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# Purpose, Policing, and the Fourth Amendment

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# PURPOSE, POLICING, AND THE FOURTH AMENDMENT

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*Fourth Amendment cases are replete with references to "purpose." Typically, these references pertain to the motivations of individual officers and occasionally to those of public institutions. That courts pay attention to purpose is unsurprising. Across many areas of law, an alleged wrongdoer's intentions are often critical to determining liability, a remedy, or both. Purpose analysis in Fourth Amendment cases, however, is surprisingly confused. The Supreme Court has, without explanation, advanced separate frameworks for analyzing purpose—objective, subjective, and programmatic. The only consistent thing about the three approaches is that they all fail to ensure that law enforcement agents behave transparently and honestly. The failure is particularly worrisome because of the increasingly salient role that purpose analysis has played in recent Supreme Court cases.*

*This Article contends that courts and policy makers should use purpose as an ex ante institutional design principle. This would be in stark contrast to its current role as a judicial device for ascertaining an actor's past motivations. A single enforcement bureaucracy should not be responsible for too broad a range of functions, particularly if those functions implicate very different levels of state coercion—for example, enforcing felony narcotics laws as opposed to traffic laws. Modern police departments tend to have sprawling mandates that sometimes make it impossible for policy makers and officers to differentiate and rank distinct goals. Mandate sprawl is particularly problematic because it creates opportunities for pretextual searches and seizures—police have access to a broad range of rationales to justify conduct actually carried out for*

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*impermissible motives. Were enforcement bureaucracies required to differentiate enforcement activities by purpose, it would go a long way in curing this problem.*

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## INTRODUCTION

Fourth Amendment cases are replete with references to "purpose." Typically, the term pertains to an individual officer's motivations for

having undertaken specific acts.[1] Occasionally, it pertains to a public institution's motivations for having undertaken a policy or practice.[2] That courts pay attention to state actors' intentions in Fourth Amendment cases is unsurprising. Across many areas of law, an alleged wrongdoer's intentions are often critical to determining liability, a remedy, or both. What is surprising is how confused and inconsistent the Supreme Court's analysis of purpose is in Fourth Amendment cases. The Court uses entirely different frameworks for evaluating purpose in different kinds of cases. Not only does the Court fail to explain why it embraces different frameworks in different contexts, but the only consistent thing about these approaches is that they all fail to ensure that law enforcement agents behave transparently and honestly. The failure is particularly worrisome because of the increasingly salient role that purpose analysis has played in recent Supreme Court cases.[3]

Recent opinions exemplify the conceptual murk surrounding purpose and the Fourth Amendment. In *Jardines v. Florida*, the Court concluded that it was a Fourth Amendment "search" for a police officer to walk a "narcotics dog" up to the front door of a house to sniff for drugs.[4] Thus, the officer's failure to obtain a warrant beforehand violated the Fourth Amendment.[5] The Court has increasingly relied upon trespass principles to assess whether a state agent's conduct was a "search."[6] This approach requires evaluating the state agent's purpose for "occup[ying] private property."[7] Writing for the majority, Justice Scalia concluded that the officer's purpose for approaching Jardines's front door was to conduct a criminal search.[8] The Court was careful to qualify that its inquiry into officer purpose was "objective."[9] The Court often qualifies its analysis of

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[1] *See, e.g.*, Fernandez v. California, 134 S. Ct. 1126, 1134–35 (2013); Jardines v. Florida, 133 S. Ct. 1409, 1416–17 (2013); Brigham City v. Stuart, 547 U.S. 398, 404–05 (2006); Whren v. United States, 517 U.S. 806, 811–13 (1996); Horton v. California, 496 U.S. 128, 138 (1990); Colorado v. Bertine, 479 U.S. 367, 371–72 (1986).

[2] *See, e.g.*, Maryland v. King, 133 S. Ct. 1958, 1978–80 (2013); California v. Quon, 560 U.S. 746, 761 (2010); Ferguson v. Charleston, 532 U.S. 67, 81–84 (2001); Chandler v. Miller, 520 U.S. 305, 322 (1997); Vernonia School Dist. v. Acton, 515 U.S. 646, 653 (1995); New York v. Burger, 482 U.S. 691, 708–10 (1987).

[3] *See* United States v. Jones, 132 S. Ct. 945, 949 (2012) (noting that the Government installed GPS on a suspect's vehicle "for the purpose of obtaining information").

[4] *Jardines*, 133 S. Ct. at 1416–17.

[5] *Id.* at 1417.

[6] *Jones*, 132 S. Ct. at 949–50.

[7] *Id.*

[8] *Jardines*, 133 S. Ct at 1417–18.

[9] *Id.* at 1417.

officer purpose in this way, noting the practical difficulties of ascertaining an individual officer's subjective intentions.[10] While the Court's analysis of purpose in *Jardines* bears some resemblance to state of mind in criminal law, the analogy is inapt because the assessment of purpose in criminal law requires subjective analysis.[11] As noted by the *Jardines* dissenters, what "objective purpose" means is unclear.[12]

The Court's framework for analyzing institutional purpose is also confused, but for different reasons. The Court's so-called programmatic-purpose inquiry has the air of doctrinal afterthought.[13] The Court casts these cases as "exceptions" to the Fourth Amendment's general requirement that there be individualized suspicion for a search or seizure.[14] For example, in *Maryland v. King*, the Court recently upheld suspicionless collection of DNA from arrestees.[15] The Court concluded that Maryland's legislative purpose in enacting the scheme was "administrative" as opposed to "criminal."[16] The Court credited Maryland's argument that the scheme's purpose was to enable law enforcement to accurately identify suspects for booking.[17] In dissent, Justice Scalia objected, stating that the majority ignored the most obvious purpose for the Maryland scheme: solving open criminal cases where there was a sample of suspect DNA.[18] Crediting that purpose, however, would have made it impossible to uphold the Maryland scheme because a search for criminal evidence requires individualized suspicion that the suspect committed a crime.[19] More broadly, the programmatic-purpose analysis in *King* bears no resemblance to the objective purpose analysis in *Jardines*. *King* bears much greater resemblance to the kind of deferential, "rational basis" review that one might see in other constitutional law contexts. This, however, is puzzling

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[10] *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 405 (2006) (qualifying "even if their subjective motives could be so neatly unraveled"); Whren v. United States, 517 U.S. 806, 814–15 (1996) (noting "the evidentiary difficulty of establishing subjective intent").

[11] *See, e.g.*, MODEL PENAL CODE § 2.02 (defining purpose).

[12] *Jardines*, 133 S. Ct. at 1423–24 (Alito, J., dissenting).

[13] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 45–47 (2000) (distinguishing "programmatic purpose" from "subjective intentions," which earlier opinions had held were not to be considered in Fourth Amendment cases).

[14] *See, e.g.*, *id.* at 37 (summarizing cases). More specifically, the Court has developed its programmatic purpose framework in the context of the so-called administrative and special needs exceptions. For a fuller description, *see infra* Section I.C.

[15] Maryland v. King, 133 S. Ct. 1958, 1980 (2013).

[16] *Id.* at 1971–72.

[17] *Id.* at 1971–74.

[18] *Id.* at 1982–83 (Scalia, J., dissenting).

[19] *Id.* at 1983.

given the Court's statements in other cases that the programmatic-purpose inquiry requires a searching analysis of an actor's actual motivations.[20]

This Article offers a critical account of purpose's role in Fourth Amendment jurisprudence. First, it critiques the frameworks the Court currently uses for evaluating purpose in Fourth Amendment cases. Second, it offers a novel account of why the Court relies on different notions in the individual and institutional decisionmaking contexts. The Court's pervasive but confused reliance on purpose in Fourth Amendment cases reflects constitutional criminal procedure's awkward role mediating between criminal law and constitutional law. In each of these two fields, purpose has a long and distinct conceptual lineage. In criminal law, purpose is a form of mens rea. In constitutional law, purpose is a method of evaluating the relationship between a state's goals and the means by which it achieves those goals.[21] In Fourth Amendment cases, the Court uses purpose in a manner that echoes both approaches, but only faintly.

The typical Fourth Amendment case presents a constitutional harm as realized between two individuals, one of whom is a police officer.[22] Such "transactional framing" of disputes has generated constitutional principles that seem writ small[23]—that is, narrow rules designed for officers' conduct in the field rather than broad principles of institutional design.[24] The purpose analysis that has evolved in these cases has the air of state-of-mind analysis in criminal law. Police officers, however, are no ordinary individuals. They are state agents. The point of a Fourth Amendment suppression motion is to determine evidence's admissibility, not to punish individual officers for having behaved badly. The Court seems to recognize

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[20] *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (citing United States v. Knights, 534 U.S. 112, 122 (2001)); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 46–47 (2000).

[21] *See infra* notes 321–337 and discussion (discussing First and Fourteenth Amendments).

[22] *See* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (requiring that defendant have suffered personal injury for standing to assert to Fourth Amendment claim).

[23] I borrow this expression from Daryl Levinson who uses it to describe courts' and commentators' tendencies to conceptualize constitutional disputes as if realized between real persons when they are not. Daryl Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002). *See also infra* Section II.A.3.

[24] This is likely why both courts and commentators tend to address the Fourth Amendment as if its underlying concerns were distinct from constitutional law more generally. *See* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200 (1993); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2001–02 (1998); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131–33 (1991).

this by insisting that its analysis of officer purpose is objective.[25] By so insisting, the Court rejects a subjective approach that evaluates a state agent's actual motivations. But that does not explain what objective purpose means.

This Article contends that officers perpetrate a hoax of constitutional significance whenever they behave pretextually—that is, when they act on the basis of unconstitutional motives, but later claim some objective rationale for their conduct. Because objective purpose cannot screen for this kind of officer duplicity or confusion, it fails to meaningfully constrain officer conduct. Although the expression suggests a concept with roots in criminal law or torts, it has neither. Rather, it is a rhetorical device for imputing the state's broad, corporate intentionality to individual officers. This is to conceive of individual officers, vis-à-vis individual citizens, as the state incarnate. The argument is bolstered by the rare case in which the Court permits analysis of officers' subjective motivations—for example, when the Fourth Amendment violation arises from an officer-judge interaction, such as misrepresentations in a warrant application. It makes no sense to conceive of an individual officer, vis-à-vis a judge, as the state incarnate. In a divided state like our own, an enforcement agent's willingness to perpetrate a hoax upon a judge is particularly disruptive. This, however, is more broadly true than just when an officer lies directly to a judge. It is true whenever an officer evades constitutional principle by ignorance or subterfuge.

The Court's decision in *King* also suggests a tolerance for pretext where institutional decisionmaking is concerned. This is ironic because the Court has insisted that a programmatic-purpose inquiry should focus on the state actor's actual motivations.[26] But the *King* Court refused to credit the actual reason for the state's DNA collection policy: solving open criminal cases. This highlights how fundamental the outstanding questions regarding programmatic purpose are. It is uncertain how intensive judicial scrutiny should be, whether particular kinds of institutions are entitled to deference (for example, state legislatures versus municipal police departments), or how to evaluate institutions that are responsible for carrying out multiple

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[25] *See supra* note 1.

[26] *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (citing United States v. Knights, 534 U.S. 112, 122 (2001)); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 45–47 (2000) (explaining the relevance of an officer's subjective intent in the programmatic-purpose inquiry, and rejecting the *Whren* rule in the context of the Indianapolis drug interdiction checkpoints).

goals that span the civil–criminal divide (of which municipal police departments are a prime example).

Normatively, this Article draws on political theory to argue that Fourth Amendment purpose should ensure enforcement bureaucracies behave honestly and transparently. To do this, purpose should serve as an ex ante organizing principle for institutions. The Fourth Amendment should require the state to narrowly define specific enforcement purposes and assign responsibility to specific institutional actors for advancing each one. This should be a prerequisite for a particular institution's agents to conduct any searches or seizures at all. This is in stark contrast to purpose's current role as a judicial device for untangling a state actor's motivations after she has already carried out a search or seizure.

The proposal here has far-reaching consequences for the organization of municipal police departments. It would require the state to strip police departments of at least some noncriminal functions. Where impractical to do so, it would require rigid segregation of employees based upon function. As matters stand, police departments tend to have sprawling mandates that encompass both criminal and civil goals. This makes it difficult, if not impossible, for policy makers and individual officers to differentiate and rank distinct goals. In addition, because police departments have sprawling mandates that include criminal and civil goals, officers have substantial opportunities for pretextual searches and seizures. The incentive for pretextual behavior will be particularly high where a state actor is responsible for overlapping purposes, some of which are subject to more stringent procedural constraints than others.

The DNA testing in *King* offers a provisional illustration of how the proposal might function. To the extent that *King* permits DNA testing of arrestees for administrative identification purposes,[27] that function should be assigned to dedicated administrative personnel who are segregated from officers responsible for investigating crimes. Communication between the two categories of personnel should be limited to constitutional purposes only. The same principle supports stripping the police of some enforcement duties altogether. For example, the Fourth Amendment currently allows police to stop motorists at fixed roadblocks to check for sobriety.[28] Officers need not have individualized suspicion to do so, provided that the roadblock's purpose is preventing drunk driving.[29] Practically speaking

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[27] Maryland v. King, 133 S. Ct. 1958, 1971–74 (2013).

[28] *See* Mich. Dep't State Police v. Sitz, 496 U.S. 444, 455 (1990).

[29] *See id.* at 450–51.

though, police officers will advance that purpose by making arrests. In addition, little prevents police officers from using the roadblock as an opportunity to investigate crimes unrelated to drunk driving.[30] This Article suggests that a civil entity without arrest authority, like the Department of Motor Vehicles, would be a more constitutionally trustworthy roadblock administrator. Its incentives are better aligned with the roadblock's constitutionally permitted purpose: removing drunk drivers from the road.

The Article proceeds in three sections. Section I surveys the Court's pervasive reliance on the notion of purpose in Fourth Amendment cases, identifying the three frameworks the Court deploys: objective, subjective, and programmatic. Section II, the Article's analytic heart, offers a critical account of the Court's reliance on purpose in Fourth Amendment jurisprudence. Section III concludes by sketching a reform proposal.

## I. PURPOSE IS UBIQUITOUS IN FOURTH AMENDMENT CASES

There is scant literature addressing the ubiquitous references to purpose in Fourth Amendment opinions. What little exists tends to narrowly advocate for a subjective approach to evaluating individual officers' intentions without recognizing the range of functions the concept serves.[31] This oversight may occur because the Court does not generally rely on purpose as the organizing principle for its Fourth Amendment analysis. Purpose analysis is embedded within the two dominant approaches to Fourth Amendment questions, "warrant plus exceptions" and "history plus reasonableness." The first approach, inaugurated by the Warren Court in *Katz v. United States*,[32] was once the preeminent approach. It required

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[30] *See infra* Section III.B.

[31] *See* Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 343 (2006) (arguing against objective test of purpose); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 111 (1982) (same); George Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 377 (2006) (same); Brooks Holland, *The Road 'Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293, 308 (2006) (same in cases involving suspicionless stops at roadblocks). In contrast this Article analyzes different conceptions of purpose that the Court has adopted across Fourth Amendment contexts. There is a growing literature regarding the role of "intention" in criminal procedure, but these scholars do not generally address the Fourth Amendment. This is likely because the Fourth Amendment is not limited to "criminal" cases. *See infra* Sections I.A–B. *See, e.g.*, Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 720–21 (1999); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1354–57 (2008); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 126–29 (2008).

[32] 389 U.S. 347 (1967). This is the framework for how at least one leading textbook

courts to decide whether police have obtained a warrant before searching, or acted pursuant to a judicially specified exception to that requirement.[33] In recent decades, the Court has increasingly embraced a second approach. It requires courts to determine what common law practice was when the Fourth Amendment was drafted and, where unclear, to use open-ended interest balancing to assess Fourth Amendment claims.[34] Scholarly critiques of these two different frameworks are legion,[35] but overlook what the two approaches share: an attention to state actors' purpose. The Court's analysis of purpose cuts across the two dominant approaches to the Fourth Amendment.

The background discussion below shows that the Supreme Court has failed to develop a consistent framework for analyzing purpose in Fourth Amendment cases. As detailed in Section A, in cases involving individual state agents, the Court usually insists that analysis of purpose is objective, but fails to account for what that means. There are rare occasions identified in Section B where the Court permits subjective analysis of officer purpose. Section C surveys the so-called administrative and special needs cases where the Court has embraced an altogether different approach to purpose, which it describes as programmatic. The Court has repeatedly stated that this requires evaluation of a state actor's actual motivations.[36] But the Court has not been consistent in heeding its own words.[37]

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teaches the Fourth Amendment. *See, e.g.*, RONALD ALLEN, ET AL., COMPREHENSIVE CRIMINAL PROCEDURE xiv–xvi (3d ed. 2011) (beginning with *Katz* and following with exceptions).

[33] *See Katz*, 389 U.S. at 357.

[34] Justice Scalia has, quite successfully, spearheaded this common-law driven approach. *See, e.g.*, David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1748–61 (2000) (describing the approach).

[35] *See, e.g.*, *id.*; Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 246 (2002); Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387, 1390 (2003). This scholarship tends to assail the jurisprudence for being too ad hoc, *see, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758–60 (1994); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 29–30 (1988), and for inadequately protecting individual rights, *see, e.g.*, Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1522 (1996) (arguing that the Fourth Amendment should protect against targeting harm); Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 278–79 (2011) (arguing that the Fourth Amendment allows police too much latitude in administrative searches).

