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## THE REASONABLE POLICEMAN: POLICE INTENT IN CRIMINAL PROCEDURE

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Mental state, or mens rea, is at the heart of criminal law. The act of killing another person can range from the crime of first degree murder to an acquittal on the ground of self defense, depending entirely on the mental state of the accused. This is true even if the facts did not support self defense, as long as the defendant reasonably believed that they did.<sup>1</sup>

Criminal procedure, by contrast, is largely unconcerned with the mental state of the accused. Even notions of the suspect's "expectations of privacy" introduced in *Katz v. United States*<sup>2</sup> as the keystone of Fourth Amendment rights were quickly turned into expectations that "society is prepared to recognize as `reasonable.'"<sup>3</sup> That is, whether certain police activity is a search or not does not depend primarily on whether the suspect has a subjective expectation of privacy but rather on what the expectations of a reasonable person would be, as defined by the Supreme Court.<sup>4</sup> Likewise, the voluntariness test

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<sup>1</sup> See MODEL PENAL CODE § 3.04 (Official Draft 1985).

<sup>2</sup> 389 U.S. 347 (1967).

<sup>3</sup> *Id.* at 361 (Harlan, J., concurring). See WAYNE R. LAFAVE ET AL, CRIMINAL PROCEDURE 129 (4th ed. 2004) (noting that the subjective approach was quickly abandoned).

<sup>4</sup> See, e.g., *California v. Greenwood*, 486 U.S. 35, 39-40 (1988) ("[A subjective] expectation of privacy does not give rise to Fourth Amendment protection, however, unless society is prepared to accept that expectation as objectively reasonable."). The Court does seem to agree, however, that such a subjective expectation is a necessary, albeit insufficient, condition for a police intrusion to be deemed a search. *Id.*

as to confessions has been rejected in favor a set of rules for the police to follow.<sup>5</sup>

This is, in general, a sensible approach. Rules for police behavior should not usually depend on the often unascertainable state of mind of the suspect—but what about the state of mind of the police? Similar to its attitude toward the state of mind of the suspect, the Supreme Court has often suggested that the state of mind of the police is also irrelevant. That is, the validity of police actions depends not on their subjective intent, but upon the objective existence of facts constituting probable cause, reasonable suspicion, or, in other situations, how a reasonable policeman would think or act.

In *Whren v. United States*,<sup>6</sup> a unanimous Supreme Court rejected a claim that it was improper for narcotics police to arrest someone for a traffic offense, for which they had probable cause, when their true motive was to investigate possible drug trafficking, for which they lacked probable cause. The Court held that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”<sup>7</sup> and boldly declared that

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<sup>5</sup> Ultimately, of course, the voluntariness of a confession is still the test of its admissibility; however, since *Miranda v. Arizona*, 384 U.S. 436 (1966), went into effect, the Supreme Court, somewhat astonishingly, has *never* struck down a station-house confession as involuntary. *But cf. Arizona v Fulminante*, 499 U.S. 279 (1991) (invalidating as involuntary a confession given under duress to an undercover agent in a prison setting); *Mincey v. Arizona*, 437 U.S. 385 (1978) (invalidating as involuntary a confession given to a detective in a hospital); *Beecher v. Alabama*, 389 U.S. 35 (1967) (invalidating as involuntary a confession given under duress prior to *Miranda*).

Similarly, voluntariness is the test of a valid consent to search, but again, the Court has never struck down a consent as involuntary. *But cf. Florida v. Royer*, 460 U.S. 491 (1983) (holding a consent invalid *per se* when obtained during an illegal detention). See Ric Simmons, *Not “Voluntary” but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005) (arguing that the voluntariness approach misses the point); Craig M. Bradley, *The Court’s Curious Consent Doctrine*, TRIAL MAGAZINE, Oct. 2002, at 72 (criticizing both prongs of consent doctrine).

<sup>6</sup> 517 U.S. 806 (1996).

<sup>7</sup> *Id.* at 813. The Court acknowledged, however, that there are at least two situations in which police intent may be relevant: administrative inspections and inventory searches, which need not be based on probable cause and “must not be . . .

“we [have] never held . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”<sup>8</sup>

*Whren*, in turn, was based on *Scott v. United States*,<sup>9</sup> where the Court rejected the contention that wiretap evidence must be excluded because the agents conducting the tap had made no effort to minimize interception of non-relevant calls. The Court held that the agents had minimized.<sup>10</sup> Beyond that, though, the Court, while conceding that, had a violation occurred, the “official motives may play some part in determining whether application of the exclusionary rule is appropriate,” the Court accepted the government's argument that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.”<sup>11</sup>

Recently, the objectivity holdings of *Scott* and *Whren* were reaffirmed by a unanimous Court in *Brigham City v. Stuart*.<sup>12</sup> However, less than a month later, in deciding whether certain witness statements were to be considered testimonial under the Sixth Amendment, the Court showed its confusion as to this issue by unanimously declaring that police purpose in obtaining the statements was of paramount importance.<sup>13</sup>

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reuse[s] for a general rummaging in order to discover incriminating evidence.” *Id.* at 811 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

<sup>8</sup> *Id.* at 812. What, never? Well, hardly ever. In *Jones v. United States*, 357 U.S. 493 (1958), a search was struck down because the police entered for the improper purpose of searching at night when the warrant specified a day search, even though they could have properly entered to arrest at night.

<sup>9</sup> 436 U.S. 128 (1978).

<sup>10</sup> *Id.* at 140-42.

<sup>11</sup> *Id.* at 136.

<sup>12</sup> 126 S. Ct. 1943 (2006). In *Stuart*, the Court held that it was irrelevant whether the police entered a house with the intent of defusing a fight or to arrest the occupants and find evidence since the police had an “objectively reasonable basis for believing” that prompt action was necessary to protect people against harm. *Id.* at 1945. Since they were justified in doing either, this was clearly correct. *Id.*

<sup>13</sup> *Davis v. Washington*, 126 S. Ct. 2266, 2273-74 (2006).

Statements are nontestimonial when made in the course of police interrogation

Also, in *United States v. Leon*,<sup>14</sup> the Court insisted that “sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”<sup>15</sup> In his classic article, *Perspectives on the Fourth Amendment*, Professor Anthony G. Amsterdam explained why:

[S]urely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.<sup>16</sup>

Professor Wayne LaFave agrees that disregarding police intent when police have probable cause, as the *Whren* Court did, is correct.<sup>17</sup> He insists, as to stops, frisks, arrests, and searches that the test “is *purely* objective and thus there is no requirement that an actual suspicion by the officer be shown.”<sup>18</sup>

But before this “objectivity train” has completely left the station,

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under circumstances objectively indicating that the *primary purpose of the interrogation* is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose of the interrogation* is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* (emphasis added). It is not clear that police purpose should matter here, so long as the questions appear aimed at defusing an emergency, which may have been what the Court meant.

