we are breaking it all the time. This is especially true on the highways, but it is true at home, at work, and in public as well. Regulatory provisions carrying minimal penalties surround innumerable aspects of everyday life, and the police can regularly claim one or another such provision as an objectively reasonable ground for seizure or search. We may very well want these helpful regulatory regimes to remain in place without having them serve as ubiquitous windows and lenses that allow the police to look more frequently and more searchingly into everyday life. Indeed, we might be justifiably concerned with the mere lurking *possibility* of the police using their regulatory powers in this way, even if the actual uses of the regulatory powers for investigatory purposes are few and far between. The possibility of police panopticism is one that constrains freedom and dissent, and one with which our Fourth Amendment search and seizure regime should rightfully be concerned.

It is possible that the careful balancing between the regulatory regime and the powers of the police could be accomplished entirely by statute, but this is

100. See *Anderson v. Creighton*, 483 U.S. 635 (1987) (holding that an officer is entitled to immunity if he could reasonably have believed that his search was reasonable under the Fourth Amendment).

doubtful for two reasons. First, as noted above, the legislature has strong incentives not to reduce the investigatory and enforcement powers of the police. We thus might not want to rely on state beneficence when the risk remains that these powers could be used pretextually not only to investigate crime in circumvention of the warrant and probable cause requirements, but to squelch dissent as well. Second, we must bear in mind the flexibility and creativity with which the police can turn one broad power into another, and the difficulty of enacting effective limitations of this practice. In this regard, a rule that treats as unconstitutional the very act of taking a power beyond its intended purpose seems the most likely to be effective.

The power-skeptical approach to the Fourth Amendment thus best serves the important end of isolating the police's important but dangerous law enforcement role from its equally important but less dangerous role as protector of the public welfare in a noncriminal sense. Ignoring pretextual use of the regulatory powers allows the lines to blur and thereby allows the more far-flung regulatory and general welfare power to serve as a hook for the more insidious criminal investigatory one. Attention to pretext claims, meanwhile, assures that the powers entrusted to police are used *for the reason* that they were so entrusted, making the settling of these various trusts by the people more informed. The powers over smoke detectors and traffic lights that we might be willing to place in trust with the police might be very different if we believed that those powers would be serving as vehicles for criminal investigation. Policing the police for pretext thus serves not only to prevent creeping state panopticism, but also to effectuate popular control over the police power.

Again, I am not denying the appropriateness of using evidence of criminality discovered during regulatory activities that otherwise would have occurred. The concern is only with the police using their regulatory or general welfare responsibilities as a pretext for otherwise barred law enforcement ends. A constable doing medical-inspector work can arrest a pharmacist if he finds a murder weapon. Indeed, a medical inspector might even legitimately use his power to effectuate a warrantless search of the pharmacy for evidence of criminal food and drug storage violations, because although the search is for criminal rather than regulatory transgressions, it is still in furtherance of the health-related purpose for which the warrantless search power was granted. But the pharmacy cannot be subjected to a search for a murder weapon that would otherwise have been barred by the Fourth Amendment under the mere pretext of a health and safety search.

The power-skeptical approach regards pretext as a profound problem because ill-motivated searches are an irresponsible exercise of an investigatory power that the people have entrusted to the government. To borrow another term from corporate law, police have a kind of Fourth Amendment fiduciary

duty to the people to discharge the enforcement powers they hold in trust for us in a constitutionally responsible way. That means exercising those powers to the ends that they were intended to serve and in a manner consistent with the probable cause and warrant requirements—that is, not subjectively trying to skirt either constitutional boundaries or the boundaries of popular will by using one power for another purpose. The particular commands of this fiduciary duty are often amorphous, and I am not suggesting that the hard cases will be any easier than they are under our current rights rhetoric. But these responsibilities nonetheless exist, and much of our exclusionary rule doctrine already serves to incentivize and enforce them. We can only do better by bringing these responsibilities to the fore and by admitting that it is not concern about invasion of individualized privacy rights but concern about abuse of power that animates our Fourth Amendment jurisprudence.

IV. THE CONSEQUENCES OF A NEW FOURTH AMENDMENT VOCABULARY

I have offered this extended defense and exposition of a power-skeptical Fourth Amendment vocabulary in large part because I think it is an essential part of any subjective intent test proffered for pretextual searches and seizures. Without admitting this power-skeptical shift in focus, the response to any such test will continue to be as it has been—that subjective officer intentions are irrelevant to the questions of whether and to what extent the rights of the relevant citizen were invaded. In refocusing us on the behavior of the searcher rather than on the situation of the searched, the shift in our terms is essential to accepting the test that I began formulating at the conclusion of Part II.