[36] *See* Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080–81 (2011) (citing United States v. Knights, 534 U.S. 112, 122 (2001)); City of Indianapolis v. Edmond, 531 U.S. 32, 46–47

A. ANALYSIS OF OFFICER PURPOSE IS USUALLY OBJECTIVE

In Fourth Amendment cases, the Court usually insists that officer purpose be evaluated from an objective perspective. When explanation is offered for this at all,[38] it is thin, hinging on the plain meaning of the word reasonable in the Fourth Amendment's text or the supposed evidentiary difficulties that subjective analysis entails.[39]

### *1. Individualized Suspicion Requires Objective Analysis of Officers' Purpose*

In Fourth Amendment jurisprudence, individualized suspicion is the paradigmatic purpose inquiry.[40] It requires that an officer have either probable cause or reasonable suspicion before searching or seizing.[41] Probable cause exists when the observable facts suggest "a fair probability that . . . evidence of a crime will be found in a particular place."[42] It takes fewer and less incriminating facts to generate reasonable suspicion.[43] Because probable cause is more stringent, it also permits a farther-reaching search than does reasonable suspicion. When an officer lawfully searches pursuant to probable cause, her search may extend as far as reasonably necessary to locate the evidence for which she has probable cause.[44] An officer acting pursuant to reasonable suspicion, however, may only conduct a brief investigative interview and a limited "pat down" for weapons.[45]

The individualized suspicion requirement generates a series of puzzles about officer error and duplicity.[46] An officer might search based on the subjective belief that the observed facts give rise to individualized suspicion

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(2000).

[37] *See infra* Section II.B.3.

[38] *See, e.g.*, Kentucky v. King, 131 S. Ct. 1849, 1859 (2011) (stating that the Court has consistently rejected the subjective approach, but without explanation for why).

[39] *See* Whren v. United States, 517 U.S. 806, 814–15 (1996).

[40] *Cf.* Maryland v. Hayden, 387 U.S. 294, 306–07 (1967) (suggesting that probable cause ensures that there is a sufficient nexus between a piece of evidence and the government's "purpose of proving crime"). Although exceptions have proliferated, the Court still describes individualized suspicion as a touchstone for a legitimate search or seizure. *See Edmond*, 531 U.S. at 37.

[41] *See* Delaware v. Prouse, 440 U.S. 548, 654–55, 655 n.11 (1979).

[42] Illinois v. Gates, 462 U.S. 213, 214 (1983).

[43] Alabama v. White, 496 U.S. 325, 330 (1990).

[44] *See* United States v. Ross, 456 U.S. 798, 820–21 (1982) (discussing search of an automobile).

[45] *See* Terry v. Ohio, 392 U.S. 1, 29–30 (1968).

[46] *See* Dix, *supra* note 31, at 441–44.

when they actually do not. Alternatively, an officer might search believing that the observable facts do not give rise to individualized suspicion when they actually do. Parallel questions exist as to the applicable criminal law. An officer might search believing that one criminal law has been violated when, in fact, it is actually some other. Alternatively, an officer might search despite her belief that no criminal law had been violated when one actually had been.

The Court's one-word solution to these puzzles has been "objective." A search or seizure is lawful provided that the objectively observable facts give rise to individualized suspicion.[47] Generally, a search that could not have occurred absent the investigating officer's error is unconstitutional, while a search that could have occurred absent the error is constitutional.[48] An officer's subjective belief that there was individualized suspicion will not make a search valid if she was objectively wrong.[49] By the same token, if the objectively observable facts supported individualized suspicion, it does not matter that the investigating officer searched without subjectively believing that there was individualized suspicion.[50] Parallel principles apply to officers' legal conclusions. If the objectively observable facts suggested that a suspect violated *a* criminal law, it does not matter that the law was not the one that the investigating officer actually thought the suspect violated.[51]

That a search or seizure, objectively speaking, could have occurred under some criminal law does not mean that it, empirically speaking, would have occurred. The gap between theoretical and empirical is potentially vast, given police officers' broad discretion not to enforce criminal laws. Officers routinely overlook criminal law violations.[52] That a reasonable

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[47] *See* Whren v. United States, 517 U.S. 806, 814–15 (1996).

[48] *See* WAYNE R. LAFAVE, SEARCH & SEIZURE § 3.2(b) (5th ed. 2012) (discussing United States ex rel. Senk v. Brierley, 381 F. Supp. 447 (M.D. Pa 1974), United States v. Day, 455 F.2d 454 (3d Cir. 1972), and Florida v. Royer, 460 U.S. 491 (1983)).

[49] *Cf. id.* (discussing, in the context of Beck v. Ohio, 379 U.S. 89 (1964), that an officer's good faith, subjective belief that he had grounds to make an arrest is insufficient to support an otherwise improper arrest).

[50] *See* Florida v. Royer, 460 U.S. 491, 507 (1983) (plurality opinion) ("[T]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's custody by proving probable cause and hence removing any barrier to relying on Royer's consent to search."); Hill v. California, 401 U.S. 797, 802–05 (1971) (holding that the police arrested the wrong individual, but that the mistake was reasonable).

[51] *See* Devenpeck v. Alford, 543 U.S. 146, 153–54 (2004).

[52] *See* Nirej Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1175–77 (2011).

officer could have permissibly searched or seized does not mean that she would actually have done so. In *Atwater v. Lago Vista*, the Court held that an arrest characterized by "gratuitous humiliations" does not violate the Fourth Amendment so long as it is supported by probable cause.[53] In *Atwater*, a police officer arrested a "soccer mom" for a seatbelt violation.[54] Atwater argued that the officer behaved unreasonably even though the officer had probable cause to arrest.[55] While the Court agreed that the officer exercised "extremely poor judgment,"[56] it refused to look beyond whether his conduct was supported by probable cause—which it was.[57]

An objective approach is also problematic because it creates considerable latitude for officers to behave pretextually.[58] In *Whren v. United States*, undercover narcotics officers pulled Whren over for a traffic violation and subsequently found narcotics.[59] Whren, who was black, conceded that he had violated a traffic law.[60] However, he argued that the stop would not have occurred absent the investigating officers' ulterior motive: to find drugs.[61] Whren further argued that the investigating officer impermissibly relied upon Whren's race to predict the presence of narcotics in his car.[62] A police department regulation limited when undercover officers were supposed to make traffic stops.[63] Whren argued that a reasonable undercover officer would not have violated the regulation and pulled Whren over for a traffic violation.[64] The Court refused to consider what a reasonable officer would have done in the same circumstance, derisively casting it as a subjective inquiry into the investigating officer's motives, a task fraught with metaphysical uncertainty and evidentiary peril.[65]

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[53] 532 U.S. 318, 347, 354 (2001).

[54] *Id.* at 323–24.

[55] *Id.* at 346–47.

[56] *Id.* at 346–50.

[57] *Id.* at 354.

[58] *See* LAFAVE, *supra* note 48, at § 1.4(f) (discussing pretext and Whren v. United States, 517 U.S. 806 (1996)); *see also id.* at § 3.2(b) (discussing problems associated with pretext in the context of police authority and discretion, broadly, and with regard to subjective intentions and *Whren*).

[59] 517 U.S. 806, 808–09 (1996).

[60] *Id.* at 810.

[61] *Id.* at 809.

[62] *Id.* at 810.

[63] *Id.* at 815.

[64] *Id.* at 816–17.

[65] Rather, the Court simply dismissed the entire question calling it an exercise in "virtual subjectivity." *Id.* at 814–15.

Together, *Whren* and *Atwater* mark the triumph of theoretical over empirical—could over would. The Court will assume that a police officer was motivated by individualized suspicion whenever theoretically possible that an officer in her position could have been.

### *2. Objective Purpose Is Increasingly Central to Determining if a Search Occurred*

The Supreme Court's recent decision in *Jardines*[66] suggests that purpose will play a more significant role in determining whether the Fourth Amendment applies at all. The Fourth Amendment only restrains conduct that is defined as a search or seizure.[67] The Court has defined the standard for whether a seizure occurred in terms of officer purpose.[68] In *Brower v. Inyo*, the Court concluded that a seizure occurs when the police "intentionally appl[y]" force to subdue a suspect.[69] The inquiry is objective.[70]

In *Katz*, the Court held that a search occurs when an officer intrudes upon a privacy interest that that society is prepared to recognize as reasonable.[71] As Professor Amsterdam recognized forty years ago, this ostensibly populist conceptualization does not readily translate into an administrable doctrinal test.[72] Commentators have rightly criticized the resultant search jurisprudence as ad hoc and unprincipled.[73] Justices have previously hinted that analyzing officer purpose could play a role in making search jurisprudence more consistent and rigorous.[74] In *Jardines*, the Court appeared to require just such an inquiry.[75] In *Jones v. United States*, when it concluded that the installation of a GPS device was a search, Justice Scalia hinted that officer purpose will play a central role in this new approach.[76] In *Jardines*, he gave fuller expression to that notion.

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[66] 133 S. Ct. 1409 (2013).

[67] U.S. CONST. amend. IV.

[68] *See* Brower v. Inyo, 489 U.S. 593, 597 (1989).

[69] *Id.* The test for whether a seizure occurred varies with context. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 201 (2002) ("If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.").

[70] *Brower*, 489 U.S. at 597.

[71] 389 U.S. 347, 361 (1967).

[72] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 386 (1974) (discussing "the problems of formulating such a basic conception").

[73] *See supra* note 35.

[74] *See* Bond v. United States, 529 U.S. 334, 341–42 (2000) (Breyer, J., dissenting).

[75] Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013).

[76] 132 S. Ct. 945, 949 (2012) ("The Government physically occupied private property

In *Jardines*, a police officer used Franky, a narcotics-sniffing dog to confirm an unverified tip that Jardines was growing marijuana in his home.[77] Without having obtained a warrant, the officer approached Jardines' home with Franky.[78] Franky sniffed the front door and "alerted."[79] The officer then obtained a warrant to search Jardines's home.[80] It turned out that Franky had been correct.[81] Jardines moved to suppress the marijuana evidence, arguing that the officer's use of Franky on the doorstep was a search that required a warrant.[82]

The Court focused on the officer's purpose in approaching Jardines's home.[83] The Court has increasingly relied upon property law concepts in analyzing whether a search occurred.[84] Writing for the majority in *Jardines*, Justice Scalia noted that under the Fourth Amendment, the home "is first among equals."[85] This was based on the Founding Era understanding that "property of every man [is] so sacred, that no man can set his foot upon his neighbor's property without leave."[86] "Leave" may be inferred from national custom-that is, Girl Scouts and trick-or-treaters typically have a license to approach one's front door.[87] That license, however, is "limited not only to a particular area, but also to a specific purpose."[88] According to the Court, it does not extend to those whose purpose is to conduct a search.[89] The Court in *Jardines*, however, took pains to qualify that its purpose inquiry was objective. It stated that the officer's conduct was a search because it "objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do."[90] But it is unclear what this means. In dissent, Justice Alito speculated that it might

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for the purpose of obtaining information.").

[77] 133 S. Ct. at 1413.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1416–17.

[84] *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 949–50 (2012) (invoking English common law principles).

[85] *Jardines*, 133 S. Ct. at 1414.

[86] *Id.* at 1415 (citing 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817). However, this is not based on any specific principle of trespass. *See id.* at 1423 (Alito, J., dissenting).

[87] *Id.* at 1415.

[88] *Id.* at 1416.

[89] *Id.*

[90] *Id.* at 1417.

mean that objective facts reveal the officer's subjective purpose.[91] This, however, is just a subjective test—whenever a court is asked to determine an actor's subjective mental state, it must answer based upon the objective facts that are part of the record.

### *3. Many Exceptions Turn on Objective Purpose*

Although the Court has stated that a warrant based upon probable cause is a prerequisite for any search or seizure,[92] exceptions abound.[93] When one of these exceptions turns on officer purpose, the Court has generally embraced an objective approach, meaning that officers' ulterior motives are of no constitutional consequence. If a reasonable officer could have availed herself of the exception, then it does not matter that an actual officer did so with an ulterior motive that would have been unconstitutional standing alone. Four examples follow: exigency, plain view, third-party consent, and inevitable discovery.

In its most recent exigency case, *King*, the Court expressly disavowed subjective purpose analysis.[94] The exigency exception permits police officers to conduct a warrantless search or seizure where there is probable cause and an exigency that makes it impracticable to obtain a warrant—for example, when there is a fleeing suspect.[95] In *King,* the Court considered whether the exception applies when officers themselves create the exigency.[96] The officers knocked on a suspected drug dealer's door and, "as loud as [they] could," yelled, "This is the police" or "Police, police, police," inducing the suspects to begin destroying evidence.[97] Relying on objective analysis, the Court held that whether the police deliberately or negligently induced the destruction of evidence does not matter so long as they "d[id] not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment."[98]

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[91] *See id.* at 1423–24 (Alito, J., dissenting).

[92] *See* Katz v. United States, 389 U.S. 347, 357 (1967).

[93] *See* California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) (surveying examples).

[94] 563 U.S. 452, 464 (2011) ("'Our cases have repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed objectively, justify the action.'" (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006))).

[95] *See* Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

[96] 563 U.S. at 455.

[97] *Id.* at 456.

[98] *Id.* at 469 (finding no such violation because, as with a private citizen who knocks at the door, occupants have no obligation to open the door for a police officer who knocks without a warrant).

In *Brigham City v. Stuart*, the Court held that exigency also permits a warrantless search of a home when it is reasonable to think that someone inside is in danger of imminent injury.[99] In such a situation, the officer's purpose is ostensibly to provide aid, not to make arrests. The officers in *Stuart* had responded to a call regarding a loud house party; upon arriving, they observed a fight and intervened.[100] The state court had held that the exception does not apply if the officers subjectively intended to make arrests.[101] The Supreme Court rejected that approach, holding that a search is constitutional if objective circumstances justify it.[102] Echoing *Whren*, the Court emphasized that the Fourth Amendment forbids only objectively unreasonable searches without regard for the investigating officer's actual, subjective plan.[103]

The Court similarly refused to allow consideration of officers' subjective motivations when claiming the plain view exception.[104] This exception permits an officer to seize evidence without a warrant if its relevance to a crime is immediately apparent and she happens upon it while lawfully present in the location.[105] For example, if an officer happens upon illegal narcotics while conducting a warrant search for illegal firearms in a private home, she could seize the narcotics under the plain view exception. Until the Court decided *Horton v. California*,[106] many thought that officers had to unwittingly come upon evidence of crime to claim the plain view exception.[107] In *Horton*, the Court held otherwise.[108] The officer applied for a warrant to search a home for the proceeds from a recent robbery in addition to the firearms used by the suspects.[109] The magistrate, however, issued a warrant for the robbery's proceeds only, not the weapons.[110] While executing that warrant, the officer discovered the weapons, not the proceeds.[111] The Court held that seizing the weapons was permissible under

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[99] 547 U.S. 398, 406–07 (2005).

[100] *Id.* at 401.

[101] *Id.* at 404.

[102] *Id.*

[103] *See id.* at 404–05.

[104] *See* Horton v. California, 496 U.S. 128, 138 (1990).

[105] *Id.* at 134–36.

[106] 496 U.S. 128.

[107] Justice Stewart suggested as much in *Coolidge*, albeit in a portion of the opinion that failed to garner the majority. *See* 403 U.S. at 469–71.

[108] 496 U.S. at 130, 142.

[109] *Id.* at 130–31.

[110] *Id.* at 131.

[111] *Id.*

the plain view exception.[112] In rejecting that such discovery must be inadvertent, the Court invoked its mantra that "objective standards of conduct" better achieve "evenhanded law enforcement" than do subjective standards.[113]

As in *Whren* and *Stuart*, *Horton* deems an officer's ulterior motive irrelevant. In *Horton*, it may have been an accident that the search warrant failed to mention the weapons that the officer expected to discover—and did ultimately discover.[114] The opinion, however, does not recognize the possibility that an officer might use the plain view exception instrumentally. If an officer has a hunch, but not probable cause, that there is evidence somewhere, she will have incentive to conduct a lawful search on whatever basis she can muster. Plain view will permit her to seize the evidence she actually sought (assuming her hunch was correct) even if the search would never have occurred absent her ulterior motive.

The gap separating empirical from theoretical is apparent in the so-called third-party consent doctrine as well. Third-party consent is a species of consent search that requires neither warrant nor probable cause.[115] When an individual agrees to permit a search, the police may conduct one. The Court, however, has interpreted "voluntariness" with unusual generosity to the police.[116] Officers may obtain consent from a third-party who only appears to have the authority to permit a search.[117] In *Illinois v. Rodriguez*, the police searched the defendant's apartment relying upon his girlfriend's consent when she had no actual authority to provide it.[118] The Court held that the search was permissible provided that a reasonable officer would have concluded that the consenter had authority to permit the search.[119]

The Court has also used objective analysis to limit the exclusionary rule's application. The exclusionary rule requires that courts exclude evidence obtained as a result of a Fourth Amendment violation.[120] This means that guilty defendants will go free because the "constable has

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[112] *See id.* at 130. The Court also noted that inadvertence would not protect privacy because, for the plain view exception to apply, the officer must already be conducting a lawful search. *Id.* at 141–42.