<sup>14</sup>468 U.S. 897 (1984).

<sup>15</sup>*Id.* at 922 n.23 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

<sup>16</sup>Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974) (footnotes omitted).

<sup>17</sup>1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 134 (4th ed. 2004).

<sup>18</sup>*Id.* § 9.5(a), at 472.

I decline to be among those who are “all aboard.”<sup>19</sup> While police intent may be difficult to ascertain and easy to fabricate, there are numerous cases in which it is, or should be, the key to the outcome. First, police knowledge of the facts is a critical, and inherently subjective, component of probable cause. While “[s]ubjective intentions” may indeed “play no role in ordinary, probable-cause Fourth Amendment analysis” when the police are *right*, these intentions may be critical, in both civil suits and suppression hearings, when police have made a mistake.<sup>20</sup> Beyond this, even when police have objective probable cause or reasonable suspicion that criminal activity is occurring or has occurred, their subjective beliefs should bear on the validity of their actions in certain circumstances. Finally, there are a variety of other situations, including the execution of search warrants,<sup>21</sup> arrest warrants,<sup>22</sup> and the administrative and

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<sup>19</sup>Also not aboard is Professor John Burkoff who, in the 1980s, wrote several articles urging that police intent was important and not precluded by the Supreme Court's opinion in *United States v. Scott*. See *supra* notes 9-11 and accompanying text; see generally John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982) [hereinafter Burkoff, *Bad Faith Searches*]; John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—or Professor Haddad's “Hard Choices,”* 18 U. MICH. J.L. REFORM 695 (1985) (responding to James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639 (1985)); John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. MERCY L. REV. 363 (1989). While these articles have been to a large extent superseded by the Supreme Court's 1996 decision in *Whren*, and while I do not agree with some of Professor Burkoff's analysis, I still give him credit for introducing insightful analysis of this difficult issue into the academic debate.

<sup>20</sup>*Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>21</sup>See, e.g., *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997) (holding that whether or not a “no-knock” entry is permissible depends, not simply on the nature of the crime, but on a “reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime”). This appears to depend on the subjective impression of the police of the situation before them, as well as the reasonableness of those impressions, not merely what a hypothetical reasonable policeman might perceive the situation to be.

<sup>22</sup>See *Payton v. New York*, 445 U.S. 573, 603 (1980) (indicating that an arrest warrant can be executed in “a dwelling in which the suspect lives when there is reason to

inventory searches acknowledged in *Whren*,<sup>23</sup> where police intent would appear to be relevant to the issue of the propriety or impropriety of the police behavior in question.

This article, while not disputing the holding of *Whren*, will examine the various contexts in which the mental state of the police is still at issue, consider how the courts have dealt with this issue, including the critical question of whether the reasonableness of the police behavior is a matter of objective or subjective analysis, and attempt to develop a consistent approach to the question of the relevance of police mental state in criminal procedure.

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believe the suspect is within").

<sup>23</sup>See *supra* note 7 and accompanying text.

## I. PROBABLE CAUSE

Consider first the most important Fourth Amendment concept, and the one declared in *Whren* to be divorced from the “[s]ubjective intentions”<sup>24</sup> of the police: probable cause. Probable cause is the prerequisite for most searches<sup>25</sup> and all arrests. The Court expanded upon *Whren* somewhat in the 2004 case of *Devenpeck v. Alford*.<sup>26</sup> In that case, the suspect, Alford, was arrested because the police believed he was taping them during a traffic stop and that this violated the state's Privacy Act.<sup>27</sup> The criminal case was dismissed at trial and Alford sued for unlawful arrest.<sup>28</sup> The Ninth Circuit overturned a verdict for the police, reasoning that the tape recording was not a crime in Washington state and that, although there was probable cause to arrest Alford for impersonating an officer, the crime was not “closely related” to the crime for which he was arrested and therefore could not justify the arrest.<sup>29</sup>

A unanimous Supreme Court per Justice Scalia reversed and declared the arrest proper: “[s]ubjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.”<sup>30</sup> Just as bad motivation, or a policeman's belief that he

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<sup>24</sup>517 U.S. at 813.

<sup>25</sup>Exceptions include administrative and inventory searches, as well as frisks. There is a further group of police searches that are not considered by the Court to be searches under the Fourth Amendment at all. *See* *California v. Greenwood*, 486 U.S. 35, 40 (1988) (trash searches); *Oliver v. United States*, 466 U.S. 170, 176 (1984) (searches of “open fields”).

<sup>26</sup>543 U.S. 146 (2004).

<sup>27</sup>*Id.* at 149.

<sup>28</sup>*Id.* at 150.

<sup>29</sup>*Id.* at 152.

<sup>30</sup>*Id.* at 154-55. It is not clear why the Court held the way it did since the closely related test applied by the court of appeals seemed to require an objective consideration of

lacks probable cause will not invalidate an arrest or search that is in fact based on probable cause,<sup>31</sup> the Supreme Court has made it clear, in *Beck v. Ohio*<sup>32</sup> for example, that in the absence of factual probable cause, the good faith of the arresting officer will not make a bad arrest or search good.<sup>33</sup>

We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officers is not enough". . . . If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects," only in the discretion of the police.<sup>34</sup>

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the two laws in question rather than an inquiry into the officer's subjective intent.

<sup>31</sup>*Florida v. Royer*, 460 U.S. 491, 507 (1983) (plurality opinion) ("[T]he fact that the officers did not believe there was probable cause . . . would not foreclose the State from justifying Royer's custody by proving probable cause . . .").

<sup>32</sup>379 U.S. 89 (1964).

<sup>33</sup>This is subject to the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984). See discussion *infra* Part I.D.

<sup>34</sup>*Beck*, 379 U.S. at 97 (citing *Henry v. United States*, 361 U.S. 98, 102 (1959)).

*A. Facts Known to the Officer*

However, even the objective question of probable cause contains, as the *Devenpeck* Court made clear, at least one issue that may require a probing of the policeman's mind: "facts *known* to the arresting officer."<sup>35</sup> In fact, the wording of the *Devenpeck* quotation is significant because it resolves some potential issues, albeit in dictum, and perhaps ill-advisedly. Consider the following scenario: police in a city decide to crack down on marijuana grown by city residents. Accordingly, two policemen scan apartment windows with binoculars, looking for marijuana plants growing there. Policeman A sees what he believes to be a marijuana plant growing in an apartment window. Policeman B looks and believes it not to be marijuana but says nothing. Policeman A then gets a search warrant, and accompanied by Policemen C and D, he enters the apartment. When they enter, they first discover that the plant in question is not a marijuana plant, though it might be mistaken for one at a casual glance; however, they discover a sawed-off shotgun lying on the floor. Policeman A arrests the occupant for possession of the shotgun.<sup>36</sup>

Since it was not known to the arresting (and searching) officers (with the exception of Policeman B) that the plant was something other than marijuana, this search would be legal, and since the entry was legal, the shotgun in plain view would be seizable, according to the quoted language in *Devenpeck*. Even if we expanded the *Devenpeck* dictum to include "known to all of the police involved in the case," as the Court has said we should,<sup>37</sup> or

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<sup>35</sup>*Devenpeck*, 543 U.S. at 152 (emphasis added). Likewise, the Court in *Stuart* held that probable cause requires an "objectively reasonable basis for believing" that an emergency is at hand. *Stuart v. Brigham City*, 126 S. Ct. 1943, 1948 (2006).