Indeed, having theorized the purpose of a power-skeptical approach to the Fourth Amendment, it is possible to complete the pretext test as follows:

*A search or seizure should be held unconstitutional when the defendant can show, by a preponderance of the evidence, that an inappropriate motive (or set of motives) is a but-for cause of the action. A motive is inappropriate if it is contrary to the Constitution, especially if it is contrary to the procedural limitations of the Fourth Amendment itself.*¹⁰¹

101. Although I recognize that “contrary to the Constitution” is not self-explanatory, nothing too complicated is intended by it. All I mean is that a police purpose is unacceptable if the Constitution, fairly interpreted, would frown on the offering of that purpose as the justification for the search. One could adopt widely variant views of when a pretextual purpose was in fact problematic. Along with the petitioners in *Whren*, one might think that

Because, on the power-skeptical view, the Fourth Amendment serves as a bulwark against totalitarianism, it in fact “incorporates” the other rights in the Constitution against officers who might use their broad powers to effect unconstitutional purposes. A speeding stop motivated by a politically contrarian bumper sticker would be a violation of the Fourth Amendment as much as the First, just as racial harassment through traffic stops would be a violation of the Fourteenth *and* the Fourth. Yet, most importantly, a stop or search motivated by the desire to avoid the hurdles of the warrant and probable cause requirements would be unconstitutional as well—as long as the defendant could meet the burden of showing that it is more likely than not that the police action would not have happened in the absence of these illicit motives. This test does not solve the difficult balancing problems outside of the pretext context, but it at least allows us to see the problem with *Whren* and its relatives.

Indeed, there are a variety of puzzling cases that this test, and the corresponding change to a power-skeptical Fourth Amendment vocabulary, would help us to understand. Among these are the waiver-like plain view cases, in which current doctrine holds that if one’s backyard is in plain enough view that a power company repair mechanic perched atop a pole might chance to see it, then it is acceptable for the police to take surveillance shots of it from an airplane to investigate an anonymous tip.¹⁰² Chance exposure to the public and intentional investigation by the police might appear the same if we focus a rights-oriented vocabulary on the expectations and exposure of the rights-holder. But not so on a power-skeptical approach. Once concern with *government* power is at the core, we will stop treating a defendant’s exposure of something to unlikely public passersby as a waiver of the right to object to government investigation that intentionally skirts the warrant and probable cause requirements. Under a language that is concerned first and foremost with governmental abuse, it is not only plausible to separate the possible acts of

only the explicit reasons for a search are acceptable, and all other purposes are condemned. See *supra* text accompanying note 18. At the other extreme, one might think that the only purpose to be considered illicit is that of circumventing the Fourth Amendment’s procedural requirements. I believe that the former view sweeps too broadly, while the latter is perhaps too narrow. Although the end of avoiding the procedural hurdles of the Fourth Amendment is the paradigm case of the sort of illicit, pretextual purpose I am describing, I think that other purposes condemned by our Constitution should also count as “bad” motives. If the end of a search were the harassment of ethnic minorities or the suppression of political dissent, it would not only pose a Fourteenth or First Amendment problem, but a Fourth Amendment problem as well.

102. See *California v. Ciraolo*, 476 U.S. 207, 214-15 (1986).

the public from the intentional investigatory acts of the police; it is strange not to.

Another strange element of the doctrine that we might better understand through power-skepticism is the rule that when a drug dog sniffs around a car that is otherwise validly pulled over, this is not a search at all. This doctrine is currently rooted in the view that because a drug dog only discloses the existence of wrongful possession, and no one has a right to hide unlawful conduct, the dog sniff does not “compromise any legitimate interest in privacy,”¹⁰³ and so “is not a search subject to the Fourth Amendment.”¹⁰⁴ On a powers-based approach, this strange claim could not prevail: the Fourth Amendment is implicated *whenever* the government exercises its investigatory powers, because the question of responsible exercise of power can be asked quite apart from the question of whether a right was violated.¹⁰⁵ We can, instead, simply admit that drug sniffs are searches and ask whether the police should be trusted to use them without any requirement of probable cause.