[113] *Id.* at 138.

[114] *See id.* at 131, 138 n.9.

[115] *See* Fernandez v. California, 134 S. Ct. 1126, 1136–37 (2013).

[116] For example, police officers' failure to inform an individual of her right to refuse a search does not vitiate that individual's consent to said search. *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39–40 (1996).

[117] *See* Illinois v. Rodriguez, 497 U.S. 177, 180, 187–89 (1990).

[118] *Id.* at 179–80.

[119] *Id.* at 188.

[120] *See* Wong Sun v. United States, 371 U.S. 471, 485–87 (1963).

blundered."[121] Objective purpose analysis also ensures that the state is not unduly punished for an investigating officer's idiosyncratic perception error when another officer could have lawfully carried out the same search or seizure.[122] In the same vein, the Court has created a host of exceptions to the exclusionary rule. For example, inevitable discovery exempts evidence that the police would have ultimately discovered absent the constitutional violation.[123] This species of harmless error is supposed to ensure that the state is not left worse off than it would have been absent a constitutional violation.[124] For example, the defendant in *Nix v. Williams* divulged the location of his victim's body in response to unconstitutional questioning by the police.[125] In the meantime, the police had been coordinating a search for the victim's body. After the confession resulted in the recovery of the body, the trial court concluded that the searchers eventually would have discovered the body and refused to exclude the evidence.[126] The Court decided that there should be no inquiry into the whether the constitutional violation was in bad faith. It curtly stated that it was implausible that officers would ever take "dubious 'shortcuts'" to obtain evidence that could be obtained lawfully, or even be able to calculate the likelihood that evidence would be discovered.[127]

B. SUBJECTIVE ANALYSIS IS OCCASIONALLY PERMITTED

Now and then, the Court seems willing to scrutinize officers' subjective motivations in connection with untruthful warrant applications. For example, in *Franks*, the defendant challenged the affidavit supporting a warrant application.[128] In the application, the officer attested to interviewing specific witnesses who confirmed that Franks's typical work attire precisely matched that of a rape suspect.[129] The officer, however, had lied about speaking with witnesses.[130] The Court held that the exclusionary rule applies if an officer was reckless or deliberately untruthful about material

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[121] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). Justice (then Judge) Cardozo's words remain a pithy statement of the exclusionary rule's social cost.

[122] *See* LAFAVE, *supra* note 48, at § 1.4(e).

[123] *See* Nix v. Williams, 467 U.S 431, 444 (1984).

[124] *See id.* at 443–44.

[125] *Id.* at 436–37.

[126] *Id.* at 437–38.

[127] *Id.* at 445–46.

[128] 438 U.S. 154, 155–56 (1978).

[129] *Id.* at 157.

[130] *See id.* at 158.

facts in a warrant application.[131] The Court emphasized that it sought to preserve the integrity of the magistrate's function.[132] Because warrant applications are ex parte, even a conscientious magistrate could miss deliberate or reckless untruths.[133]

In both *United States v. Leon* and *Murray v. United States*, the Court reiterated that officers must be subjectively honest when seeking warrants. In *Leon*, the Court approved the good-faith exception to the exclusionary rule.[134] Where an officer relies in good faith upon a warrant that is later determined not to have been supported by probable cause, the exclusionary rule does not apply—evidence seized pursuant to the faulty warrant remains admissible.[135] While the Court emphasized that good faith is an objective inquiry, it reaffirmed *Franks*.[136] The Court noted that an officer cannot have acted in good faith if she was reckless or deliberately untruthful in her warrant application.[137]

In *Murray*, the Court implied that subjective inquiry was necessary to ascertain the purity of an officer's choice to apply for a warrant.[138] In *Murray*, officers suspected that a large quantity of narcotics was being stored in a warehouse.[139] The officers confirmed their suspicion by illegally entering the warehouse and observing narcotics.[140] Only afterward did the officers seek and receive a warrant to search the warehouse.[141] The officers did not mention the illegal search that had preceded their application.[142] The magistrate issued a warrant based on the information that the officers had accumulated independent of the unlawful earlier search.[143] The government argued against exclusion because the warrant would have issued whether the illegal search had occurred or not.[144] Suppressing the evidence would

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[131] *Id.* at 171–72. If the officer lies in the affidavit, and what is left of the warrant application after the false information is removed still sustains the conclusion that there was probable cause for the search, then the warrant's fruits need not be suppressed. *Id.* at 172 n.8.

[132] *See id.* at 168–69.

[133] *See id.*; *see also* United States v. Leon, 468 U.S. 897, 914 (1984) (providing "that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based").

[134] *Leon*, 468 U.S. at 913, 922.

[135] *See id.* at 919–22.

[136] *See id.* at 922–23.

[137] *Id.* at 926.

[138] Murray v. United States, 487 U.S. 533, 535 (1988).

[139] *Id.*

[140] *Id.*

[141] *Id.* at 535–36.

[142] *Id.* at 543.

[143] *Id.* at 542–43.

[144] The so-called independent source exception to the exclusionary rule is animated by

accordingly have left the government in a worse position than it would have been had the illegal search not occurred.[145] Although the Court accepted this argument, it asked whether the search pursuant to the warrant "was in fact a genuinely independent source" of the evidence seized.[146] The Court remanded for fact finding as to whether "the agents would have sought a warrant if they had not earlier entered the warehouse."[147] That is tantamount to asking what the agents' purpose was in first entering the warehouse.[148] There is no suggestion that this was—or could be—anything other than a subjective inquiry into the agents' motivations.

The Court has also expressly conditioned constitutionality upon officers' good faith in so-called inventory searches.[149] Officers may conduct an inventory search of an impounded automobile without a warrant or even probable cause.[150] An inventory search allows police to identify the contents of such vehicles in order to protect owners against theft, protect the police against claims of theft, and ensure police safety.[151] The Court has repeatedly approved inventory searches, but only on the condition that the police department has standardized regulations governing their execution.[152] The Court has cautioned against pretextual use of inventory searches to investigate crimes for which the officers do not have probable cause.[153] The Court, however, has muddled this invitation to engage in subjective inquiry. In *Stuart*, the Court cast inventory search cases as permitting scrutiny of programmatic purpose only, not officer motive.[154] This invites the question of how the two differ.

### C. ADMINISTRATIVE AND OTHER SPECIAL NEEDS

In evaluating so-called administrative and special needs searches, the Court has developed an entirely different framework for evaluating purpose

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the same logic as the "inevitable discovery" exception discussed above. *See id.* at 537 (citing Nix v. Williams, 467 U.S. 431, 443 (1984)).

[145] *See id.* at 537.

[146] *Id.* at 542.

[147] *Id.* at 543.

[148] The agents had argued that their purpose in entering the warehouse without a warrant was to ensure that no evidence was destroyed while they obtained a warrant. *Id.* The district court acknowledged this but did not make a specific factual finding as to independent source. *Id.*

[149] Colorado v. Bertine, 479 U.S. 367, 374 (1987).

[150] *Id.* at 375–76.

[151] *Id.* at 373–74.

[152] *See* Florida v. Wells, 495 U.S. 1, 4–5 (1990).

[153] *See Bertine*, 479 U.S. at 376–77 (Blackmun, J., concurring).

[154] 547 U.S. 398, 405 (2006).

than in the cases described above. The Court has called it "programmatic purpose."[155] While the typical Fourth Amendment case involves a police officer enforcing a criminal law, the state often searches and seizes to advance noncriminal, regulatory interests—for example, enforcing the building code,[156] supervising state employees,[157] enforcing rules at public schools,[158] and inspecting businesses that impact public health.[159] In these cases the Court balances the state's programmatic purpose—provided that it is not to investigate ordinary crime—for carrying out searches or seizures against the individual intrusions that such conduct entails.[160] The Court's recent decision in *King*,[161] however, highlights the foundational questions that remain unanswered with regard to programmatic-purpose analysis.[162] First, whether the Fourth Amendment requires courts to evaluate a state actor's actual purposes, or whether hypothetical purposes might suffice.[163] Second, whether courts must differentiate an actor's primary purposes from secondary and tertiary purposes, and if so, by what method.[164]

To understand why the Court takes a different approach to purpose in the administrative and special needs contexts, one must understand the history that has given rise to the patchwork of exceptions. It was not long into the Warren Court's expansion of criminal procedure rights that it confronted a noncriminal regulatory search. In *Camara v. City of San Francisco*,[165] the Warren Court decided that a housing inspector need not demonstrate individualized suspicion to obtain a warrant for an administrative search to ensure building code compliance.[166] While breaking from precedent that had held no warrant was required,[167] *Camara* held that a warrant could issue upon a showing that the state had a

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[155] City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000).

[156] Camara v. San Francisco, 387 U.S. 523 (1967).

[157] California v. Quon, 560 U.S. 746 (2010).

[158] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[159] *See* Donovan v. Dewey, 452 U.S. 594 (1981).

[160] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 41–42, 44 (2000).

[161] 133 S. Ct. 1958 (2013).

[162] *See infra* notes 202–213 and accompanying text.

[163] *See, e.g.*, Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080–81 (2011); *see also* Chandler v. Miller, 520 U.S. 305, 319 (1997) ("Nothing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity.").

[164] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001) (distinguishing a drug test program's primary purpose from its secondary purpose).

[165] 387 U.S. 523 (1967).

[166] *Id.* at 538–39.

[167] *See* Frank v. Maryland, 359 U.S. 360, 372–73 (1959) (holding that there is no warrant required for search by health inspector).

reasonable basis for carrying out inspections in a particular area.[168] When a search target is part of an industry that is pervasively regulated—which diminishes operators' expectations of privacy—it may be subject to administrative inspection without warrant.[169] In *Burger v. New York*, for example, the Court permitted a warrantless inspection of an auto yard pursuant to New York State's administrative scheme designed to prevent auto thefts.[170]

The special needs exception evolved from the administrative search cases.[171] In *New Jersey v. T.L.O.*, the Court held a principal's warrantless search of a public high school student's purse for cigarettes did not violate the Fourth Amendment.[172] The Court's reasonableness scale tipped toward the school's interest in maintaining order and away from the student's privacy interest.[173] The Court subsequently expanded the special needs exception to include "dragnet" type searches.[174] For example, the Court has permitted suspicionless searches at fixed roadblocks that are for the primary programmatic purpose of stemming "the flow of illegal entrants" into the United States,[175] "preventing drunken driving,"[176] or identifying evidence of a recent crime.[177]

Until recently, it was reasonable to think that a legitimate "special need" arose only when the state was trying to solve an empirically demonstrated problem. In *Vernonia School District v. Acton*, the Court upheld random, suspicionless drug testing of student athletes.[178] In *Acton*, the Court credited the school district's showing that there was an actual drug problem in the district, particularly among student athletes.[179] In

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[168] *Camara*, 387 U.S. at 538–39.

[169] *See* New York v. Burger, 482 U.S. 691, 702 (1987).

[170] *Id.* at 718.

[171] The early special needs cases explicitly rely on *Camara*. *See* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); Primus, *supra* note 35, at 275–76. The expression "special needs" was first used in a Supreme Court opinion by Justice Blackmun in concurrence in *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

[172] 469 U.S. at 328.

[173] *Id.* at 339–40.

[174] Dragnet searches are those "searches or seizures of every person, place, or thing in a specific location or involved in a specific activity." Primus, *supra* note 35, at 260. Professor Primus argues that the Court should not have expanded the special needs exception to include dragnet searches. *See id.* at 259–60, 309–10.

[175] United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976).

[176] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

[177] Illinois v. Lidster, 540 U.S. 419, 423 (2004).

[178] 515 U.S. 646 (1995).

[179] *Id.* at 663.

*Skinner v. Railway Labor Executives' Ass'n*,[180] a federal agency successfully demonstrated that drug and alcohol testing was necessary to respond to railroad accidents.[181] The regulations were promulgated based upon evidence of property damage and fatalities that alcohol and drug-impaired railroad employees were involved in.[182] These interests outweighed individual workers' interest in privacy, particularly given that the relevant regulations controlled agency discretion.[183]

In contrast to *Acton* and *Skinner*, in *Chandler v. Miller* the Court concluded that Georgia's interest in requiring drug and alcohol testing of candidates running for office was not a special need.[184] Georgia argued that drug use could hamper elected officials' job performance and undermine public confidence in them.[185] However, there was nothing in the record to suggest that this had actually happened.[186] Accordingly, the Court rejected these arguments because they did not amount to a showing of "concrete danger," but rather were merely "hypothetical."[187]

Not only has the Court suggested that the special needs exception demands an actual problem but also it has noted that the problem cannot be one of "ordinary crime control."[188] Without these requirements, the Court was concerned that state actors would pretextually circumvent the individualized suspicion and warrant requirements that apply in criminal cases. For example, in both *Acton* and *Von Raab*, the Court seemed to give significant weight to the fact that the suspicionless drug testing protocols prohibited positive tests from being divulged to law enforcement.[189] In *Skinner*, there was no express prohibition on divulging positive test results to law enforcement, but there was no suggestion of pretextual drug testing

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[180] 489 U.S. 602 (1989).

[181] *Id.* at 609–10.

[182] *Id.* at 608.

[183] *Id.* at 624.

[184] 520 U.S. 305, 321–22 (1997).

[185] *Id.* at 318.

[186] *Id.* at 321.

[187] *Id.* at 319. *But see* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989). In *Von Raab*, the Court permitted suspicionless drug testing of Customs officials who carried firearms and worked with narcotics based upon hypothetical security and danger-related problems. *Id.* at 669–71. The Court, however, rationalized this by underscoring the agency's "unique mission" as the "first line of defense" against narcotics smuggling. *Id.* at 668, 674. This did not mollify Justice Scalia who contended that an empirically demonstrable problem was necessary for a special needs search. *Id.* at 683–84 (Scalia, J., dissenting).

[188] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

[189] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 658 (1995); *Von Raab*, 489 U.S. at 663, 666.

to obtain convictions.[190] Transferring evidence generated by a suspicionless search to law enforcement sometimes provides good evidence of unconstitutional pretext.[191] For example, in *Ferguson v. Charleston*, a public hospital tested maternity patients for cocaine use and the evidence was turned over to prosecutors pursuant to official protocol.[192] The Court held the drug testing unconstitutional, rejecting the argument that it was justified by the special need of protecting mothers' and babies' health.[193] The police's integral role in administering the testing program suggested that its purpose was simply criminal law enforcement.[194]

The rule that ordinary crime control is not a special need presents unique difficulty for police departments because crime control will always be a background purpose.[195] The Court nonetheless permits police departments to conduct suspicionless searches under the special needs exception.[196] The Court requires that the primary programmatic purpose not be crime control, but the secondary purpose can be.[197] This means that courts may treat similar instances of police conduct differently depending on the motives underlying each instance.[198] The Court has elaborated on the primary–secondary distinction by casting the former as an "immediate objective" and the latter as an "ultimate goal."[199] In *Ferguson*, the Court acknowledged that the "ultimate" purpose of the maternity drug-testing program may have been addiction remediation, but the "immediate" goal was generating evidence of criminal misdeed.[200] But this distinction is not easily reconciled with other special needs cases involving police departments. For example, in the roadblock cases, the immediate means available to the police for advancing the ultimate goals of "interdicting the flow of illegal entrants from Mexico" and eradicating "the drunken driving problem" were enforcing criminal prohibitions.[201]

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[190] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 621 n.5 (1989).

[191] *See* Ferguson v. City of Charleston, 532 U.S. 67, 80–81 (2000).

[192] *Id.* at 71–73.

[193] *Id.* at 81.

[194] *See id.* at 82–83.

[195] *See* City of Indianapolis v. Edmond, 531 U.S. 32, 46–47 (2000) (noting the "challenges inherent in a purpose inquiry").

[196] *See* Illinois v. Lidster, 540 U.S. 419, 428 (2003), Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990).

[197] *See* Ferguson v. City of Charleston, 532 U.S. 67, 82–84 (2001).

[198] *See Edmond*, 531 U.S. at 46–47.

[199] *E.g.*, *Ferguson*, 532 U.S. at 82–84.

[200] *Id.* at 82–83.

[201] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976).

*King* calls into question whether special needs requires an empirically demonstrable problem at all.[202] It also underscores the difficulty of distinguishing primary from secondary purposes. In *King*, the Court approved Maryland's collection of DNA samples from arrestees based upon the program's secondary (maybe even tertiary) purpose rather than its most obvious primary purpose. Maryland authorizes law enforcement agencies to collect DNA samples from arrestees accused of certain violent felonies for inclusion in the State's DNA database.[203] After arresting King for assault, the police took a DNA sample from him. When compared to other samples in the database, King's DNA profile matched the DNA evidence collected in an unsolved rape case.[204] King challenged the DNA evidence's admission in the rape case against him because there was no probable cause to collect the DNA.[205] Had the State's purpose been solving past crimes, the individualized suspicion and warrant requirements would have applied.[206] The Court, however, analyzed the DNA collection program using the same species of reasonableness balancing used in the special needs cases.[207] In concluding that the balance of interests tipped in the government's favor, the Court credited the government's interest in "proper[ly] processing . . . arrestees."[208] That requires properly identifying arrestees which, in turn, may facilitate an accurate determination of whether the individual is a flight risk or poses danger to the community if released.[209]

The *King* Court paid scant attention to the program's primary purpose of investigating crime even though it was identified in the preface of the law itself.[210] Writing for four dissenting justices, Justice Scalia chided the majority for paying no attention to the Maryland Legislature's express statement of purpose.[211] In addition, the Maryland law forbade police from testing arrestees' DNA until first appearance, casting significant doubt on

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202 *See* 133 S. Ct. 1958, 1969–70 (2013).