<sup>36</sup>This may seem like an unlikely use of police time, but this actually occurred in my apartment building in Washington, D.C., when I was a prosecutor there, including the misidentification of the plant and the search warrant, but not the finding of the sawed-off shotgun.

<sup>37</sup>*See* *United States v. Leon*, 468 U.S. at 923 n.24 ("References to 'officer' throughout

even “known to anyone in the police department,”<sup>38</sup> it is not clear that Policeman B's doubts would qualify. Probable cause, after all, just requires a “substantial basis”<sup>39</sup> for a “fair probability”<sup>40</sup> that the plant in question was marijuana. Arguably, there was a fair probability that this was marijuana despite B's belief. Even if B voiced his belief, there is still a 50/50 chance that A is right and this, according to the Court, is enough to constitute probable cause.<sup>41</sup> However, it is hard to say that the evidence was “known” to police when at least some of the officers had serious doubts. As will be discussed in more detail later, there can be no knowledge without belief. Therefore, in this situation, it should be held that there was no probable cause.

What if, due to specialized training, the police involved *know* that this plant is not marijuana but also know that a reasonably well-trained officer could mistake it for that dreaded weed? They get a warrant anyway (because the apartment belongs to a person they suspect of other illicit activity, someone they want to harass, etc.). It is quite clear from *Devenpeck* that any evidence found must be suppressed, despite the objective existence of probable cause: the facts known to the officers did not support probable cause.<sup>42</sup> This result reinforces the conclusion in the previous paragraph since the only difference in the two cases is Policeman A's ignorance of the characteristics of the marijuana plant.

And what if the police did not know that the plant was something other than marijuana, but were reckless as to that fact? That is, using criminal law terminology, they “consciously

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this opinion should not be read too narrowly. It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination.”).

<sup>38</sup>See *United States v. Giglio*, 405 U.S. 150, 154 (1972) (holding that knowledge of a fact by one prosecutor in the office was attributable to all).

<sup>39</sup>*Illinois v. Gates*, 462 U.S. 213, 238 (1993).

<sup>40</sup>*Id.* (citing *Jones v. United States*, 362 U.S. 257, 271 (1960)).

<sup>41</sup>See *Maryland v. Pringle*, 540 U.S. 366 (2003) (holding that a one in three chance was enough to satisfy probable cause).

<sup>42</sup>See *supra* notes 26-30 and accompanying text.

disregarded a substantial and unjustifiable risk" that it was another kind of plant that they had heard about, but they had not familiarized themselves with the characteristics that distinguished it from marijuana? And what if they were negligent, mistaking it for marijuana when a reasonable policeman would not have? It is hard to say that it was "known" to the police that such a plant was marijuana when a reasonably well-trained officer would not have believed that it was. Only in the situation where the police had both a reasonable and a good faith belief that the plant was marijuana should the search be considered appropriate.<sup>43</sup>

The Court has supported this result in *Franks v. Delaware*,<sup>44</sup> at least as to knowing and reckless mistakes: "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment."<sup>45</sup>

However one comes out as to these factual scenarios; the subjective knowledge, recklessness (also a subjective concept), or negligence as to facts on the part of the police is certainly a legitimate subject for inquiry.

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<sup>43</sup>See *infra* Part I.D.

<sup>44</sup>438 U.S. 154 (1978).

<sup>45</sup>*Id.* at 165. However, as Professor Alschuler has pointed out, the *Franks* standard is almost impossible for a defendant to meet. Albert W. Alschuler, "Close Enough for Government Work?: The Exclusionary Rule After Leon, 1984 SUP. CT. REV. 309, 318 (1984). Professor Alschuler explained that in order to secure a hearing on the truthfulness of an affidavit, the defendant must first make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Id.* (quoting *Franks*, 438 U.S. at 155-56). But the defendant cannot make this showing without the hearing. *Id.* at 319. Therefore, "*Franks's* requirement of a substantial preliminary showing becomes an insurmountable 'Catch-22': A defense attorney cannot develop the facts until he secures a hearing, and he cannot secure a hearing until he develops the facts." *Id.* at 319.

*B. Probable Cause in Issue*

Beyond the highly subjective question of what facts were known to the officers lies another common situation, unlike *Whren* where probable cause was conceded and *Beck* where its lack was conceded. That is where the existence of probable cause is at issue. As the passage from *Franks* quoted above suggests, where the existence of probable cause is in doubt, it is certainly appropriate to probe the police mental state, be it knowledge that the information is false, or recklessness or negligence as to its truthfulness, in determining the existence of that probable cause.

The Supreme Court has acknowledged that this is a permissible inquiry in cases where the credibility of the police in asserting probable cause is in issue. In *Scott v. United States*,<sup>46</sup> the Court observed that

[w]e . . . have little doubt that as a practical matter the judge's assessment of the motive of the officers may occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not available to them at the time of the incident in question.<sup>47</sup>

Thus, in the above marijuana search example, suppose that instead of a random examination of the windows of the apartment building, police actually were looking for some excuse to search a particular individual's apartment. They spot the same plant, have the same reactions, and discover the same non-marijuana plant upon entry. It is easier to accept the *Whren* reasoning when the police, as in *Whren*, were unquestionably right about probable cause.<sup>48</sup> But if the existence of probable

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<sup>46</sup>436 U.S. 128 (1978).

<sup>47</sup>*Id.* at 139 n.13.

<sup>48</sup>*See supra* notes 6-8 and accompanying text. *But see* Burkoff, *Bad Faith Searches*, *supra* note 19, at 100-01 (stating that he would strike down a search when the police have a bad motive, even if they had objective probable cause, if they would have performed an illegal search regardless of having probable cause). I agree with *Whren* and Professor LaFave that such a search should be legal. *See supra* notes 17-18.

cause is in issue, it is surely correct to require the trial court to consider their motive in assessing whether or not there was probable cause.

### C. When Police Make Mistakes

The previous two subsections have dealt with the state of mind of the police in assessing whether there was factual probable cause and whether the police knew it. But, as *Scott* acknowledged, police intent is also relevant when “it has been determined that the Constitution was in fact violated.”<sup>49</sup> While this statement was to become true in *United States v. Leon*,<sup>50</sup> six years after *Scott* was decided, more often the Court has used police (good) intent to declare that, what would otherwise appear to be a constitutional violation by the police, was not.