For very similar reasons, a power-skeptical approach also helps us to understand why *Kyllo v. United States*¹⁰⁶ reaches its famous ban on the warrantless use of thermal sensors to detect marijuana grow-lamps. On the typical rights-oriented approach, *Kyllo* is a hard decision to understand. The thermal detector in that case only picked up information radiating out into the world from the walls of the house—that is, heat information that was freely exposed to the public. It also failed to provide any private or intimate details about the house; for the most part, the only thing it would disclose was the unusual heat output of a large-scale agricultural endeavor. To that extent it is not unlike the dog search that only produces evidence of illegal drug possession. Thermal detectors, like drug dogs, do not throw open the doors of

103. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

104. *Id.*

105. There are, in fact, layers of oddity here. We know that *Edmond* forbids suspicionless highway vehicle checkpoints employing drug dogs because the general law enforcement purpose of such stops is impermissible. See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Yet the addition of a drug dog to an ordinary traffic stop is apparently unproblematic. See *Caballes*, 543 U.S. at 408. One wonders what possible purpose animates the dog sniff in *Caballes* other than drug interdiction and how it could be any different from *Edmond*. The only way to square these views on the rights-based approach is to suppose that there is a right to be free from dog sniffs in *Edmond*, but that a driver waives that right by exceeding the speed limit or committing some other technical violation. Such an assertion strikes me as strange, but it remains the run of the mill for our rights rhetoric in this context.

106. 533 U.S. 27 (2001).

the house or the privacy of the person to the prying eyes of the police: they only expose illegal conduct, which no person has a right to hide.

Answering this argument within an individual-rights-oriented vocabulary is much harder than it would be on a power-skeptical approach. In *Kyllo* itself, Justice Scalia was more or less forced to hypothecate a wholly innocent private detail that would be revealed to the police through the thermal detector—his answer was that it might disclose “at what hour each night the lady of the house takes her daily sauna and bath.”¹⁰⁷ Because such personal details could be revealed, there is a claim that an individual right or privacy interest has been invaded. Yet it is somewhat far-fetched to think that this case is really about bathing times and keeping one’s heat output private. Instead, it appears plainly to be about what government investigatory techniques are sufficiently powerful that it would be irresponsible to exercise them in the absence of a warrant. If we accept the vocabulary of power-skepticism, we do not need to hypothecate information that we have a right to keep private and that might be revealed by a thermal imager. Instead, we can merely wonder—directly—whether the government can responsibly make warrantless thermal surveillance a part of everyday life.

Yet no doctrinal turn is as strange and as difficult to swallow as the one that has animated this Note. The *Whren* rule supposes that the Fourth Amendment would stand idly by while an officer sat upon the witness stand and shouted to the heavens that the *only* reason he made a traffic stop was to see inside the suspicious-looking car of four young Hispanic men; indeed, the Constitution might have to stand idly by even if the men were pretextually *arrested* for a fine-only traffic violation¹⁰⁸ and their car was pretextually searched for what are pretextually referred to as “inventory purposes.” It is true that most cases are not so clearly troubling because the facts are never as clear as I have presented them in my hypotheticals—especially when subjective motivations are concerned. Yet the existence of even hypothetical absurdities is a problem for constitutional doctrine because if the doctrine cannot capture our intuitions about possible cases, we cannot help but wonder if we have the right approach.

Even with the wide acceptance of *Whren* in the case law, I believe that the subtle change I have suggested for our Fourth Amendment vocabulary is sufficient to see its bankruptcy. The test that I have suggested is practically workable even if it is a difficult bar for the typical defendant to pass, and I hope I have shown that in analyzing the subjective motivations of individual officers,

¹⁰⁷. *Id.* at 38.

¹⁰⁸. See *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001) (concerning a motorist who was pretextually arrested for speeding).

the test does not focus upon irrelevancies. We, as a citizenry, *should* be concerned with pretext on the part of the police because, perhaps more than anything else, pretext indicates that it may not be appropriate to trust them to responsibly discharge the powers we have granted them for the ends that these powers were intended to serve.

Indeed, pretext ought to be a core problem for the Fourth Amendment because it represents a breach of trust. The Fourth Amendment exists explicitly to limit the set of available practices that may be deployed in pursuit of law enforcement, and pretextual actions simply enlarge that set of practices by employing certain *limited* powers to *general* law enforcement ends. The test I have advanced is intended to root out such pretextual power plays before they turn, say, laws against speeding into an invitation to racial profiling and to peering into “suspicious” cars without warrant or probable cause. The change in vocabulary I have advocated is intended to show not only why pretext is such a serious problem, but how it is merely a symptom of a more pervasive failure to emphasize responsible law enforcement behavior and a healthy skepticism of government power in our interpretation of the Fourth Amendment.