203 *Id.* at 1967.

204 *Id.* at 1966.

205 *Id.*

206 *See id*. at 1981–82 (Scalia, J., dissenting).

207 *Id.* at 1981–82, 1982 n.1. The majority denied that it applied the special needs exception, stating that the exception "d[id] not have a direct bearing on the issues presented . . . because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy." *Id.* at 1978 (majority opinion). The Court offered no support for the claim but, strangely, stated that the case's outcome was supported by the special needs cases. *See id.*

208 *Id.* at 1974.

209 *Id.* at 1972–73.

210 *See id.* at 1985 (Scalia, J., dissenting).

211 *See id.* at 1984.

the majority's suggestion that the legislature's purpose was to facilitate accurate identification and processing of arrestees.[212] This is inconsistent with the Court's suggestion in earlier opinions that programmatic purpose requires evaluation of the state's actual reasons for carrying out searches.[213]

*King* highlights the confusion as to what programmatic-purpose analysis requires, let alone how it relates to the notions of objective and subjective purpose analysis that the Court has used in other Fourth Amendment contexts.[214]

## II. STATE PURPOSE AND THE FOURTH AMENDMENT

Having demonstrated the ubiquity and inconsistent application of purpose in Fourth Amendment jurisprudence, this Section advances a critical, descriptive account of the concept. It also explains the functions that concept serves and why the Court has failed to fully develop it.

Section A demonstrates that despite that objective purpose has the trappings of state-of-mind analysis in criminal law or torts, it ultimately functions as a rhetorical device for imputing the state's corporate intentionality to individual officers. Objective purpose seems analogous to state of mind only because the typical Fourth Amendment challenge arises as an incident to an individual criminal case. This implicitly casts the constitutional dispute as one between two individuals, an officer and a suspect. But a police officer is not an ordinary individual. The Court's insistence that its analysis of purpose is objective reflects the officer's status as state agent. Section B shows that when evaluating institutional behavior in special needs and administrative exception cases the Court uses programmatic purpose as shorthand for constitutional means-ends testing. The Court refuses to expressly draw the analogy, ensuring that programmatic purpose remains much more schematic than means-ends testing in other areas of constitutional law. The discussion below demonstrates that this is because the Court is unable to identify whether criminal enforcement is an end or a means. Thus, it is not only unclear what programmatic purpose requires of institutional policy-making, but also unclear what it requires of the relationship between an institution and its agents in the field. A fully developed framework for addressing the latter

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[212] *See id.* at 1983.

[213] *See, e.g.*, Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080–81 (2011); *see also* Chandler v. Miller, 520 U.S. 305, 318–22 (1996) (discussing the state's interest in passing a drug-testing requirement for political candidates, and comparing the instant case to other special needs cases).

[214] *See supra* Section I.A.

question could have radical normative consequences for Fourth Amendment analysis. It is perhaps for that reason that the Court avoids it.

## A. UNDERSTANDING OBJECTIVE PURPOSE

Court and commentators invoke the notion of objective purpose in a manner that suggests mental-state analysis is used to evaluate individual compliance with conduct rules.[215] "Conduct rules" refer to laws that govern individual behavior in society, such as tort and criminal laws.[216] Section 1 below tests the analogy between objective purpose and mens rea, and concludes that it fails. Section 2 then turns to the notion of decision rules in search of definition. "Decision rules" dictate what remedies courts can make available for conduct-rule violations and under what circumstances the courts can grant them. The Court, for example, has directed judges not to provide exclusion for many Fourth Amendment violations because doing so has no deterrent effect on police. Where conduct rules are addressed to individuals in society, decision rules are addressed to judges.[217] Section 2 concludes that objective purpose makes as little sense in the context of decision rules as it does in the context of conduct rules.

Having exhausted the most obvious sources of legal meaning for objective purpose in Sections 1 and 2, Section 3 then offers an original account grounded in philosophy and political theory. Section 3 shows that objective purpose mediates between two contradictory conceptions of police officers that awkwardly coexist in Fourth Amendment jurisprudence. The first conception relies on an individualistic, transactional frame to cast police officers in "cops and robbers" terms. The second conception relies on a broader, corporate frame to cast police officers as the State incarnate.

### *1. Conduct Rules*

Because criminal procedure governs the investigation and enforcement of criminal law violations, there is appeal in thinking of it as akin to criminal law for police officers.[218] Criminal law, of course, conditions

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[215] Virtually all of the commentary on the subject frames the subjective-objective question in a manner that suggests such a framing. *See* sources cited *supra* note 31.

[216] Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469–70 (1996) (adopting the terminology and concept from Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984)).

[217] *See id.*

[218] *See id.* at 2534 ("[T]he constitutional rules promulgated under the Fourth, Fifth, and Sixth Amendments are a species of substantive criminal law for the police: they are the conduct rules that the Supreme Court wants the police to follow just as substantive criminal

punishment upon the wrongdoer's state of mind, or mens rea, of which "purpose" is the most exacting.[219] For crimes of purpose, the state must show that it was the defendant's desire to produce the forbidden result.[220] As discussed in Part I above, the Court regularly refers to officer purpose but disavows subjective analysis.[221]

The objective purpose inquiry that the Court uses in Fourth Amendment cases, however, is not analogous to mens rea in criminal law.[222] Purpose, however, generally requires a subjective inquiry while negligence generally requires objective inquiry.

Neither retributivist nor utilitarian accounts—the two dominant sources of criminal law theory—of mens rea satisfactorily explain the notion of objective purpose. Retributivist accounts are grounded in moral individualism and require subjective blameworthiness as a prerequisite for punishment.[223] That an alleged wrongdoer made a morally incorrect choice is the *sine qua non* of blameworthiness, and mens rea is criminal law's most salient mechanism for distinguishing between its degrees. Purpose describes the most culpable mental state.[224] It is, by definition, subjective.[225] Objective purpose, therefore, makes no sense.

Utilitarian theory is better equipped to afford definition of objective purpose, but it fails to offer a complete account. Utilitarianism describes a range of theories that are concerned with maximizing future welfare.[226] Exclusion is the typical remedy for a Fourth Amendment violation. The Court has made clear that this remedy's only purpose is to deter police

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prohibitions are the conduct rules that the legislature wants individual citizens to follow.").

[219] *See* MODEL PENAL CODE § 2.02.

[220] *Id.*

[221] One might object that the Court uses the term purpose to mean something more akin to officer motive than mens rea. While criminal law distinguishes between the two, there is considerable slippage between the two in practice. A number of criminal laws authorize punishment based upon motive—such as hate crimes and sex crimes, see, e.g., 18 U.S.C. § 249(a)(1)—and, more generally, motive often supplies evidence of mens rea.

[222] For a different view, see Alice Ristroph, *Covenants for the Sword*, 61 U. TORONTO L.J. 657, 671–74 (2011) (arguing that "it is . . . useful to think of the [objective reasonableness] inquiry as a variant of a mental-state requirement").

[223] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997).

[224] MODEL PENAL CODE § 2.02(a)(1) (defining purpose). To take a textbook example, one who deliberately kills pursuant to a plan is worse than one who does so accidentally. *See* JOHN KAPLAN ET AL., CRIMINAL LAW 346–50 (7th ed. 2012).

[225] MODEL PENAL CODE § 2.02(a)(1).

[226] *See* JOHN RAWLS, A THEORY OF JUSTICE 22–27 (2005) (reviewing classical utilitarian theories); Robinson & Darley, *supra* note 223, at 458–68 (describing theories and identifying limitations).

officers from committing future constitutional violations, not to compensate the defendant for the constitutional harm he endured.[227] The point is to advance the interests that underlie the Fourth Amendment—privacy, liberty, and dignity—not to establish whether a particular officer is blameworthy.[228]

From a utilitarian vantage, categories of intention are significant only to the extent that they distinguish would-be wrongdoers based on how readily they might be deterred in the future.[229] Mental-state requirements simply reflect the policy conclusion that a more significant sanction is required to deter those who intentionally misbehave than those who accidentally do.[230] In other words, specific mens rea categories are just placeholders for psychological generalizations about particular categories of offenders. So long as the rules actually deter misconduct, the legal label's

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[227] *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) ("[T]he exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence.'" (second alteration in original) (quoting United States v. Leon, 468 U.S. 897, 909 (1984))). The exclusionary remedy has influenced the development of substantive Fourth Amendment rights. Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 388–90 (2014). Fourth Amendment questions are typically adjudicated incident to criminal cases where exclusion is the only available remedy. *Id*. at 388. Of course, a civil remedy is available in other contexts, principally § 1983 suits. 42 U.S.C. § 1983 (2012). In that context, qualified immunity and municipal liability doctrines create a more significant role for subjective notions of fault. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 589, 667–70 (1998); Mark R. Brown, *The Failure of Fault Under §1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1504 (1999). Qualified immunity only permits an officer to be held individually liable for violating the Fourth Amendment (or any other federal right) when the Fourth Amendment right violated was clearly established. *See* Armacost, *supra*, at 619–24. This is plausibly understood as tantamount to a fault requirement, although the Court's most recent opinion on the subject tends to suggest otherwise. *See id. But see* Messerschmidt v. Millender, 132 S. Ct. 1235, 1248 n.6 (2012). A municipality may only be held liable where it specifically authorized the violation or was deliberately indifferent to training its personnel not to commit such. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978). Commentators have noted that this is also akin to a subjective fault standard. *See* Brown, *supra*, at 1503–04; *see also* Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 175 (2011) (stating that "the Court's approach to municipal liability incorporates questions of fault and blame," and giving examples).

[228] There are criminal laws for punishing officers for particularly egregious Fourth Amendment violations. *See* 18 U.S.C. § 242 (2013).

[229] *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2427 (2011) ("When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." (quoting *Herring*, 555 U.S. at 143)).

[230] *See* KAPLAN, *supra* note 224, at 35–46.

lexical integrity or consistency is not important. By this view, the Court just uses "objective purpose" metaphorically. But the question remains as to what precisely "objective purpose" is a metaphor for.

The most intuitive, utilitarian explanation is that objective purpose roughly tracks negligence. Whether in tort or criminal law, liability for negligence arises for failures to behave in accordance with an objective standard of care, whether deliberate or not.[231] For example, where an officer accidentally draws the wrong conclusion from the available facts as to whether individualized suspicion is present in a particular case, the officer's good faith will not foreclose exclusion.[232] In tort and criminal law, the hypothetical exercise of imagining what a reasonable person would have done in the same circumstances as the alleged wrongdoer creates the baseline from which to measure whether the alleged wrongdoer engaged in misconduct.[233] In Fourth Amendment cases, the Court has identified the standard in terms of a hypothetical "objectively reasonable police officer."[234]

The analogy between objective purpose and negligence is, however, superficial at best. First, the Court has explicitly refused to permit exclusion for official negligence in some Fourth Amendment cases.[235] Second, the reasonable police officer does not seem to function as an empirical baseline for assessing officer behavior. Empirical here refers to an average based upon actual observations of how others in the relevant community actually behave.[236] It is unclear which police officers' conduct is to be "averaged," if that is even possible.[237] Police officers are a diverse lot and how any one of them might behave likely turns on various occupational and other characteristics. For example, the reasonable narcotics officer and reasonable patrol officer look at the world through different eyes.[238] Whereas a

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[231] *See* RESTATEMENT (SECOND) OF TORTS § 283.

[232] *See supra* Section I.A.

[233] *See* MODEL PENAL CODE § 2.02(d) (defining criminal negligence as a substantial deviation from what a reasonable person would have done in the same circumstances); *see also* Allen D. Miller & Rohen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 324–25 (2012) (describing in torts context).

[234] *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).

[235] *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2434 (2011) (denying exclusionary remedy for good faith reliance on unconstitutional statute); Herring v. United States, 555 U.S. 135, 141–43 (2009) (illustrating the same for police negligence with regard to updating status of active warrants that are outstanding).

[236] *See* Miller & Perry, *supra* note 233, at 370–71 (summarizing features of the model).

[237] *But see id.* at 325.

[238] *See* EDWARD CONLON, BLUE BLOOD 158 (2004) (comparing personal experience as narcotics officer versus patrol officer).

specialized narcotics officer is trained to identify narcotics transactions and devote his efforts to doing so, a patrol officer will expend her labor on more varied tasks.[239] These differences will have considerable bearing on how each of the two officers interprets and reacts to her environment. The latter may not notice, let alone take any action against, two individuals who engage in a quick hand-to-hand exchange on the street, while the former sees a narcotics transaction.

The Court specifically disclaimed an empirical formulation of the reasonable officer in both *Whren* and *Atwater*. In each of those cases, the Court was unmoved by the argument that a reasonable officer in the same position as the investigating officer would not have behaved as the investigating officer did.[240] In *Atwater*, the Court explicitly recognized that a reasonable officer would not have behaved as the arresting officer had.[241]

If not empirical,[242] the hypothetical reasonable officer must function as a normative baseline in some other way.[243] One can often discern such normative judgments in the traits that are attributed to the hypothetical, reasonable person. Those traits of the putative wrongdoer that are included and excluded from the reasonable person's profile represent normative judgments about what the law is trying to accomplish and to whom it is directed. But, again, the Court has refused to define the reasonable officer in terms of salient occupational or other characteristics. This leaves the standard so highly abstracted from any actual officer that it does not seem like a surrogate for a police officer at all.[244] For example, in *Atwater*, after noting the officer's "extremely poor judgment" and "gratuitous humiliation[]" of Atwater, the Court upheld the arrest because, objectively, there was probable cause for a seatbelt violation.[245] As developed further in Section 3 below, the reasonable officer standard better approximates a hypothetical magistrate than a police officer.

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[239] *See id.*; DAVID E. BARLOW, POLICE IN A MULTICULTURAL SOCIETY 14 (2000) (noting study that found patrol officers spend less than fifteen percent of on-duty time fighting crime); David Weisbund & John E. Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 44, 49–51, 57 (2009).

[240] *See supra* notes 52–65 and accompanying discussion.

[241] Atwater v. City of Lago Vista, 532 U.S. 318, 346–47 (2001).

[242] *See* Miller & Perry, *supra* note 233, at 325 (arguing that such a conception is theoretically impossible).

[243] *See* Victoria Nourse, *After the Reasonable Man: Getting over the Subjectivity/ Objectivity Question*, 11 NEW CRIM. L. REV. 33, 33–34 (2008) (arguing that the "reasonable man" is an institutional "heuristic" for negotiating "majoritarian norms").

[244] *See, e.g.*, Whren v. United States, 517 U.S. 806, 815 (1996) (noting that the personnel manual suggested that undercover officers were not to behave as traffic officers).

[245] *Atwater*, 532 U.S. 318 at 346–47, 354.

### *2. Decision Rules*

Just as the conduct-rule analogy between criminal procedure and criminal law fails to produce a satisfactory account of objective purpose, a decision-rule analogy also fails to do so. Objective purpose analysis leads courts to ignore officers' deliberate violations of Fourth Amendment conduct rules by instrumentally relying upon a decision rule. This defeats the purpose of having decision rules, as highlighted by the isolated instances where the Court seems to authorize subjective analysis to ensure a decision rule's integrity.[246]

In an ideal world there would be "acoustic separation" preventing the individuals who are subject to a set of conduct rules from hearing the content of judges' decision rules.[247] This would ensure that individuals did not instrumentally rely on decision rules when making choices about whether to comply with conduct rules.[248] Carol Steiker famously relied on the distinction and noted that there is no acoustic separation between police officers and courts.[249] Officers can easily learn decision rules' content and exploit that knowledge to strategically violate conduct rules.[250]

Distinguishing between accidental and deliberate violations of criminal procedure decision rules would be a way to make up for acoustic separation's impossibility.[251] For example, in the case of "inevitable discovery," evidence seized in violation of the Fourth Amendment would, in theory, have eventually been discovered lawfully had the violation never occurred.[252] According to the Court, exclusion thus leaves the state worse off and the defendant better off than if the violation had never occurred.[253]

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[246] *See* Murray v. United States, 487 U.S. 533, 542–43, 443 n.3 (1988) (implying that it is appropriate for a magistrate to determine whether the fruits of an illegal search motivated application for search warrant); Brown v. Illinois, 422 U.S. 590, 604–05 (1975) (stating that officers' purposeful violation of Fourth Amendment is factor in determining whether a subsequently obtained confession is admissible). *See also supra* Section I.B.

[247] *See* Meir Dan-Cohen, *Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (coining the term acoustic separation, and defining it as "an imaginary world in which only officials know the content of the decision rules and only the general public knows the content of the conduct rules").

[248] *See id.* at 633 (describing defense of duress as decision rule).

[249] Steiker, *supra* note 216, at 2471, 2534.

[250] *See id.* at 2535 n.329.

[251] *See id.* at 2471, 2533.