In *Maryland v. Garrison*,<sup>51</sup> police obtained a search warrant to search the person of one McWebb and “the premises known as 2036 Park Avenue third floor apartment.”<sup>52</sup> When the police got the warrant and conducted the search, “they reasonably believed that there was only one apartment on the premises described in the warrant.”<sup>53</sup>

As it turned out, there were two third floor apartments and the police wandered into Garrison's and spotted contraband in plain view before they realized their mistake.<sup>54</sup> The Court declared

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<sup>49</sup>436 U.S. at 139 n.13. The *Scott* Court cited *United States v. Janis*, where evidence unconstitutionally seized by state police was held admissible in an IRS forfeiture proceeding, because such use was “outside the offending officer's zone of primary interest.” 428 U.S. 433, 458 (1976). It also cited *United States v. Ceccolini*, 435 U.S. 268 (1978), where an illegal search turned up a live witness, and the Court refused to exclude such witness's testimony. Neither of these cases seems to have much to do with police intent, suggesting the elusiveness of this topic. A reference to civil suits against police would have been more to the point.

<sup>50</sup>468 U.S. 897 (1984).

<sup>51</sup>480 U.S. 79 (1987).

<sup>52</sup>*Id.* at 80 (citation omitted).

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* At least that is what the majority concluded; however, not all of the justices

that "if the officers *had known, or even if they should have known*, that there were two separate dwellings on the third floor," they should have obtained a more limited warrant.<sup>55</sup> Thus, a negligence standard was applied where the warrant was inadequate due to a good faith mistake by police. Although the Court described the police conduct as "objectively understandable and reasonable,"<sup>56</sup> the decision clearly hinges on "the mistaken belief that there was only one apartment on the third floor."<sup>57</sup> The Court's objective analysis does not even come into play until it recognizes a good faith, subjective, belief on the part of the police in the validity of their acts.

Under these circumstances, the Court held both that the warrant was not defective for lack of specificity and that the execution of the warrant was acceptable: "[T]he Court has . . . recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants."<sup>58</sup>

Likewise, in *Hill v. California*,<sup>59</sup> the police, with probable cause to arrest Hill, arrested Miller whom they found in Hill's apartment, believing him to be Hill.<sup>60</sup> They seized evidence that incriminated Hill during a search of the apartment incident to the arrest.<sup>61</sup> The Court, per Justice White, one of the principal proponents of the objective approach, found that the police had a reasonable good faith belief that the party arrested was Hill, and it adopted the holding of the California courts that "[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest."<sup>62</sup> The Court went on

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agreed. *Id.* at 90 (Blackmun, J., dissenting) ("[The] mistake . . . was not reasonable under the circumstances.").

<sup>55</sup>*Id.* at 85 (majority opinion) (emphasis added).

<sup>56</sup>*Id.* at 88.

<sup>57</sup>*Id.* at 85.

<sup>58</sup>*Id.* at 87.

<sup>59</sup>401 U.S. 797 (1971).

<sup>60</sup>*Id.* at 799.

<sup>61</sup>*Id.* at 799-800.

<sup>62</sup>*Id.* at 802 (alteration in original) (citation omitted). Clearly, the same result would

to note that “subjective good-faith belief”<sup>63</sup> alone would not justify the police conduct, but “on the record before us, the officers' mistake was understandable and the arrest a reasonable response to the situation.”<sup>64</sup> Thus the outcome in *Hill* clearly depends on the fact that the officers acted in subjective good faith as well as reasonably (*i.e.*, non-negligently)—a combined subjective/objective test. It surely would not have been enough for the officers to have pointed to all of the reasons why a reasonable officer might have believed that Miller was Hill had they themselves not believed it.

Thus, if police in fact have probable cause, but make a reasonable (objective), good faith (subjective) mistake in either writing or executing the warrant (*Garrison*)<sup>65</sup> or in arresting the wrong person (*Hill*), I agree with the Court that the arrest or search should be valid. But this result hinges on an analysis of the officers' state of mind.

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have been obtained had they found evidence incriminating Miller.

<sup>63</sup>*Id* at 804.

<sup>64</sup>*Id.*

<sup>65</sup>*But see* Groh v. Ramirez, 540 U.S. 551 (2004) (holding that an obvious misstatement in a warrant as to the objects to be seized was not “reasonable”).

*D. The Good Faith Exception*

Similar to *Garrison* and *Hill*, the subjective good faith of the police is also in play when they rely on a defective warrant, despite the Court's seeming stand to the contrary. In *United States v. Leon*,<sup>66</sup> the Court held that, where police have seized evidence pursuant to a search warrant, later found defective because it lacked probable cause, the evidence may nevertheless be admitted if the police had a "reasonable good-faith belief" in the validity of the warrant.<sup>67</sup> (This differs from the *Garrison/Hill* situation in which the Court found that the police actually had probable cause which, by definition, is sometimes wrong, and did not act unconstitutionally.) The *Leon* reasoning was that, since the exclusionary rule was designed to deter police mistakes and misbehavior, and since the mistake here was that of the magistrate who issued the warrant, not (just) the police, exclusion would not serve its deterrent purpose, as long as the police acted in reasonable good faith reliance on the warrant.<sup>68</sup>

*Leon*, under the same reasoning, was subsequently extended to mistakes by legislatures in drafting unconstitutional statutes on which police rely in good faith<sup>69</sup> and to mistakes by court personnel who enter incorrect information into a computer on

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<sup>66</sup>468 U.S. 897 (1984).

<sup>67</sup>*Id.* at 909 (citation omitted).

<sup>68</sup>*Id.* at 919-20. Of course, the reasoning of *Leon* could also apply to searches and arrests without warrants. If the police act in the good faith belief that they have probable cause, or exigent circumstances, then what deterrent purpose can be served by excluding evidence? In criminal law, there is an ongoing debate about whether any acceptable purpose is achieved by punishing *negligent* behavior. Since a reasonable good faith belief by police is not even negligent, how can that be deterred by exclusion? Why should "the criminal go free because the constable blundered" at least when it is a reasonable good faith blunder? But presently, the Court has not been willing to go this far. See Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983) (arguing, in anticipation of *Leon*, that this is why the deterrence rationale is an inadequate and unjustifiable basis for the exclusionary rule).

<sup>69</sup>*Illinois v. Krull*, 480 U.S. 340 (1987).

which police rely in making an arrest.<sup>70</sup>

So the Court is willing to accept police assertions of good faith as to probable cause when there is objective evidence of a mistake by an independent<sup>71</sup> government actor. But what exactly is the state of mind of the police required by *Leon*? The term, “reasonable good-faith belief,” seems to be both objective and subjective, as it was used in *Hill* and *Garrison*. That is, the policeman must subjectively believe in the validity of the warrant, and that belief must be objectively reasonable. But the Court strove mightily to explain that *Leon*, despite its repeated use of the apparently subjective term “good-faith,” “eschew[s] inquiries into the subjective beliefs of law enforcement officers who seize evidence . . . [O]ur good faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.”<sup>72</sup>

It is clear, however, that this reasoning was largely to deflect criticism, written in advance of the *Leon* holding, that a good faith belief *alone* should not be sufficient to waive exclusionary sanctions.<sup>73</sup> That is, the Court was making it clear that it was not abandoning the *Beck* standard. The Court explicitly accepted that knowing or reckless misstatements as to the facts constituting probable cause in the affidavit could still be the basis for exclusion.<sup>74</sup>

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<sup>70</sup>Arizona v. Evans, 514 U.S. 1 (1995).