[252] *See* Nix v. Williams, 467 U.S. 431, 443–44, 443 n.4 (1984).

[253] *Id.* at 444. Carol Steiker argued that the Burger and Rehnquist courts were able to undercut the Warren Court's expansion of criminal procedure conduct rules by creating decision rules that permit courts to deny remedies for conduct-rule violations. Steiker, *supra* note 216, at 2504.

Under ideal conditions, "acoustic separation" between courts and police would prevent officers from learning of the inevitable discovery principle. In practice, though, police have ready access to decision rules.[254]

The Court's opinions in *Brown v. Illinois* and *United States v. Murray* hinted at a willingness to use subjective purpose as an imperfect substitute for acoustic separation.[255] Ordinarily, the Court will not apply the exclusionary rule where the causal relation between the Fourth Amendment violation and the incriminating evidence is attenuated.[256] In *Brown*, however, the Court stated that this principle may not apply where the constitutional violation was purposeful.[257] In *Murray*, officers seized narcotics pursuant to a warrant, but that warrant had been obtained following an illegal "sneak and peek" search confirming the contraband's presence.[258] The Court held that evidence should be suppressed unless the warrant-issuing magistrate had an opportunity to decide whether the illegal search actually motivated the officers' decision to seek a warrant.[259] This seems to invite magistrates to delve into officers' subjective motivations, although the Court does not state that explicitly. Even if so, *Brown* and *Murray* are hard to generalize upon.

In the main, the Court is nearly as disinterested in subjective analysis in the context of decision rules as it is in the context of conduct rules. For example, in *Nix v. Williams*, the Court allowed officers' deliberate exploitation of a decision rule to stand.[260] The Court held that the officers' bad faith had no bearing on the inevitable discovery doctrine's application.[261] Even more striking was the Court's decision in *United States v. Payner*.[262] There, IRS agents instrumentally relied upon Fourth Amendment standing rules to break into a banker's hotel room and steal documents that incriminated Payner.[263] Fourth Amendment standing

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254 *See* Steiker, *supra* note 216, at 2471, 2534.

255 *See* Murray v. United States, 487 U.S. 533, 542–43, 443 n.3 (1988) (implying that it is appropriate for a magistrate to determine whether the fruits of an illegal search motivated application for search warrant); Brown v. Illinois, 422 U.S. 590, 604–05 (1975) (stating that officers' purposeful violation of Fourth Amendment is a factor in determining whether a subsequently obtained confession is admissible). *See also supra* Section I.B.

256 *See Brown*, 422 U.S. at 604–05.

257 *See id.*

258 *See* sources cited *supra* notes 139–148 and discussion for summary of case.

259 *See* sources cited *supra* notes 139–148 and discussion for summary of case.

260 *See* sources cited *supra* notes 124–127 and accompanying discussion.

261 *See* sources cited *supra* notes 124–127 and accompanying discussion.

262 447 U.S. 727 (1980).

263 *Id.* at 729–31; *see also* Steiker, *supra* note 216 at 2509–10 (arguing that "[t]he strictness of the current standing regime makes it much more likely that cases will arise in

principles only permit individuals whose privacy has been infringed to move for exclusion of the unconstitutionally seized evidence.[264] In *Payner*, that was the banker, not defendant Payner.[265] The Court permitted the evidence's admission despite the agents' egregiously deliberate constitutional violation.

On both the conduct rule and decision rule fronts, objective purpose holds sway. But in neither context is the Court transparent about what the expression means or what analytical work it is doing. One must mine deeper for answers to those questions.

### *3. Accounting for Objective Purpose*

The transactional framing[266] of criminal procedure disputes makes it easy to confuse police officers' status as individuals and state agents. This section demonstrates that objective purpose is a rhetorical device for managing the tension between individual and state purpose in Fourth Amendment cases.

#### *a. Individual Versus State Purpose*

The Court's reliance on purpose reflects not only the concept's centrality to our notions of moral and legal responsibility, but also the extent to which most Fourth Amendment disputes are framed as transactional. In the typical case, the locus of inquiry is the point of contact between an individual police officer and an individual citizen. This litigation posture leads the typical Fourth Amendment dispute to feel like a private dispute even though it is not. In private disputes between individuals, the moment preceding the parties' encounter serves as a baseline for whether there was harm.[267] And the putative wrongdoer's state of mind (or negligence) determines responsibility for that harm.[268] That an officer is investigating or enforcing particular criminal laws in a particular place, however, is not a simple matter of personal choice. Departmental directive determines his assignment to a particular beat, unit, and perhaps

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which law enforcement agents can exploit the fact that the "target" of their investigation will lack standing to contest searches and seizures designed to obtain evidence against him or her," and discussing *Payner* as an example).

[264] *See* Rakas v. Illinois, 439 U.S. 128, 136–38 (1978).

[265] *See Payner*, 447 U.S. at 735.

[266] I have borrowed the expression from Daryl Levinson. Levinson, *supra* note 23.

[267] *Id.* at 1319.

[268] *Id.*

even his focus on specific kinds of crime or suspects.[269] Notions of individual purpose fail to adequately capture those dynamics.

Purpose has unique cultural and philosophical salience in defining conceptions of public and private morality. Justice Holmes's adage that "even a dog distinguishes between being stumbled over and being kicked,"[270] says less about dogs' moral acuity than it does about humans' preoccupation with typologizing intentionality.[271] That preoccupation finds expression in (and is, in turn, reaffirmed by) law and philosophy. The law generally forbids kicking others, but often permits stumbling into them. Common law categories of criminal and tort liability turn upon distinctions between intentional, foreseeable, and purely accidental acts.[272] Philosophers have long been preoccupied with identifying the moral bases for these distinctions.[273] Many have offered various defenses for the intuition,[274] although recent scholarship questions its normative plausibility.[275]

Even if there is a plausible distinction to be drawn between intentional and foreseeable conduct for individuals, it cannot be extrapolated to the State. David Enoch has recently argued that doing so is incorrect because states are "artificial" agents that cannot be analogized to real human beings.[276] State institutions are comprised of multiple individuals who collaborate (or compete) to make collective choices through what are often complex decision-making processes.[277] Enoch also argues against "taking the state out of the picture altogether and focusing instead on the mental states of the []real, natural, individual[] decision-makers."[278] Such

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[269] Sekhon, *supra* note 52, at 1186–91.

[270] OLIVER WENDELL HOLMES, THE COMMON LAW 2 (Stephen L. Carter ed., 2009).

[271] David Enoch, *Intending, Foreseeing, and the State*, 13 LEGAL THEORY 69, 71 (2007).

[272] I am using these words colloquially here. We often refer to foreseeable but intended consequences as accidental, but they have a different moral (and, often legal) status than totally unforeseen consequences. *Id.* at 90–91.

[273] *See id.* at 71–72.

[274] They tend to use puzzles to isolate the relevant moral features of human agency. Trolley hypotheticals are grist for the philosophical mill: a runaway trolley car barrels towards a fork, five hapless souls lounge on one track, while just one lounges on the other track. It seems morally permissible to steer the trolley into the one rather than the five, but not to kill an individual and use her organs to save five people. The intuitive difference turns on intending a harmful result as opposed to merely foreseeing it. *See id.*

[275] *See id.*

[276] *See id.* at 85–86.

[277] They are capable of behaving in fundamentally inconsistent ways that cannot be analogized to real persons. *See* Philip Pettit, *Akrasia, Collective and Individual*, in WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY 68, 71–75 (Sarah Stroud & Christine Tappolet eds., 2003).

[278] Enoch, *supra* note 271, at 86.

individuals are acting in their capacities as state officials, not as natural individuals. They may be vested with special authority not of their own making and be required to behave in ways that are impermissible in their capacities as real, natural individuals. This is certainly true of police officers.

The distinction between intention and foresight also falters with regard to the states' choices because, unlike with private individuals, there is no readily identifiable baseline for measuring fault and harm. The common law's transactional framing of disputes is unhelpful because it creates a baseline to measure harm and fault by isolating the moment just before one party ran afoul of the other.[279] Using that baseline to judge state conduct—particularly, its constitutionality—ignores the fact that the state's acts and omissions have *always already* run afoul of someone. Put differently, policymaking requires that the state make cost-cost tradeoffs.[280] The state's choice to regulate particular conduct will typically rearrange an existing pattern of costs and benefits. Similarly, electing not to regulate ratifies an existing distribution of benefits and burdens. Sunstein and Vermeule illustrate the dynamic using the death penalty.[281] If it actually deters homicides, then any choice the state might make about permitting or prohibiting it will result in lives lost, it is just a question of whose lives. While the example is fraught, the basic insight applies to most any context in which the state has the power to regulate.[282]

The transactional framing of most Fourth Amendment cases confuses the line between individual and state purpose analysis.[283] Even more than other areas of constitutional law,[284] criminal procedure cases rely upon transactional framing. Fourth Amendment questions typically arise in connection with individual criminal cases, not as broad structural challenges to law enforcement practices. Often enough, officers are direct participants in the criminal transaction. For example, in many narcotics cases an undercover police buyer initiates the illegal transaction. Even when the officer is not directly involved in the transaction that creates criminal liability, she is often intimately bound up with it: whether by directly observing the misconduct or its immediate aftermath, aiding victims, taking

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[279] *See* Levinson, *supra* note 23.

[280] *See id.* at 1378.

[281] Cass Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 724–25 (2005).

[282] *See id.*

[283] *See* Ristroph, *supra* note 222, at 660–61, 678 (arguing based on Hobbes that such confusion is endemic to the nature of sovereignty).

[284] *See* Levinson, *supra* note 23, at 1337–38.

statements at the scene, and so on. This lends to framing Fourth Amendment disputes as dramatic, oppositional encounters between individuals. Not coincidentally, "cops and robbers" is law school slang for the criminal procedure course focusing on the Fourth Amendment.

But the modern police officer is not an individual in the ordinary sense. Police officers are state actors who are embedded in hierarchical, bureaucratic structures that enable and constrain their behavior through mandates, rules, and personnel policy.[285] The discretion that police officers do enjoy is wielded for public, not personal gain.

*b. Objective Purpose Mediates Between Individual and Corporate Conceptions of Police Officers.*

By casting its Fourth Amendment purpose inquiry as objective, the Court simultaneously invokes the deeply familiar, individualized concept of purpose and disavows it.[286] Objective purpose is a rhetorical device for attributing a corporate, state purpose to individual officers. Implicitly, that is to conceive of individual officers as "the state" when interacting with suspects in the field. The state, however, is not unitary. It does not make sense to equate officers with the state vis-à-vis courts. Accordingly, in the limited instances when an officer has directly perpetrated a hoax on a court, the Court seems more willing to permit scrutiny of an officer's subjective, individual motivations.

The Court's notion of objective purpose implicitly casts individual officers as the state personified vis-à-vis citizens.[287] It does this by attributing any legitimate basis that the state might have had for the search or seizure to the individual officer. In most contexts, the Court has deemed it irrelevant that an illegitimate motive led a particular officer to search or seize so long as any other police officer could have legitimately engaged in the same search or seizure.[288] This analysis tracks that of a hypothetical magistrate ex ante. Assume that the actual officer had an opportunity to apply for a warrant and did so. If the applying officer made a factual error in the application—for example, incorrectly thinking that probable cause existed because of fact X when, in actuality, it existed because of fact Y—this would not prevent the magistrate from issuing a warrant so long as she was made aware of fact Y. Similarly, an officer's misidentification of the

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[285] *See* Sekhon, *supra* note 52, at 1186–91.

[286] *See* sources cited *supra* notes 83–91 and discussion.

[287] *Cf.* Ristroph, *supra* note 222, at 672, 674 (characterizing "objective reasonableness" as a form of "sovereign mens rea").

[288] *See* sources cited *supra* notes 52–65 and discussion.

relevant law would not prevent the magistrate from concluding that there was probable cause to believe some other crime had been committed. This is, in effect, to impute a legal rationale to the investigating officer if any such rationale is available based upon all observable facts and applicable criminal laws. This is true even if, subjectively speaking, nothing other than the investigating officer's illegitimate motivation accounted for her conduct.[289]

The Court's objective purpose inquiry, in effect, evaluates individual officer's choices as coextensive with the state's broad discretion to enforce criminal law. The jurisprudence is less calibrated to developing specific conduct rules for officers than it is to roughly defining the outer bounds of the state's investigation and enforcement discretion. For example, criminal procedure permits any officer to search or seize any time there is probable cause to think that an individual has violated any criminal law.[290] There are countless criminal laws that apply to a vast range of human conduct.[291] This creates vast enforcement opportunities for the state and, by extension, police officers.[292] Even when an officer violates a constitutional conduct rule, criminal procedure permits exclusion only if there is but-for cause linking that officer's conduct to the evidence seized.[293] If some other state agent, behaving constitutionally, would have discovered the same evidence, it is admissible.[294] The officer's individual constitutional obligations dissolve into the state's corporate ones.

The big exception seems to be where officers directly perpetrate a hoax upon a court by, for example, lying on a warrant application. The Supreme Court seems more willing to permit exploration of their subjective intentions in these situations.[295] Because the state is not unitary, it makes little sense to treat officers as the state embodied when they are seeking the court's authorization to search or seize. In these circumstances, the Court treats them more akin to individuals and is more willing to delve into their minds' subjective workings. The Court has made clear that purposeful or even reckless misrepresentations of fact in a warrant application will invalidate a subsequent search.

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289 *See* sources cited *supra* notes 52–65 and discussion.

290 *See supra* Section I.A.

291 *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514–15 (2001) (describing state and federal criminal codes).

292 *See id.* at 519.

293 *See supra* text accompanying notes 121–29.

294 *See supra* Section I.A.3.

295 *See supra* Section I.B.

This willingness to scrutinize subjective officer intent in these situations finds parallels in other criminal procedure contexts where state agents may have perpetrated a hoax upon a court. For example, the Fifth Amendment's Double Jeopardy Clause permits courts to scrutinize prosecutor's subjective motives to assess whether she "intended to 'goad' the defendant into moving for a mistrial."[296] Where she has, double jeopardy forecloses subsequent retrial.[297] The Court's willingness to scrutinize subjective intentions where judicial process is concerned likely owes something to judgments about institutional competence. Courts may be better equipped to undertake subjective state-of-mind analyses where it pertains to in-court misconduct. This pragmatic account, however, is not theoretically satisfying. Nor does it entirely capture the Court's willingness to evaluate subjective motivations.

The more it seems that police officers are deliberately perpetrating a hoax upon the courts, the more amenable the Supreme Court is to considering their subjective intentions. For example, in *Missouri v. Seibert*,[298] the Court paid close attention to officers' subjective intentions without being entirely forthright that it was doing so. In *Seibert*, the Court concluded that officers violated the defendant's Miranda rights by engaging in a two-phase interrogation.[299] In the first phase, officers extracted a confession without having Mirandized Seibert.[300] In the second phase, the officers Mirandized Seibert and then asked her to reiterate the confession.[301] The interrogation tactic appeared to have been based upon a strategic reading of the Court's earlier decision in *Elstad v. Oregon*.[302] In that case an officer inadvertently questioned (and obtained a confession from) the suspect prior to Mirandizing him.[303] After Mirandizing the suspect, the officer then obtained a second confession.[304] The Court held that the Miranda warning, in effect, cured the officer's initial error—that is, recitation of the Miranda warning was sufficient to apprise the suspect of

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296 Oregon v. Kennedy, 456 U.S. 667, 676 (1982).
297 *Id.*
298 542 U.S. 600 (2004).
299 *Id.* at 604 (plurality).
300 *Id.* at 605.
300 *Id.* at 604–05.
301 *Id.* at 605.
302 *Id.* at 609, 614–15.
303 470 U.S. 298, 301 (1985).
304 *Id.*

his rights and allow him to make an intelligent choice regarding waiver despite his already having confessed once.[305]

Although the structure of the interrogation in *Seibert* was identical to that in *Elstad*, the big difference was that the officers in *Seibert* deliberately elicited the first confession. This was not lost on the Court in *Seibert*, although the plurality was loathe to make the point explicitly. The plurality reasoned that the police tactic was unconstitutional because it "effectively threaten[ed] to thwart *Miranda*'s purpose."[306] Concurring, Justice Kennedy called the interrogation a "deliberate violation of *Miranda*," and wrote that there should be a remedy for any tactic that "was used in a calculated way to undermine the *Miranda* warning."[307]

Officer duplicity vis-à-vis courts raise obvious difficulties in a divided state. An officer stratagem to circumvent constitutional restraint à la *Seibert* undermines not only judicial authority, but also the underlying point that the constitutional rule is supposed to serve. The latter, of course, is generally true whenever police officers deliberately circumvent constitutional principles. While the Court seems to, at least implicitly, recognize this problem, it has not built a jurisprudence that meaningfully addresses it.

The Court's use of objective purpose analysis obfuscates the nature of police officers' public role by falsely suggesting an analogy to mens rea or negligence. In fact, the notion awkwardly mediates the tension between the individual and corporate conceptualizations of officers.

### B. UNDERSTANDING PROGRAMMATIC PURPOSE

The special needs and administrative exception cases oblige the Court to more directly address state purpose because they involve institutional decisionmaking. In those cases, the Court employs what it terms programmatic-purpose analysis.[308] Programmatic purpose is best understood as a metaphor for the broad policy impulses that animate state decisionmaking—more colloquially, a policy's underlying point or goal. Section 1 below suggests that this understanding of purpose has deep resonances with constitutional means-ends testing.