<sup>71</sup>Note Justice O'Connor's concurring opinion in *Evans*, joined by two others, that had this mistake been in the *police's* computers rather than the court's, she would have come out the other way. *Id.* at 17 (O'Connor, J., concurring).

<sup>72</sup>*Leon*, 468 U.S. at 922 n.23 (citations omitted). As subsequent discussions of civil suits will make clear, the Court is apparently also willing to consider claims that the police knew that the warrant was not based on probable cause, leaving several subjective issues open. See discussion *infra* Part I.E.

<sup>73</sup>In *Leon*, the Court quoted at length from Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412-13 (1977). *Id.* at 919 n.20. However, Israel clearly was arguing for an approach that was *both* objective and subjective.

<sup>74</sup>*Id.* at 923 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Since a negligent

Taking the Court at its (somewhat confusing) word, in terms of inquiry into the police's state of mind, *Leon*'s rule about warrants is not substantially different from non-warrant cases. In neither case is the subjective belief of the police that they either met, or failed to meet, the *legal* standard of probable cause relevant.<sup>75</sup> The test in warrant cases is whether a reasonable officer would have believed in the warrant's validity. In non-warrant cases, the test is whether there was in fact probable cause.

In both cases, however, subjective awareness by police that the *facts* on which they are relying are, or may be, false, *is* relevant. If the police know that these facts are wrong, or are reckless or negligent as to their accuracy, then the evidence must be suppressed, as *Garrison* makes clear, regardless of the existence of a warrant. The magistrate, after all, is usually in no position to verify the facts stated in the affidavit. He simply decides whether the facts, as written, add up to probable cause.<sup>76</sup>

What about the execution of warrants? As appears in *Garrison*<sup>77</sup> and *Leon*,<sup>78</sup> when police exceed the scope of a warrant, their mental state should also be critical. That is, if the police negligently, recklessly, or knowingly exceed the scope of the

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mistake by the police would also be unreasonable by definition, this should also be an evidence-excluding error. *Id.*

<sup>75</sup>*But see* discussion of civil suits *infra* Part I.E (making it clear that if an officer "knew" that a warrant was legally defective, despite its appearance of validity, the evidence should also be suppressed and immunity from civil suit lost).

<sup>76</sup>*See* Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 302 (1985) (explaining this problem in greater detail).

<sup>77</sup>*Garrison* applies its negligence standard to both the obtainment and execution of the warrant. *Compare* *Maryland v. Garrison* 480 U.S. 79, 85 (1987) ("The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate."), *with Id.* at 86 ("If the officers had known, or should have known, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment.").

<sup>78</sup>*Leon*, 468 U.S. at 919 n.19 ("Our discussion . . . assumes, of course, that the officers properly executed the warrant and searched only . . . for those objects that it was *reasonable to believe* were covered by the warrant.") (emphasis added).

warrant, then anything they find should be excluded. On the other hand, if the police exceed the scope of a warrant reasonably and in good faith, then the evidence should not be suppressed, as *Garrison* holds. But what if, though a reasonable policeman might have believed that a warrant to search the house for guns would have included looking in drawers, this policeman knows that the guns in question are shotguns that could not be in the drawers searched. This goes back to the original *Devenpeck* reference to the knowledge of the arresting or searching officer. As long as *he* knows that he is exceeding the scope of the warrant, it does not matter what a reasonable officer might think.

#### *E. Civil Suits*

The law concerning civil suits against police and other public officials casts further light on the meaning of good faith. The Court has made it clear that the “objective” approach of *Leon* applies to civil suits as well as to the application of the exclusionary rule to defective search warrants,<sup>79</sup> so everything the Court has said about civil suits applies equally to criminal cases involving warrants.

In *Harlow v. Fitzgerald*,<sup>80</sup> the Court held that the prior mixed “objective and subjective” standard of good faith would be changed to a “purely objective” approach.<sup>81</sup> Thus government officials would be “shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>82</sup> But it is clear that the Court is talking about an objective approach that eliminates a malice basis for the

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<sup>79</sup>Malley v. Briggs, 475 U.S. 335 (1986). This conclusion was recently reaffirmed by the Court in *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004).

<sup>80</sup>457 U.S. 800 (1982).

<sup>81</sup>*Id.* at 815, 819.

<sup>82</sup>*Id.* at 818.

civil suit.<sup>83</sup> Still open for consideration was whether the officer knew or should have known that his conduct violated the law:

If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be expected to “know” that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.<sup>84</sup>

As Justice Brennan elaborated in a concurring opinion:

I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant “knew or should have known” of the constitutionally violative effect of his actions. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions even if he could not “reasonably have been expected” to know what he actually did know.<sup>85</sup>

Thus, in civil suits based on constitutional violations by the police, which use the same standards as those used for admissibility of evidence in *Leon*-type situations, the subjective knowledge and intent of the police is critical.

#### *F. Police Beliefs*

Even if the police have not made a mistake, and when they have objective probable cause or reasonable suspicion, is it necessary that they believe in the truth of that evidence? In my view, the answer is yes.

Of course this scenario will not arise very often. If police do not believe that someone is a criminal, they ordinarily will not arrest or stop him, despite the existence of objective probable cause or

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<sup>83</sup>*Id.* at 816. Trial judges had often regarded this as a question of fact for the jury, requiring a trial. *Id.*

<sup>84</sup>*Id.* at 818-19.

<sup>85</sup>*Id.* at 821 (Brennan, J., concurring) (citations omitted).

suspicion. But it can arise.<sup>86</sup> Suppose the police see a man who meets the description of the perpetrator of a series of robberies that had recently occurred in the same vicinity: “A white male, about 40 years old, about 5’10,” wearing a blue knit cap and a long black trench coat.” This would be probable cause to arrest.<sup>87</sup> However, one of the policemen recognizes the man as the principal drug wholesaler for the neighborhood (but the officers have no reason to believe he is currently carrying drugs). There is no way he would be out committing robberies, though the police do not actually know for a fact that he is not the robber. Is an arrest proper? I think not.

It is not an empty exercise to require that police believe their objective evidence. Of course, if they had arrested this man, and found a stash of narcotics in his coat pocket, they would, no doubt, swear to their belief that he was a robber. But the police might well have said something during the arrest to indicate that they knew who the man was, or their knowledge might otherwise be established, and thus be forced to admit their underlying belief that he was not a robber. The courts may be tempted to extend *Whren* to this case, but it is not the same. Here the police had additional information about the suspect that brought the existence of probable cause into question. In effect, the police no longer “knew” that they had probable cause: the relevant question according to *Devenpeck*.