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[305] Elstad v. Oregon, 470 U.S. 298, 318 (1985).

[306] *Seibert*, 542 U.S. at 617.

[307] *Id.* at 620, 622 (Kennedy, J., concurring).

[308] *See* Brigham City v. Stuart, 547 U.S. 398, 405 (2006) (emphasizing the word programmatic in distinguishing programmatic-purpose inquiry from subjective motive inquiry).

Section 2 demonstrates that programmatic purpose is substantially underdeveloped in comparison to means-ends testing in other constitutional contexts. This is because the Court has refused to define whether criminal law enforcement is an end or a means. In addition, the Court has not consistently used the principle of fit in those cases where analysis is called for. Nor has the Court devoted sufficient attention to what the Fourth Amendment requires of the relationship between a particular institution's purpose and the individual agents who are responsible for advancing that purpose in the field.

### *1. Purpose is a Method for Reviewing Institutional Choice*

While purpose evokes a state-of-mind analysis in criminal and tort law, the concept also has deep purchase as a device for understanding public institutions' choices.[309] The Court appears to recognize as much when it appends "programmatic" to qualify purpose analysis in the special needs and administrative exception cases.[310]

There is a relationship—although not entirely felicitous—between these two distinct notions of purpose. We often imagine the state as if it were a large individual that possesses intentions analogous to those of a real person. Scholars have criticized such a conception for reasons noted above.[311] Nor should institutional choices be reduced to the aggregation of constituent decisionmakers' individual intentions.[312] Even if empirically possible to identify each individual's actual intentions, aggregating them will often fail to produce a coherent portrait of institutional purpose. For example, legislation scholars have long recognized that wildly disparate motivations may account for individual legislators' choices with regard to a particular bill.[313] In addition, deliberative processes have the capacity to generate internally inconsistent results.[314] This means that an institutional actor cannot behave with the kind of "rational unity" that philosophers would expect of an "intentional agent."[315]

But corporate entities still can act pursuant to a general plan or towards a rough goal. To be intelligible as policy, there has to be some reasonably

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[309] *See* RONALD DWORKIN, LAW'S EMPIRE 52 (1986).
[310] *See supra* Section I.C.
[311] *See supra* Section II.A.3(a).
[312] *See* Enoch, *supra* note 271, at 87.
[313] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 326 (1990).
[314] *See* Pettit, *supra* note 277, at 71–75.
[315] *See id.* at 73–74.

clear answer to the question, "What is the point?" Were it otherwise, liberal governance would impossible. The liberal state is, by definition, one that is both reasonably responsive to its constituents' desires and subject to constitutional principles of justice.[316] The state must have the capacity to act in ways that constituents can identify and challenge. All of this presupposes some kind of shared political vocabulary and some reasonably specific state goals to agree or disagree about.[317]

Liberal theories of the state are preoccupied with identifying the kinds of goals that the state might legitimately pursue and the constraints they may be subject to. For example, in John Rawls' formulation, a liberal state may legitimately pursue majoritarian ends subject to libertarian and distributive restrictions.[318] These principles of justice both restrict the range of legitimate goals that the state may pursue and the methods by which those legitimate goals might be advanced.[319] These constraints on state ends and means have deep resonance in our constitutional jurisprudence.

"Means-ends testing" is a staple of constitutional jurisprudence. It requires the Court to evaluate the "fit" between a state's legitimate goals and the method that it uses to advance those goals.[320] The degree of fit required varies depending upon the nature of the goal. Roughly speaking, the more legitimate the goal, the more leeway the state has to pursue it. The more constitutionally suspect the goal, the less leeway the state has to pursue it.

For example, the First Amendment severely limits the state's ability to regulate "protected speech."[321] For less constitutionally significant categories of speech—lewd speech or fraud, for instance—the state enjoys considerably more leeway to regulate.[322] To the extent that the state restricts protected speech in the course of pursuing some other legitimate goal—for example, banning depictions of animal cruelty in order to forestall future animal cruelty[323]—it must demonstrate that it employed the "least

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[316] *See* DON HERZOG, HAPPY SLAVES 202 (1989).

[317] *See* DWORKIN, *supra* note 309, at 63 (stating that shared vocabulary ensures that citizens understand one another's arguments as "claims rather than just noises.").

[318] *See* RAWLS, *supra* note 226, at 312–15.

[319] *See id.* at 220 (noting permissible goal that would permit restrictions on liberty and the minimum requirements for doing so).

[320] *See* Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 U. ILL. L. REV. 691, 698 (2004).

[321] This includes most forms of speech. *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010).

[322] *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976); Roth v. United States, 354 U.S. 476, 483 (1957).

[323] *See Stevens*, 559 U.S. 464 (2009) (prohibition unconstitutional due to overbreadth).

restrictive means" to do so.[324] The state cannot limit any more speech than is absolutely necessary to accomplish its legitimate goal.[325] This prevents both pretextual state behavior and sloppiness.

Equal protection analysis is similar. There are some goals that the state may not pursue at all: for example, racial segregation for its own sake. Where the state distributes benefits or burdens based upon a suspect classification, such as race, to accomplish some other ostensibly legitimate goal, such as preventing fights in prison,[326] the goal must be exceedingly important.[327] The Court evaluates the state's proffered goal with "strict scrutiny" in order to root out pretext.[328] Where the state relies upon a suspect classification, strict scrutiny review virtually presumes that any nonracial goal is pretextual.[329] Even if a state's goal is compelling, however, the Court also evaluates whether the suspect classification is "narrowly tailored" to accomplish the goal.[330] This onerous standard requires the state to show that it did not rely on race any more than necessary to accomplish its exceedingly important goal.[331]

In contrast, state practices rarely fail to satisfy the less rigorous rational-basis review.[332] When the state distributes benefits or burdens on the basis of a nonsuspect classification without impinging upon any fundamental right, the Court only requires that the classification be rationally related to *a* legitimate goal.[333] States, for example, have broad discretion to distribute taxation's benefits and burdens as they see fit.[334] The Court usually reviews the state's purpose for bare plausibility, sometimes accepting post hoc rationales or supplying them itself.[335] For legislative

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[324] United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004)).

[325] *See id.*

[326] *See* Johnson v. California, 543 U.S. 499, 502–03 (2005).

[327] *See id.* at 505–06.

[328] *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are . . . in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

[329] Thus the adage "strict in theory, but fatal in fact." *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

[330] *Id.* at 333–34.

[331] *Id.*

[332] *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976).

[333] *See id.* at 313−14.

[334] *See* Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012).

[335] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993) (arguing that courts must reject the "equal protection challenge if there is any reasonably conceivable state of facts that could

acts, there is no obligation that the legislature itself have articulated the rationale for the challenged policy.[336] And the fit between means and ends need not be particularly tight; the state's conduct just cannot be "irrational."[337]

### *2. Programmatic Purpose is Stunted Means-Ends Testing*

The Court's programmatic purpose is a form of means-ends testing. It is, however, considerably underdeveloped in comparison to the tiered system of review used in other constitutional contexts.[338] The Court has held that open-ended interest balancing for reasonableness is permissible when an agency's primary purpose is other than ordinary crime control.[339] If the goal is ordinary crime control, the Fourth Amendment requires individualized suspicion.[340] The Court, however, has not advanced a principle for distinguishing when (or whether) criminal enforcement is an "end" and when it is a "means." The Court has permitted interest balancing in cases in which law enforcement has used criminal enforcement as a means to achieve some ostensibly noncriminal end.[341] In addition, the Court has not developed clear rules of fit between means and ends where a state's primary purpose is noncriminal.

The Court's special needs and administrative exception cases turn on whether the state's primary purpose was crime control. For example, in *Edmond*, Indianapolis stated that its goal in erecting a vehicle roadblock was interdicting illegal drugs.[342] This made it easy for the Court to conclude that the roadblock's primary purpose was ordinary crime control without having to offer guidance on how to distinguish between primary and secondary purposes.[343] In *Ferguson*, the Court suggested that the distinction between primary and secondary purposes is a distinction between "ultimate" and "immediate" goals.[344] There, a state hospital forwarded

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provide a rational basis for the classification" (quoting FCC v. Beach Commc'n, Inc., 508 U.S. 307, 313 (1993))).

[336] *Id.*

[337] *See Armour*, 132 S. Ct. at 2080 (2012).

[338] *See supra* Section II.B.1.

[339] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 41–42 (2001).

[340] *Id.* at 41.

[341] *See* sources cited *supra* notes 200−201 and accompanying discussion.

[342] *Edmond*, 531 U.S. at 40.

[343] *Edmond*, 531 U.S. at 41–42.

[344] Ferguson v. Charleston, 532 U.S. 67, 82–83 (2001). *But see* Maryland v. King, 133 S. Ct. 1958, 1969 (2013) ("[T]he Court has preferred 'some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion'" (second and third

evidence that pregnant women were addicted to cocaine to law enforcement.[345] While the state's ultimate goal in *Ferguson* might have "been to get the [cocaine-addicted] women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal."[346] *Ferguson* suggests that when criminal enforcement is used as a means for achieving a noncriminal goal, the standard requirements of individualized suspicion apply.[347] Otherwise, special needs would swallow all of criminal procedure "[b]ecause [criminal] law enforcement involvement always serves some broader social purpose or objective . . . ."[348]

The distinction between immediate and ultimate goals drawn in *Ferguson*, however, does not sit comfortably with the Court's holding in *New York v. Burger* or in earlier roadblock cases.[349] In both *Martinez-Fuerte* and *Sitz*, roadblock cases predating *Ferguson*, the Court approved the suspicionless roadblocks for ostensibly noncriminal purposes—preventing undocumented migration and drunk driving, respectively.[350] But the state relied upon criminal law enforcement to advance both of those policy purposes.[351] A police department or most other state actors are unlikely to describe criminal law enforcement as valuable for its own sake. Such enforcement usually advances some broader, underlying policy goal.[352]

In *Burger*, the Court permitted the warrantless search of a junkyard for evidence of stolen cars pursuant to a New York state statute that authorized police officers to conduct "administrative inspections."[353] The Court concluded that the legislature's purpose was administrative, not criminal.[354]

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alteration in original) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560–61 (1976))).

[345] *Ferguson*, 532 U.S. at 71–73.

[346] *Id.* at 82–83 (footnote omitted).

[347] *See id.* at 82–84.

[348] *Id.* at 84.

[349] 482 U.S. 691, 693 (1987). The *Ferguson* majority attempts to distinguish *Burger*. *See Ferguson*, 532 U.S. at 83 n.21.

[350] Mich. Dep't State Police v. Sitz, 496 U.S. 444, 451, 455 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 552, 561–62 (1976).

[351] *Sitz*, 496 U.S. at 450–52; *Martinez-Fuerte*, 428 U.S. at 552.

[352] *See Sitz*, 496 U.S. at 451 (describing the "tragedy" of drunk driving); *Martinez-Fuerte*, 428 U.S. at 551−52 (discussing the years-long national policy to limit immigration into the United States).

[353] *Burger*, 482 U.S. at 693.

[354] *See id.* at 708−10.

The Court understood the inspection statute's goal as reducing the economic harms associated with auto theft.[355] Of course, the same might have been said about criminal statutes punishing auto theft.[356] The administrative inspection statute itself made it a crime to refuse to cooperate with the police.[357] The police could also use evidence seized in the so-called administrative search in a theft case against the individual whose business was subjected to administrative search.[358] That is exactly what the state did when it prosecuted Burger.[359] The opinion suggests that there is nothing problematic about using criminal means to pursue noncriminal ends.[360]

Similarly, in cruel-and-unusual-punishment and double-jeopardy cases, the Court has refused to characterize criminal punishment as a means or ends. Rather than squarely addressing what "criminal" means, the Court has deferred to legislative labels.[361] This, with few exceptions, has been true even in cases where the state has used the "civil" label to describe harsh, custodial practices that most laypersons would think of as criminal.[362] The notion that criminal punishment is an end is deeply retributive. By this view, criminal law exists so that the state may inflict suffering upon a blameworthy person in strict proportion to the moral wrong the blameworthy person has done.[363] By a utilitarian view, criminal punishment is a kind of super-deterrent that might be used to achieve any number of public policy ends.[364] The Court resisted the conclusion that the

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[355] *Id.* at 708−09.

[356] *See id.* at 712–14.

[357] *Id.* at 694 n.1.

[358] *See id*. at 716.

[359] *Id.* at 695–96. The Court did make the slightest nod of recognition that there might be a pretext problem. *See id.* at 716 n.27 (stating that "[t]here is . . . no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws").

[360] *See id.* at 716.

[361] *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

[362] *See id.* at 361−62 (permitting civil detention of sex offenders following completion of criminal sentence, and finding that civil commitment "does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence"). In the immigration context, lengthy civil detention is quite common. *See, e.g.*, David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1004−08 (2002) (describing instances of immigration detention); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1301−02 (2011) (noting how harsh deportation can be for deportees).

[363] *See* Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment).

[364] *E.g.*, *Burger*, 482 U.S. at 712−14 (justifying the use of criminal procedural tools—i.e., searches by law enforcement—to serve both administrative and criminal goals).

Constitution does not require legislatures to choose among these or any of the other available rationales for criminalizing conduct.[365] While federalism concerns may weigh in favor of deferring to legislative prerogatives, the same is not true for police departments' choices. The Court, however, does not seem poised to scrutinize the latter's choices more vigorously.

Even if it were clear whether criminal enforcement was means or ends, questions of how to judge fit between the two would remain. *King* highlights the broad questions that remain outstanding. The reasonableness balancing in *King* is redolent of the least stringent version of rational basis review. The Court credited what appeared to be incidental reasons—if not entirely hypothetical ones—for the DNA testing policy. In assessing Maryland's goals, the Court assiduously avoided any reference to the most obvious (and likely actual) reason for Maryland's DNA collection practices. The statute's preamble indicated that the state had authorized DNA collection in order to solve past crimes.[366] Notwithstanding, the Court upheld the practice's constitutionality based upon what it identified as the state's administrative goal in properly identifying arrestees.[367] This outweighed the minimally intrusive cheek swab by which police collected arrestees' genetic material.[368] In previous special needs cases, the Court paid considerably more attention to the state's actual reasons for carrying out the searches.[369]

While the Court has never required that the state use the least restrictive means to accomplish its special need,[370] it has generally required that those needs be more than hypothetical. For example, in *Skinner*, suspicionless drug testing was limited to those railroad employees in safety-sensitive positions.[371] A review of railroad accidents triggered the testing requirement.[372] In addition, there was evidence to suggest that intoxication on the job was a problem.[373] Similarly in *Acton*, there was an actual drug use problem in the school district, and evidence suggested that student athletes were driving it.[374] While there was no evidence of an actual drug

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365 *E.g.*, *Ewing*, 538 U.S. at 25 (plurality opinion).
366 Maryland v. King, 133 S. Ct. 1958, 1985 (2013) (Scalia, J., dissenting).
367 *See id.* at 1970.
368 *Id.* at 1977–78.
369 *See supra* Section I.C.
370 *See, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n., 489 U.S. 602, 629 n.9 (1989).
371 *Id.* at 620.
372 *Id.* at 607–08.
373 *Id.* at 606–07.
374 Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 648−49 (1995).

use problem among Treasury employees in *Von Raab*,[375] the Court determined that suspicionless drug testing was permissible for those employees in specific, security-sensitive positions.[376] In none of the three cases was there any suggestion that the state's purpose for suspicionless drug testing was securing convictions.[377] *King* is to the contrary; indeed, King was convicted after being tied to an unsolved case by his DNA.[378]

To summarize the disarray: a special-needs search is permitted where an institution's primary goal is noncriminal. But the institution can use criminal means to achieve its noncriminal goal. Further, the Court is agnostic as to whether criminal punishment is means or ends. Notwithstanding, the Court will sometimes scrutinize the fit between means and ends vigorously to ensure that criminal means have not subsumed a noncriminal end. Other times though, the Court will not scrutinize fit with any vigor at all. The Court has not announced when it will do the former and when it will do the latter.

### *3. The Relationship Between Institutional Purpose and Officer Purpose is Murky*

The disarray surrounding Fourth Amendment regulation of institutional choice is compounded by lack of guidance on what steps institutions must take to ensure that their individual agents effect a non-crime-control programmatic purpose. This is the problem of pretext. The question is most pressing for police agencies and officers because the power to make a criminal arrest is a background fact regardless of what the department's primary programmatic goal may be. Even if one could neatly define a legislature's or police department's purpose as civil, it is not clear why or how that would map onto individual police officers' motivations in a particular situation. While the Court has made veiled allusions to the dangers of pretext in such cases,[379] it has not developed principles to forestall their realization. *Burger* is illustrative.

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[375] Justice Scalia emphasized this point in his dissent in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 682, 685−86 (1989) (Scalia, J., dissenting).

[376] *Id.* at 677 (majority opinion). The case was remanded for fact finding regarding other, nonsecurity related positions covered by the suspicionless drug testing requirement. *Id.* at 678.