The notion that probable cause requires not only the existence of objective facts, but also that the police believe those facts, is as ancient as the concept of probable cause itself. (Justice Scalia take note). Probable cause was also called “probable cause of suspicion.”<sup>88</sup> As Lord Hale stated, “They [warrants] are not to be

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<sup>86</sup>*See, e.g.,* *Ochana v. Flores*, 199 F. Supp. 2d 817, 825 (N.D. Ill. 2002), *aff’d* 347 F.3d 266 (7th Cir. 2003) (holding that an “officer’s subjective belief of probable cause” is important “in evaluating the [validity] of an arrest”); *see also* *United States v. McCarty*, 862 F.2d 143 (7th Cir. 1988).

<sup>87</sup>Even readers in doubt would have to agree that probable cause exists if a red muffler and horn-rimmed glasses were added to the equation.

<sup>88</sup>Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 703 (1999). “[The] common law required that arrests or search warrants had to be

granted without oath made before the ju[s]tice of a felony committed, and that the party complaining ha[s] probable cau[s]e to [s]u[s]pect they are in [s]uch a [h]ouse or place, and do [s]h[o]w his rea[s]ons of [s]uch [s]u[s]picion."<sup>89</sup> That is, the complainant himself had to hold the suspicion, as well as present objective reasons to support it.

Landynski observed that "the standards of probable cause required by Hale applied equally to arrest and to search warrants."<sup>90</sup> He went on to note that Hale's views were adopted in the 1765 case of *Entick v. Carrington*,<sup>91</sup> which "exercised great influence on the subsequent course of search law in the United States as well as in England."<sup>92</sup>

Thus it appears that the term probable cause in the Fourth Amendment was intended to augment actual subjective suspicion on the part of the police, not to supplant it. The arguments presented above would apply equally when the police, with objective probable cause, had doubts that the offense was actually committed or that the property was in the place to be searched.

It might be thought that it is obvious that when the Supreme

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based on an allegation of an offense or theft 'in fact' as well as 'probable cause of suspicion' as to a particular person to be arrested or place to be searched." *Id.* Davies continues: "Thus, because Lasson's treatment of search warrants understated Hale's insistence on an allegation of felony-in-fact, it allowed readers to erroneously believe that common law permitted a search warrant to be issued on 'probable cause' alone." *Id.* at 704 n.447. An allegation of "felony-in-fact" would seem to require that the constable *believed* that there had been a felony and that the suspect had committed it, not merely that a reasonable person could believe that based on the evidence. *See Id.*

<sup>89</sup>2 SIR MATTHEW HALE, A HISTORY OF PLEAS OF THE CROWN 150 (new ed. 1800).

<sup>90</sup>JACOB LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 27 (1966).

<sup>91</sup>19 Howell's State Trials 1029 (C.P. 1765).

<sup>92</sup>LANDYNSKI, *supra* note 90, at 29. Early Supreme Court pronouncements on the issue are equivocal, suggesting that the Court had not really focused on this particular question. *See Stacy v. Emery* 97 U.S. 642, 645 (1878) (quoting various sources including Justice Bushrod Washington in *Munns v. DeNemours*, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9926)) (defining probable cause as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offense with which he is charged").

Court is talking about an objective test, everybody understands that the Court did not mean to exclude police disbelief in the guilt of the suspect. But this is not the case.

As discussed below, there is a conflict in the circuits on the issue of whether the police must really be suspicious in order to have reasonable suspicion for a stop or frisk. Likewise, there is similar confusion about probable cause. Consider the following passage from LaFave:

On one occasion at least the Supreme Court has stated the rule as being "that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony," which seems to call for a subjective belief. Similar dictum on this particular point is also to be found in some lower court decisions, such as that "actual facts creating an actual belief can alone give rise to probable cause." *But this is not the correct view.*<sup>93</sup>

While I am loathe to disagree with the nation's leading authority on the Fourth Amendment, both the history of the term probable cause, *Carroll*, *Beck*, and other Supreme Court cases suggest that a requirement of an actual belief is the correct view, and that LaFave has it wrong. LaFave discusses the case of *United States ex rel. Senk v. Brierley*<sup>94</sup> to bolster his view. *Brierley* held that:

[T]he mere subjective conclusion of a police officer concerning the existence of probable cause is not binding on this court which must independently scrutinize the objective facts to determine the existence of probable cause. Moreover, since the courts have never hesitated to overrule an officer's determination of probable cause when none exists, consistency suggests that a court may also find probable cause in spite of an officer's judgment that none exists.<sup>95</sup>

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<sup>93</sup>LAFAVE, *supra* note 17, § 3.2(b), at 36-37 (emphasis added) (quoting *Carroll v. United States*, 267 U.S. 132, 156-57 (1925); *People v. Langston*, 226 N.W.2d 686, 672 (1975)). In fact, as noted, *Beck* held the same thing, and *Beck* was quoted with approval in both *Terry* and *Leon*.

<sup>94</sup>381 F. Supp. 447 (M.D. Pa. 1974); *aff'd mem.* 511 F.2d 1396 (3d Cir. 1975).

<sup>95</sup>*Id.* at 463 (citation omitted).

This is very close to the reasoning of *Whren* and *Devenpeck* and, with LaFave's learned support, very likely how the Supreme Court would decide this issue. I disagree for the following reasons.

The consistency discussed by the *Brierely* court, and adopted by LaFave, is false. It is true, as *Leon* reiterated, that a policewoman's belief in *legal* probable cause is irrelevant (which is probably what *Brierely* is saying), whether or not factual probable cause exists. But this does not rule out a requirement that she must believe the *facts* that appear to constitute probable cause.

In most cases, these two concepts will be inseparable. A policewoman usually will believe that she has both factual and legal probable cause before she arrests or searches. But one can easily envision a situation where the two are separable. Suppose a policewoman receives information from an informant who has given her reliable information on one prior occasion. The policewoman believes the informant, but is under the impression that without two prior instances of reliable information, the information does not constitute probable cause. The trial court concludes, correctly in my view, that since she knows the identity of the informant and would know where to find him again if necessary, this was enough to constitute probable cause under *Illinois v. Gates*.<sup>96</sup> Under these circumstances, where the policewoman *believes* the information, plus there was enough to constitute factual probable cause, the evidence should be admitted. Her legal conclusions about probable cause are irrelevant.

By contrast, if the informant had given reliable information on two prior occasions (clearly enough for probable cause, even under the tougher regime of *Spinelli v. United States*,<sup>97</sup> prior to *Gates*) but the policewoman did not believe him in this case, an arrest or search based on this information should be disallowed. As Professor Amsterdam observed in the passage quoted earlier

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<sup>96</sup>462 U.S. 213 (1983).

<sup>97</sup>393 U.S. 410 (1969).

in this article, it will be difficult to get police to admit such doubts when they have in fact arrested a suspect or searched his premises.<sup>98</sup> But when the situation arises, as for example, where the policewoman who dealt with the informant admits that, despite her doubts as to the informant's story, her superior ordered her to seek a warrant, evidentiary suppression is the correct outcome.

Suppose further that an epistemologist was lurking in the police station and questioned the policewoman about the basis for her disbelief. If she said, "it was because he looked at me funny" or "from what I knew of the suspect, what he said could not be true," or any other reason, or even no particular reason,<sup>99</sup> the epistemologist would declare that "she did not know that the facts constituted probable cause," as *Devenpeck* requires. It is a fundamental principle of epistemology that "*Knowledge requires belief.*"<sup>100</sup>

In fact, I suspect that many of the courts that have insisted on an objective approach to probable cause might not disagree with the outcomes reached above. Instead, as the decisions cited by LaFave tend to illustrate, the courts, in declaring police subjective intent irrelevant, seem to be thinking of the first hypothetical—where the policeman has doubts about legal probable cause—and not the second, where he doubts the facts constituting probable cause.<sup>101</sup> But LaFave is quite adamant that the "test [for stops], as is the case with the legal standard for arrest, is *purely* objective and thus there is no requirement that

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<sup>98</sup>See *supra* note 16.

<sup>99</sup>In the situation where there is no basis for her disbelief, my colleague Joe Hoffmann argues that, even though this policewoman lacked probable cause, the warrant or arrest should be valid because any reasonable policeman would have believed in this evidence. But he agrees with me that if there is *any* credible basis for the policewoman's disbelief, she cannot be said to "know" that probable cause exists. (These opinions were asserted in conversation with the author).

<sup>100</sup>Matthias Steup, *Epistemology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/spr2006/entries/epistemology/#JTB> (last visited October 7, 2006) (emphasis added).

<sup>101</sup>*E.g.*, *United States v. Thomson*, 354 F.3d 1197, 1202 (10th Cir. 2003).

an actual suspicion by the officer be shown” and he cites many cases that support his view.<sup>102</sup>

Another situation where the courts have rightly disregarded police intent, and which gave rise to Justice White's statement in the *Painten* case,<sup>103</sup> which he then quoted with approval in his majority opinion in *Leon*, is “unexecuted intent to act unlawfully.”<sup>104</sup> In *Painten*, police went to an apartment with the intention to arrest and search the occupant whom they suspected of a crime, even though they lacked probable cause.<sup>105</sup> The police did not communicate this plan to the defendant, who was led to believe that they only wished to speak to him.<sup>106</sup> He asked them to wait a minute, closed the door, and tossed a paper bag onto the fire escape.<sup>107</sup> He then admitted the officers who in fact only asked him questions.<sup>108</sup> Meanwhile, another officer seized the bag from the fire escape, finding evidence.<sup>109</sup>

The court of appeals suppressed the evidence on the ground that what transpired after the knock was irrelevant because at the time of the knock the officers' purpose was to arrest the petitioner. Justice White, correctly in both my view and Professor LaFave's view, argued that such an unexecuted intent was irrelevant as long as what the police actually did was objectively justifiable. The Court majority subsequently adopted this view in *United States v. Hensley*.<sup>110</sup> But while this case has given rise to some of the Supreme Court's emphasis on objectivity, it is distinct from the situations discussed in this article where police intent is relevant. In *Painten*, the police only arrested and searched after they had obtained legitimate probable cause, and

<sup>102</sup> LAFAVE, *supra* note 17, § 9.5(a), at 472 (footnote omitted).

<sup>103</sup> See *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting).

<sup>104</sup> LAFAVE, *supra* note 17, § 1.4(b), at 116.

<sup>105</sup> *Painten*, 389 U.S. at 563-64 (White, J., dissenting). These are the facts according to Justice White's opinion dissenting from the Court's dismissal of the case.

<sup>106</sup> *Id.* at 563.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> 469 U.S. 221 (1985).

they believed in those facts.

In sum, when it comes to probable cause, the following mental states by the police continue to be at issue, notwithstanding the Court's repeated declarations of objective tests over the last twenty plus years:

1. Whether the police knew, or should have known,<sup>111</sup> that the facts they claim amounted to probable cause, whether in a warrant or not, were incorrect.

2. Whether the police knew, or should have known, that a warrant issued by a magistrate was legally insufficient, as to probable cause or particularity, if in fact it was insufficient.<sup>112</sup>

3. Whether police knew, or should have known, that they were exceeding the scope of a warrant.

4. Whether the police subjectively believe that a person to be arrested is in fact a criminal, notwithstanding the existence of objective probable cause.

5. Whether the police subjectively believe that a place to be searched contains criminal evidence, notwithstanding the existence of objective probable cause.

The first three of these assertions are directly supported by Supreme Court holdings, discussed above. The latter two are not directly supported by Supreme Court holdings, but are implicit in *Devenpeck's* statement that probable cause must be supported by "facts known to the officer." It cannot, or at least should not, be said that facts are "known" to the officer if he does not believe those "facts."

Finally, it should be reiterated that where there really never was factual probable cause, even though the police reasonably and in good faith believed there was, a search or arrest is invalid and the evidence must be excluded, except in warrant cases. *Beck* held this and *Leon* made it clear that it was only announcing an

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<sup>111</sup> The should have known standard is negligence, which necessarily includes recklessness.

<sup>112</sup> *Groh v. Ramirez*, 540 U.S. 551, 553-55 (2004) (involving a civil suit based on a negligent mistake as to the particularity of the items to be seized).

exception to the *Beck* principle in warrant cases.<sup>113</sup> Likewise, when there really is factual probable cause, it does not matter if the police thought that the evidence was insufficient to qualify as legal probable cause, as long as they believe the facts that constitute probable cause. This is the correct, and limited, understanding of the objectivity principle.

## II. REASONABLE SUSPICION

Stops and frisks pose somewhat different issues. First, they are not based on a quantum of evidence, but upon reasonable suspicion, an apparently mixed criterion requiring a subjective belief that is objectively reasonable. As one court put it, “[a]n officer cannot have a *reasonable* suspicion that a person is armed and dangerous when he in fact has *no* such suspicion.”<sup>114</sup> Second, they are a lesser intrusion than probable cause based searches and arrests, requiring less justification, and involving different concerns, so police intent considerations might be different.

*Terry v. Ohio*,<sup>115</sup> the source of the stop and frisk doctrine in the Supreme Court, is not completely clear on this issue. First, the term reasonable suspicion does not appear in the *Terry* opinion, but only disparagingly in Justice Douglas' dissent.<sup>116</sup> Likewise, it appears only with reference to the use of that term in the New York statute in the *Terry* companion case of *Sibron v. New York*.<sup>117</sup> Thus, while that term has become accepted by the Court as the holding of *Terry*,<sup>118</sup> one cannot place much weight on the literal language.