[377] *See id.* at 663 (showing test results not transmitted to prosecutor); *see also Acton*, 515 U.S. at 651 (suggesting the same). In *Skinner*, there was no prohibition on forwarding results to law enforcement, but no evidence that that had happened. 489 U.S. at 621 n.5.

[378] Maryland v. King, 133 S. Ct. 1958, 1966 (2013).

[379] *See, e.g.*, New York v. Burger, 482 U.S. 691, 716 n.27 (1987); Colorado v. Bertine, 479 U.S. 367, 376–77 (1987) (Blackmun, J., concurring).

In *Burger*, police officers were charged with executing the administrative search authorized by the New York legislature. The legislature created the scheme to deter auto theft.[380] Because this deterrence regime was designed to achieve the same goal that underlies criminal laws prohibiting auto theft, it is questionable that there could be any neat distinction between criminal and administrative purposes in this setting.[381] Nonetheless, the Court concluded that the search was administrative, not criminal.[382] The opinion implies that the officers' purpose in carrying out the suspicionless search was continuous with the legislature's purpose in creating the statute.[383] Whether that was actually true is questionable.[384] The Court stated that if officers come across evidence of "crimes in the course of an *otherwise proper* administrative inspection" that evidence is admissible to convict.[385] It is unclear what "otherwise proper" means. Is it enough that the officers are acting pursuant to legislative authorization, or must the officers' purpose actually be consistent with the legislature's purpose?

Similarly, the Court has approved roadblock searches without specifying what, if any, alignment there must be between the department's and an individual officer's intentions. Recall that in *Martinez-Fuerte* and *Sitz*, the Court approved suspicionless roadblocks for ostensibly noncriminal, public policy purposes—preventing undocumented immigration and drunk driving, respectively.[386] In both cases there were criminal laws prohibiting the conduct. Officers subjected motorists to more intensive, secondary searches based upon information gleaned in the initial, suspicionless search.[387] The Court has suggested that the initial, suspicionless searches should be conducted according to a protocol that minimizes the discretion exercised by the individual officers staffing the checkpoint.[388] Beyond that, however, the Court has not indicated whether the Fourth Amendment imposes any additional constraints upon officer

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[380] *See Burger*, 482 U.S. at 698.

[381] The dissenters in *Burger* hinted at this very conclusion. *See id.* at 728 (Brennan, J., dissenting).

[382] *Id.* at 712 (majority opinion).

[383] *See id.* at 717 ("So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individual for violation other than those created by the scheme itself.").

[384] *See id.* at 694 n.2.

[385] *Id.* at 716 (emphasis added).

[386] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976).

[387] *See Sitz*, 496 U.S. at 450–51; *Martinez-Fuerte*, 428 U.S. at 549–50.

[388] *See Martinez-Fuerte*, 428 U.S. at 559.

discretion than would ordinarily apply. If individual officers understand their jobs to be making arrests,[389] they might view a roadblock as an opportunity to do so regardless of the department's official statement of purpose. For example, officers staffing a roadblock might aggressively use *Terry* stops or consent to maximize secondary searches and arrests.[390] In *Edmond*, the state made it easy for the Court to conclude that the roadblock's primary purpose was criminal by conceding that it was set up for drug interdiction.[391] Had the department described the roadblock's purpose as "keeping drug-addled drivers off the road," it might have seemed analogous to the constitutional drunk-driving checkpoint in *Sitz*.[392] Such rebranding likely would not have dissuaded individual officers from making just as many narcotics arrests at the checkpoint.

Even when the Court has explicitly recognized that an institutional practice may be rife with opportunities for individual agents to behave pretextually, it has not imposed serious constraints. For example, in *Colorado v. Bertine*, a three-justice concurrence recognized that the inventory search exception is problematic because it creates opportunities for police officers to pretextually search for evidence of criminal wrongdoing.[393] To prevent this from occurring, the concurrence indicated that inventory searches should be conducted pursuant to departmental regulations that prescribe when and how such searches are to be carried out.[394] In subsequent cases, however, the Court clarified that such regulations could leave considerable discretion to individual officers.[395] Much like in the roadblock context, the Court has created an incentive for departments to create some sort of general policy, but not necessarily to actually restrain officer discretion.

Scrutinizing the intersection of institutional and individual purposes in the special needs or administrative contexts might strike the Court as a slippery slope. Other traditional crime-control cases could readily be recast as disputes about the disjuncture between programmatic purpose and

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[389] *See* Sekhon, *supra* note 52, at 1207–08 (describing how N.Y.P.D. encouraged officers to view their responsibility in terms of making arrests).

[390] In *Terry v. Ohio*, the Court authorized police officers to make brief investigatory stops based upon reasonable suspicion, which is a less stringent standard than probable cause. 392 U.S. 1, 21–22 (1968). Police may also conduct a brief pat down for weapons in connection with a *Terry* stop. *Id.* at 27.

[391] City of Indianapolis v. Edmond, 531 U.S. 32, 40–41 (2000).

[392] *See Sitz*, 496 U.S. at 451–52.

[393] *See* Colorado v. Bertine, 479 U.S. 367, 376–77 (1987) (Blackmun, J., concurring).

[394] *Id.*

[395] *See* Florida v. Wells, 495 U.S. 1, 4 (1990).

individual officers' choices. In *Whren*, for instance, there was a departmental policy limiting the circumstances in which undercover officers could make traffic stops.[396] The primary, programmatic purpose for creating a specialized, undercover narcotics unit was presumably to enforce narcotics, not traffic, laws. The policy evinced a departmental intention with regard to both ends and means. Similarly, in a case like *Jardines*, it seems appropriate to assume that the primary, programmatic purpose of a narcotics K-9 unit is to identify criminal narcotics violations. Anytime the officer uses the narcotics dog, one might assume that the officer's individual purpose was to advance the programmatic purpose. It would be strange for a K-9 officer to approach someone's front door with the dog and claim that her primary purpose was community caretaking.[397] Neither in *Whren* or otherwise, however, has the Court been willing to create a Fourth Amendment remedy for officers' failure to behave in ways required by local or state institutions.[398]

The critique implicit throughout Section B has been that the Court is insufficiently vigorous in its Fourth Amendment means-ends testing. The Court does not consistently require institutions to be clear about their goals or how to achieve them. Nor does it require such institutions to prevent their agents from behaving pretextually when implementing a noncriminal programmatic purpose. The latter is most troubling when the agents are police officers. These problems cannot be solved by doctrinal reform alone.

### C. THE PRAGMATIST'S REBUKE

Section II's core arguments are vulnerable to pragmatist objection. At the most general level, the discussion's overarching criticism has been that the Court has failed to adequately develop a Fourth Amendment framework for analyzing state purpose. The pragmatist might counter that doing so is unimportant because Fourth Amendment doctrine has so little impact on police officers. By this view, evidentiary issues, equity concerns with remedy, and judges' dispositions will have greater bearing on suppression outcomes than any Fourth Amendment test.

Answering whether a constitutional violation occurred will often turn on factual questions. Given this structural reality, one might wonder how much difference it makes whether the standard for evaluating purpose is objective, subjective, or something else. The court's legal conclusions will turn on the same facts regardless of the standard and it will usually be

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396 Whren v. United States, 517 U.S. 806, 815 (1996).
397 *See* Brigham City v. Stuart, 547 U.S. 398, 406 (2006).
398 *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 176 (2008).

officers and suspects that supply those facts. Unlike most suspects, police officers are credible and experienced witnesses. They have typically had some practice conforming their observations and recollections to the relevant legal standard.[399] Courts are likely inclined to credit their testimony.[400] Even when this is not true, courts may be willing to overlook officer deception because "letting the criminal go free" seems like too high a cost to pay for constitutional rectitude.[401]

Similarly, one might think that adopting a more formalized means-ends test in the special needs and administrative exceptions contexts would make little difference to case outcomes. From a formalist's standpoint, it might be more seemly if the Fourth Amendment's means-ends lexicon conformed to that deployed in other constitutional contexts. While the Court might win some transparency points for explicitly naming its interpretive practice, this would not necessarily make for any change in outcomes. Tiered review in other constitutional contexts has not led to predictable and consistent results.[402] Commentators have assailed the Court's distinctions between strict, intermediate, and rational-basis review,[403] some suggesting that these complex gradations actually create cover for the Court to behave in *ad hoc* ways.[404]

Pragmatist critique counsels against imagining normative upshot in terms of doctrinal change. But the normative implications of the discussion in Section II need not be imagined in doctrinal terms alone. Rather, a fuller more consistent framework for evaluating purpose would likely impel significant structural reform. The next section explains why.

## III. PURPOSE AND INSTITUTIONAL DESIGN

What would a fully developed Fourth Amendment framework for evaluating state purpose look like? The normative account that follows is offered as an ideal of liberal constitutionalism, not as a recipe for near-term

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399 *Cf.* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041–42 (1996) (discussing the "systematic," "routine," "commonplace," and "prevalent" practice of "testilying," or police perjury to effect a conviction).

400 *See* ALLEN ET AL., *supra* note 32, at 349.

401 *See id.* at 350.

402 *See, e.g.*, Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1718 (2005) (discussing the "doctrinal[] awkward[ness]" of *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

403 *See* sources cited *supra* notes 320–337 and accompanying discussion.

404 *See, e.g.*, sources cited *supra* notes 320–337 and accompanying discussion; *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 493–94 (2004).

doctrinal reform. It endeavors to give full expression to the radical consequences of the preceding analysis.

Fourth Amendment purpose has greater conceptual potential as an ex ante regulatory principle than as a post hoc principle of judicial review in individual cases. Doing so would help ensure that enforcement bureaucracies fairly and transparently calibrate the coercion their agents wield to achieve clearly defined goals. This is to embrace a means-ends conception of purpose.[405] Simply importing a means-ends test from another constitutional law context, however, is unlikely to be helpful. As the discussion above suggests, judicial review is ill equipped to sort and identify the entangled motivations that often impel institutional and individual enforcement choices.[406]

This section argues that purpose should be used as a regulatory principle for directly addressing mandate sprawl. Institutional responsibility for specific enforcement goals should be parceled precisely, and specific conduct rules for individual agents should flow from that purposive division of labor. This might mean stripping police departments of responsibility for noncriminal enforcement actions. For example, to the extent that a suspicionless DUI roadblock's primary purpose is removing drunk drivers from the road, perhaps the DMV or some other entity without arrest authority ought to operate them. Similar parceling should occur within police departments so that different internal procedures apply to different categories of criminal enforcement based upon coerciveness—for example, issuing speeding tickets is significantly less coercive than making narcotics arrests.

While there is an important role for courts in developing and implementing a purposive division of enforcement labor, that role would be quite different from the one that courts currently play in typical Fourth Amendment suppression motions.[407]

If purpose is to function as an effective regulatory tool and remain true to its origins in liberal political theory, purpose must do two related things. Each is taken up in Sections A and B respectively.

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[405] *See, e.g.*, sources cited *supra* notes 320–337 and accompanying discussion; Goldberg, *supra* note 404, at 493–94.

[406] *See supra* Section II.B.3; *see also* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776 (2012) (arguing that judicial review is ill equipped to manage the core tensions that lie at the heart of policing in democratic society).

[407] *See supra* Section II.A.3(a). It would be an approach that focused to a considerably lesser degree on individual rights. *Cf.* Harmon, *supra note* 406, at 776–81 (critiquing the role of rights in regulating police).

First, purpose should define permissible goals for police departments with sufficient particularity to permit meaningful comparisons. If goals are drawn too broadly, courts (or some other regulatory authority) cannot properly calibrate procedural constraints—they will be under- and overinclusive if too broad a range of state conduct is lumped together. The flip side of the coin is a typology so particularized that it forecloses meaningful comparisons between different incarnations of state coercion. An approach that evaluates government coercion on the specific facts that arise in individual cases might lose sight of constitutional values by getting caught up with narrow, empirical questions implicated by those cases.[408] Both problems currently beset Fourth Amendment jurisprudence. The roughly hewn distinction between criminal and civil matters leads procedural protections to be both over- and underinclusive. And the transactional framing of disputes tends to obfuscate the broad institutional concerns that Fourth Amendment purpose analysis should implicate.[409]

Second, purpose would also help minimize goal confusion and pretext. The state should be truthful about the goals that it seeks to advance when undertaking coercive action. For procedural constraints on state coercion to function, it must be possible to identify the actual reasons impelling a policy or practice. This requires that state actors be clear about their own goals and be truthful in representing them to other state actors and the public. This might be impossible for an institution that is responsible for too many overlapping goals—a condition defined below as "goal confusion." Goal confusion and pretextual enforcement undermine efficient regulation, frustrate constitutional review, and undermine constituents' ability to meaningfully challenge state enforcement practices. For example, voters might feel a good bit more supportive of a state agency collecting biometric data for the purpose of identifying the population's vulnerability to a particular disease than for national security surveillance. A properly liberal state would not do the latter while claiming to do the former.

If understood and applied in a principled way, Fourth Amendment purpose analysis would require significant restructuring of many enforcement bureaucracies, particularly police departments. This would, in turn have significant consequences for the regulation of individual state agents. The Court is right to question the practicality of delving into

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[408] Jerry L. Mashaw made such a criticism of the Court's procedural due process framework. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46–49 (1976).

[409] *See* sources cited *supra* Section II.A.3.

individual officer's subjective intentions each time a Fourth Amendment issue arises.[410] The discussion above has demonstrated, however, the Court's "objective" approach obfuscates the essential nature of Fourth Amendment analysis.[411] If enforcement bureaucracies were organized in terms of narrowly delimited purposes, it would be much easier to objectively review individual officers' conduct. Individual conduct that substantially deviated from the defined institutional mandate would be *per se* unreasonable.

### A. CRIMINAL IS OVER- AND UNDERINCLUSIVE

The Fourth Amendment imposes more stringent procedural restraints on the government in criminal prosecutions than in civil enforcement actions. As discussed, this creates incentives for an enforcement bureaucracy to claim it is doing the latter when it is actually doing the former.[412] This is true despite the fact that the label criminal includes much state conduct that is pretty mild and excludes much that is very harsh. The criminal–civil binary has been the subject of extensive criticism elsewhere,[413] so only a brief account is provided here.

The government has been both profligate and parsimonious in using the label criminal. Legislatures have made extensive use of criminal law as a regulatory device, leading many scholars to complain of overcriminalization.[414] The proliferation of criminal laws means that trifling misconduct can make one vulnerable to criminal punishment.[415] Criminal procedure, of course, governs the investigation of all those crimes. On the other hand, the state treats a host of individuals quite harshly for conduct that is not criminal. For example, the state routinely detains individuals before criminal charges have been filed, undocumented immigrants pending their removal from the United States, individuals civilly committed for being dangerous to themselves or others, and so on.[416] Criminal procedure does not apply to such civil proceedings. The Court has readily deferred to legislative labels even in circumstances where the label has seemed patently inaccurate.[417] This, in effect, cedes discretionary authority to legislatures

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[410] *E.g.*, Whren v. United States, 517 U.S. 806, 813 (1996).

[411] *See supra* Section II.A.3.

[412] *See supra* Section II.B.3.

[413] *See supra* Section II.B.3.

[414] *See, e.g.*, Erika Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713, 713 n.49 (2005).

[415] *See id.* at 713–14.

[416] *See* sources cited *supra* notes 361–362 and discussion.

[417] *See* sources cited *supra* notes 361–362 and discussion.

and enforcement bureaucracies to strategically dodge criminal procedure's requirements by designating enforcement actions civil. The New York junkyard inspection regulation at issue in *Burger* is a good example.[418]

Some scholars have suggested abandoning the binary entirely. For example, Isachaar Rosen-Zvi and Talia Fisher have advocated for a case-by-case approach to determining procedural protections. They would leave it to courts to determine the procedural protections that should apply in any particular case based upon the relative power of the parties, the stakes of the litigation, and so forth.[419] Rosen-Zvi and Fisher are largely concerned with one source of procedural protection alone, the burden of proof at trial.[420] The ad hoc approach they prescribe may be useful in identifying the procedures required for fair adjudication. It is not, however, helpful for structuring fair enforcement action in advance of litigation. A more nuanced and modulated approach is necessary and limned below.

Regulating enforcement activity requires firm categories ranked by coerciveness so that appropriate procedural rules may be crafted ex ante.[421] While the criminal–civil binary is probably too general to serve that purpose effectively, a more detailed and graduated typology could. New categories should reflect meaningful differences in the severity of the state's intrusiveness and potential consequences of that intrusiveness. Investigating a seatbelt violation, for example, should not be subject to greater procedural protections than an invasive home visit by a social worker.[422]

The identity and authority of the state agent should be an important factor in tailoring procedural restraints upon that agent's investigatory power. A state actor that has the power to arrest or undertake other comparably severe action should, other things being equal, be subject to greater procedural restrictions than one that does not. These intuitions are developed further in the section that follows.

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[418] *See* sources cited *supra* notes 380–385.

[419] *See* Rosen-Zvi & Fisher, *supra* note 31, at 84–87.

[420] *See id.*

[421] Contrary to Rosen-Zvi and Fisher, I am assuming that there will be no practical opportunity for a neutral referee to consider the parties' relative strength vis-à-vis one another in advance of enforcement action.

[422] *See* Wyman v. James, 400 U.S. 309, 317–18 (1971) (concluding that mandatory home visit by case worker of state aid recipient was neither a search nor unreasonable).

B. PRETEXT AND GOAL CONFUSION

Even if permissible goals are delimited finely, another problem remains: Those goals must be parceled in a manner that limits "goal confusion" and pretext.

A liberal state should transparently pursue goals.[423] Unique transparency challenges arise when the state vests an actor—whether institution or individual—with responsibility for advancing a broad range of goals. The state actor may claim to be pursuing one goal when it is actually pursuing another. The incentives to do this will be particularly pronounced where goals overlap with some subject to more stringent procedural restrictions than others. If two goals overlap such that accomplishing one goes reasonably far in accomplishing the other and the latter is more procedurally "costly" to pursue, the state actor will have incentive to claim that it is pursuing the former even if it is pursuing the latter. Returning to *Burger*, the police will always have incentive to claim that they are regulating junkyards even if punishing thieves was a significant goal.[424] Teasing the two goals apart in advance of the search would have been difficult since the legislature entangled them. When enforcement bureaucracies are charged with entangled goals in this way, it will be difficult if not impossible for the bureaucracy or its agents to honestly rank goals for any practice or policy that advances them simultaneously—that is to say, there will be goal confusion.[425]

Municipal police departments are particularly vulnerable to goal confusion. They are tasked with a broad range of goals, many of which are not even nominally criminal.[426] As a consequence, municipal police departments are often first responders for a host of social ills.[427] This goal proliferation carries over into individual officers' responsibilities. But the power to arrest always lurks in the background—the goal of getting a "good collar" likely overlaps with each of the wide variety of other goals a patrol officer is responsible for advancing in a given workday.[428] It is no wonder that courts have trouble distinguishing official justification from ulterior motive in Fourth Amendment cases. At least some members of the Court

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[423] *See supra* Section II.B.1.

[424] *See* sources cited *supra* notes 353−360 and accompanying discussion.

[425] *See supra* Section II.B.2.

[426] *See, e.g.*, Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 261 (1998).

[427] *See id.* at 271–73.

[428] For a detailed and intimate portrait of a patrol officer's workday routines, see CONLON, *supra* note 238, at 14−38.

seem to recognize that pretext and goal confusion are problems.[429] But it is practically impossible for the court, post hoc, to disentangle and rank goals that were entangled by design.

The beginning of a solution to pretext and goal confusion would be for courts to simply assume that a state agent's purpose is always that which corresponds to the most severe brand of coercive authority she wields. Under this approach, courts would just assume that police officers' and departments' purpose is always to make arrests—even when they claim otherwise in a particular case. This would mark a dramatic doctrinal shift. Not only would it be easier for courts to apply than current formulations of purpose analysis, it would create incentives for the state to disaggregate and assign goals in institutionally appropriate ways. Such structural reform would not only reduce pretext and goal confusion, it would make it easier for courts to review individual and institutional state practices for either.[430]

The endgame would be a goal-delimited disaggregation of enforcement bureaucracies. Section 1 below sketches the outlines of such reform for criminal versus noncriminal goals.[431] Section 2 does the same for criminal goals based upon seriousness.

### *1. Purpose and Institutional Role*

Disaggregating criminal from noncriminal police functions would help make the motivations for police behavior more transparent. In *Burger*, for instance, the fact that sworn police officers were responsible for carrying out an ostensibly administrative search created a powerful appearance of pretext. At the very least, there must have been goal confusion: the administrative scheme's goal of decreasing auto theft was coterminous with that of criminal theft. Nonetheless, the Court explicitly rejected the

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[429] *See, e.g.*, New York v. Burger, 482 U.S. 691, 716 n.27 (1987); Bertine v. Colorado, 479 U.S. 367, 381 (1987) (Marshall, J., dissenting).

[430] There may be a host of additional benefits. For example, Eric Miller has argued that role-based regulation of policing (as distinguished from the current approach of rule-based regulation) could bolster police legitimacy in minority neighborhoods. Eric Miller, *Role-Based Policing: Restraining Police Conduct Outside the "Legitimate Investigative Sphere*,*"* 94 CALIF. L. REV. 617, 621, 643−44 (2006). Miller argues, for example, that different state actors should be responsible for enforcing serious crimes as opposed to petty, order-maintenance type infractions. *Id.* at 664−66. Nonsworn personnel might be more effective at responding to the latter without engendering community resentment. *Id.*

[431] "Criminal" is used here and through the remaining sections in a rough, colloquial way as opposed to the more technical way that it was when discussion the criminal–civil binary. *See supra* Section III.A.

possibility of requiring the state to use nonsworn officers to carry out its administrative scheme.[432] It did so without any serious explanation.[433]

One can see the outlines for such an approach in some of the Court's earlier administrative search cases. For instance, in fire investigations, a plurality of the Court subjected the state to higher procedural constraints when its goal was identifying an arsonist as opposed to just identifying the causes of the fire in order to prevent reoccurrence.[434] Where the purpose of a state investigation is identifying an individual for punishment, procedural constraints should be stringent to ensure accuracy and minimize invasions of privacy and liberty.[435] But where the state's purpose is to prevent future reoccurrence, less stringent procedural standards are necessary because the state's purpose advances social good without posing a high threat to individual liberty, privacy, or dignity.[436] Where the investigator's purpose is the former, she must obtain a criminal warrant upon a showing of probable cause.[437] Where the investigator's purpose is noncriminal, she must obtain an administrative warrant, which requires a lesser showing.[438] These two functions may be intertwined in a fire inspection, but primary responsibility for each will often fall upon a different actor's shoulders—criminal investigator versus fire inspector. That helps courts avoid tortured purpose analysis. Similarly, in *Camara*, the Court held that building code inspectors would be subject to less stringent procedural constraints than police officers investigating a crime.[439] Again, given the state's goal, it makes sense that procedural restrictions would be relatively more relaxed than would be true for more potentially coercive state action like a criminal investigation. In both cases, however, an institutional division of labor was already in place. The Supreme Court would have done well to incentivize legislatures to create more such divisions of labor. But in *Burger*, the Court passed on the opportunity: "[W]e decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents."[440]

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[432] *Burger*, 482 U.S. at 717−18.

[433] *See id.*

[434] *See* Michigan v. Clifford, 464 U.S. 287, 294 (1984) (plurality opinion).

[435] *Id.* at 294–95.

[436] *See* Michigan v. Tyler, 436 U.S. 499, 510 (1978).

[437] *Clifford*, 464 U.S. at 294–95 (plurality opinion).

[438] *Id.* The Court, however, has not had occasion to decide what if any application *Horton* and the plain-view exception has in the context of fire inspections. *See* sources cited *supra* notes 104−106 and accompanying discussion.

[439] *See supra* notes 165−168 and accompanying discussion.

[440] Burger, 482 U.S. at 718.

Had the Court done otherwise in *Burger*, one could imagine any number of cases turning out differently. For example, the Court might have refused to allow police-department-directed roadblocks. Limiting police departments to the use of such tactics for a primary purpose other than ordinary crime control is to invite goal confusion and pretextual enforcement.[441] The mechanism that a police department is likely to use at a drunk driving roadblock is making arrests for violating criminal drunk driving laws.[442] Unless the department forbade officers from making arrests, it is impossible to cabin the broad public policy goal of minimizing drunk driving from the crime control mechanism that is used to advance it. A better approach would be to charge an entirely different bureaucracy with responsibility for advancing the public policy objective where this kind of constitutional tension exists between means and ends. To the extent that a roadblock's goal is removing unsafe drivers from the road—this must be the primary purpose for a suspicionless search at a DUI roadblock for it to be constitutional[443]—perhaps it should be the Department of Motor Vehicle's duty to administer it. The DMV has the authority to suspend a driver's license, but not to make arrests.

Such purposive division of labor could also occur within an institution by creating firewalls between different categories of state agents. For example, in theory an inventory search is only permitted for the purpose of protecting a police department from liability and from dangerous items.[444] There is no reason why sworn officers should perform this function, let alone those officers who made the decision to impound a particular vehicle. Where an investigating officer has discretion to order a vehicle impounded and is then permitted to engage in a thoroughgoing search of the vehicle without probable cause, we should expect rational officers to use this authority pretextually whenever efficient to do so. This is notwithstanding that unsworn personnel could readily carry out inventory searches pursuant to standardized rules without revealing the results to the investigating officers or prosecutors.

Similarly, nonsworn personnel might be charged with responding to community caretaking exigencies that do not appear to implicate any criminal law violation. Lower procedural protections are defensible where the state's purpose for violating an individual's privacy is to help her rather

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441 *See supra* Section II.B.3.
442 *See supra* Section II.B.2.
443 *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).
444 Bertine v. Colorado, 479 U.S. 367, 371−72 (1987).

than to target her for criminal investigation.[445] There are any number of quotidian exigencies that might compel a state agent to violate an individual's privacy or liberty interest: entering someone's home to prevent death or serious injury;[446] forcibly administering narcotics overdose medication or seizing narcotics that might cause an overdose;[447] or even removing agitated bees from an urban beekeeper's tenement hives.[448] These are circumstances where we might expect state agents to intervene—and there is a powerful liberal rationale for requiring lower procedural restraints upon such interventions in comparison to those designed to identify criminal wrongdoing.[449] It is this intuition that animates the community caretaking exception.[450] But the exception's integrity is undercut by permitting sworn officers to make arrests while searching pursuant to it.[451] The solution lies not in prohibiting community caretaking, but requiring that nonsworn personnel perform these ostensibly noncriminal searches and seizures. The same approach should be adopted for the DNA testing authorized in *King*. If the only permissible constitutional goal is arrestee identification,[452] the personnel charged with carrying out that goal should be segregated from the police officers responsible for investigating other crimes the arrestee may be responsible for.

This is to invoke what Eric Miller has termed "role-based conceptions of . . . [state] authority."[453] Miller develops the notion in a different context—exploring the consequences of so-called order-maintenance policing on the state's legitimacy in minority communities.[454] Miller argues that relying on sworn officers to police low-level public order disturbances in the hopes of preventing more serious crimes in minority communities—what Miller terms "escalation"—undermines the state's legitimacy in those

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[445] *See* Livingston, *supra* note 426, at 273−74.

[446] *See* Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

[447] *See* J. David Goodman, *In Expanded Program, Officers Across New York City Will Carry Antidote for Heroin Overdoses*, N.Y. TIMES, May 27, 2014, http://www.nytimes.com /2014/05/27/nyregion/in-expanded-program-officers-across-new-york-city-will-carry-antidote-for-heroin-overdoses.html?_r=0.

[448] *See* Frank Rosario & Kirsten Conley, *Beehive Relocated to New Home atop Waldorf Astoria Hotel*, N.Y. POST, May 27, 2014, http:// nypost.com/2014/05/27/beehive-relocated-to-new-home-atop-waldorf-astoria-hotel.

[449] *See* sources cited *supra* notes 318–320.

[450] *See* Stuart, 547 U.S. at 406.

[451] *See* Miller, *supra* note 430, at 622.

[452] *See* sources cited *supra* notes 202−209 and accompanying discussion.

[453] *See id.*; Miller, *supra* note 430, at 622.

[454] Miller, *supra* note 430, at 630.

communities. Accordingly, he advocates for assigning order-maintenance type enforcement to nonsworn personnel.[455]

A purposive division of labor could minimize goal confusion and pretext without creating role formalism that precludes appropriate responses to serious crimes. One might reasonably wonder what nonsworn, state agents would do if they confronted evidence of criminal wrongdoing in the course of performing their work. What is the building inspector to do when she encounters evidence of criminal misconduct in the course of conducting an inspection? There is no categorical answer here, but there should be some instances where prosecution is foreclosed in order to preserve the integrity of a purposive division of labor. For example, evidence of modest narcotics possession should not be the basis for prosecution when seized following an inventory search. Such a rule would prevent sworn officers from pretextually ordering vehicle impoundments where they have a hunch, but no probable cause that a narcotics violation has occurred.

There may be situations where prosecutors should be permitted to rely upon criminal evidence identified by a state agent in the course of a noncriminal search. For example, when the agent comes upon evidence of a particularly grave criminal offense, we should encourage her to inform the police. The housing inspector cannot be expected to ignore a dead body that she happens upon while carrying out a building inspection pursuant to an administrative warrant. While that is the sort of evidence that no one could or should ignore, perhaps evidence of drug use or sales is. The building inspector would view all such evidence through the lens of her official role as determined by her agency's programmatic purpose. To the extent that housing inspectors rely upon citizen complaints and cooperation to ensure code compliance, that might counsel in favor of "looking the other way" with some criminal wrongs, but not others. The choice need not be left to individual agents. In the first instance, a building inspector might report the existence of criminal evidence to an official within her own bureaucracy who, in turn, pursuant to some internal guidelines, would make a decision as to whether to alert the police or not.

Using purpose to parcel institutional responsibilities would not just reduce goal confusion and pretext. When necessary, courts would be able to more readily identify the purpose impelling both institutional and individual action. Rather than delving into the subjective workings of the latter's consciousness, courts could simply evaluate whether her investigative

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[455] *Id.* at 665–66.

conduct was consistent with her organization's programmatic purpose. Where the answer was "no," the search would be unconstitutional.

The reform proposed here is far-ranging and would require politically contentious and potentially expensive institutional reform. These constraints may make full realization of a purposive division of labor impractical. But the proposal here is not "all or nothing." Any effort to control police departments' mandate sprawl would be an improvement. This might entail assigning some noncriminal task to other social service agencies. It might also mean better segregating sworn from nonsworn task assignment within police departments.

### *2. A Purposive Typology of Criminal Enforcement*

This Article's core insight also applies within the ambit of criminal law enforcement. Even if limited to criminal law enforcement, police departments would still be responsible for pursuing a wide of range of enforcement goals. Eric Miller's work identifying the unique dangers of order-maintenance policing is, again, illustrative.[456] But the problem is broader. The tactics that departments use in pursuing different goals generate different threats to privacy, liberty, and democratic transparency. The use of specialized units highlights this fact. Most medium and large police departments rely upon specialization. Specialized units, such as those targeting narcotics crimes, may be significantly more arrest-intensive than patrol units.[457] Specialized units may also operate undercover, collecting intelligence in a manner more akin to spying than conventional patrol.[458] For example, specialized units that focus upon terrorism and organized crime are likely to rely upon strategies of infiltration and surveillance.[459] The N.Y.P.D.'s much-criticized efforts to identify "homegrown" Muslim terrorists are a case in point.[460]

It may be that enforcement agencies themselves are in the best position to create and monitor fine-grained conduct rules for different categories of agents.[461] Such internal rulemaking seems particularly important given the

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[456] *Id.* at 630–32.

[457] *See* Sekhon, *supra* note 52, at 1189.

[458] *Id.*

[459] *See* Michael Powell, *Police Monitoring and a Climate of Fear,* N.Y. TIMES (Feb. 12, 2012), http://www.nytimes.com/2012/02/28/nyregion/nypd-muslim-monitoring-and-a-climate-of-fear.html?_r=0 (describing N.Y.P.D.'s undercover surveillance of Muslims in New Jersey).

[460] *Id.*

[461] This echoes Wayne LaFave's suggestion that the Court should use the Fourth Amendment to encourage greater rulemaking amongst police departments. Wayne R.

Court's repeated insistence that it has only limited ability to control officer behavior in the field.[462] This dilemma is, in part, a function of the transactional framing that is pervasive in criminal procedure.[463] Courts generally view criminal procedure cases as discrete encounters between a given suspect or officer rather than as broad regulatory dilemmas. Were it otherwise, the Court might have been slower to dismiss the kind of challenge that was at the center of *Whren*. In that case, the D.C. police department had a policy limiting undercover officers' authority to conduct traffic stops.[464] The officers in that case appear to have violated the policy, which is another way of saying that they deviated from the programmatic purpose of undercover policing. The Court, of course, was unwilling to create a Fourth Amendment remedy for the deviation.[465] While constitutional criminal procedure need not be the primary mechanism for vindicating such deviations, courts should incentivize departments to see to it that their officers behave honestly and transparently with their units' programmatic purposes.

## CONCLUSION

State purpose does and should play a significant role in Fourth Amendment jurisprudence. This is both on account of the concept's salience as a precept of state legitimacy and the unique coerciveness of searches and seizures. The Court has failed, however, to develop a robust Fourth Amendment framework for analyzing state purpose because of structural impediments: transactional framing and enforcement agencies' sprawling mandates. Courts typically confront Fourth Amendment issues in individual criminal cases and are frequently trying to untangle official purposes that are entangled by design. These are not problems that can be simply resolved by altering a legal test or creating a new one. Rather, Fourth Amendment purpose should be the basis for a forward-looking precept of institutional design. It is not for courts alone to ensure that

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LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 504–08 (1990). Part of the difficulty is likely that municipal police departments do not present themselves as analogous to administrative agencies because of their (the police departments') sprawling mandates.

462 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12 (1967) (noting awareness "of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street").

463 *See supra* Section II.A.3(a).

464 Whren v. United States, 517 U.S. 806, 815 (1996).

465 *Id.*

officers' conduct properly aligns with the agency or unit's programmatic purpose. All branches should be responsible for ensuring that clearly and specifically defined notions of purpose are used to structure institutional and individual mandates well in advance of any search or seizure.