*Terry* itself explains the nature of the suspicion that must be entertained by the police several times: “[W]here [the officer] has

<sup>113</sup> United States v. Leon, 468 U.S. 897, 915 n.13 (1984) (“We adhere to this view [from *Beck* that good faith belief is required but ‘not enough’.]”) (citation omitted).

<sup>114</sup> United States v. Lott, 870 F.2d 778, 7884 (1st Cir. 1989).

<sup>115</sup> 392 U.S. 1 (1968).

<sup>116</sup> *Id.* at 37 (Douglas, J., dissenting).

<sup>117</sup> 392 U.S. 40 (1968).

<sup>118</sup> For the most recent example, see *Illinois v. Caballes*, 543 U.S. 405, 415 (2005).

reason to believe that he is dealing with an armed and dangerous individual . . . the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."<sup>119</sup> These statements and others, as Professor LaFave concedes, suggest that "a protective search is permissible only when the officer *reasonably believes* that the suspect *is* armed and dangerous."<sup>120</sup> (That is the mixed subjective and objective test).

But then the Court "holds . . . that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity *may* be afoot and the persons he is dealing with *may* be armed and dangerous, [he may stop and frisk them]."<sup>121</sup> Professor LaFave concludes that this passage establishes an objective standard which does not require that the officer actually believe that criminal activity is afoot or that the suspect is armed and dangerous.<sup>122</sup> It seems to me, however, that a suspicion that a person *is* armed and dangerous means the same thing as a suspicion that he *may* be. Suspicions, by definition, are not conclusive. In my view, *Terry* and *Sibron* do require a subjective belief on the part of the police that criminal activity is (or may be) afoot and that the suspect is (or may be) armed and dangerous, as well as an objectively reasonable belief in the same. *Terry* really is fairly clear on this point: "simple `good faith on the part of the arresting officer is not enough."<sup>123</sup> That is, a good faith belief is a necessary, but not a sufficient, condition for a valid stop or frisk.

The circuits are split on this issue<sup>124</sup> and Justice Souter,

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<sup>119</sup> *Terry*, 392 U.S. at 27.

<sup>120</sup> LAFAVE, *supra* note 17, § 9.6(a), at 621.

<sup>121</sup> *Terry*, 392 U.S. at 30.

<sup>122</sup> LAFAVE, *supra* note 17, § 9.6(a), at 621.

<sup>123</sup> *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

<sup>124</sup> Compare *United States v. Lott*, 870 F.2d 778, 783-84 (1st Cir. 1989), and *United States v. Prim*, 698 F.2d 972 (9th Cir. 1983) (actual suspicion required), with *United States v. Holmes*, 385 F.3d 786 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 1175 (2005), *United States v. Rowland*, 341 F.3d 774 (8th Cir. 2003), *cert. denied*, 540 U.S. 1093 (2003), and *United States v. Brown*, 188 F.3d 860 (7th Cir. 1999) (subjective

concurring in the unrelated case of *United States v. Knights*,<sup>125</sup> noted that he would reserve it. No doubt, some members of the Court would like to abandon the subjective suspicion component, whatever *Terry* may have intended and LaFave opines that this purely objective approach is the correct position.<sup>126</sup>

Rather than dealing with the often contradictory facts in the court of appeals cases, consider a hypothetical. Suppose the police see an individual whom they have reasonable suspicion to believe possesses narcotics, combing his hair with a large comb as they approach him. He puts the comb in his back pocket just before they grab him. A frisk reveals a single hard object in that pocket. The police pull it out. It is, of course, the comb, but the act of pulling it out also pulls out a packet of white powder, which turns out to be cocaine.

There are two issues here (the stop is legal by definition). The first is the frisk. Is the frisk appropriate when the police have no reason to believe that the suspect is armed beyond their belief that he possesses narcotics? While the answer to this question is clearly no under *Terry*, the Court more recently seems to have heeded Justice Harlan's admonition, concurring in *Terry*, that if the stop is justified, the frisk must be as well, since otherwise the stop is too dangerous.<sup>127</sup> Thus, in *Minnesota v. Dickerson*, the Court did not upset the finding of the lower courts that a frisk was justified where police suspected only narcotics possession.<sup>128</sup>

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suspicion not required).

<sup>125</sup> 534 U.S. 112, 123 (2001) (Souter, J., concurring). *Knights* held that evidentiary searches based on reasonable suspicion were permissible when a probation agreement authorized them. *Id.* at 121-22 (majority opinion).

<sup>126</sup> "The test is an objective rather than a subjective one, just as with probable cause to arrest or search, and thus it is not essential that the officer actually have been in fear." LAFAVE, *supra* note 17, § 9.6(a), at 623 (footnote omitted).

<sup>127</sup> *Terry*, 392 U.S. at 31-34 (Harlan, J., concurring). "There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." *Id.* at 33. See *Adams v. Williams*, 407 U.S. 143 (1972), (upholding an immediate frisk prior to any questioning; however, the information that the police were given was that the suspect had a gun).

<sup>128</sup> 508 U.S. 366 (1993).

The *Dickerson* case went on, however, to hold that *seizure* of a hard lump from the suspect's pocket "overstepped the bounds of the 'strictly circumscribed' search for weapons allowed under *Terry*."<sup>129</sup> "[T]he officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby."<sup>130</sup> Likewise, it would seem that seizure of the comb was improper when police knew that the comb was what they felt.

In the usual case, however, the police will not "know" that the object in question is not, or could not be used as a weapon. In *United States v. Holmes*,<sup>131</sup> for example, where the police felt a hard object in the suspect's pocket that he declared, and they believed, was a scale, the court nevertheless upheld the extraction of the scale from his pocket, and it was subsequently discovered that the scale had cocaine residue on it. As Judge (now Chief Justice) Roberts wrote for the court: "We cannot fault the officer for taking the simple step of checking to ensure that the hard object was not something more threatening before continuing."<sup>132</sup>

In the end, then, the standard of police intent for stops and seizures following a frisk that most courts are applying would appear to be the same as the Supreme Court is applying to arrests and searches. If police *know* that there is no reason for suspicion, despite appearances, the stop or seizure is no good. But if they do the procedure even though they do not think that it is really necessary, as in *Holmes*, it will be upheld. As for frisks, it seems, after *Dickerson*, that if the stop is justified, the frisk may be automatic.

But is this the right standard? Arguably not. *Terry* represents an exception to the general Fourth Amendment requirement of probable cause prior to seizures of the individual (the stop),

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<sup>129</sup> *Id.* at 378.

<sup>130</sup> *Id.* (alteration in original).

<sup>131</sup> 385 F.3d 786 (D.C. Cir. 2004).

<sup>132</sup> *Id.* at 790-91.

searches (the frisk) and seizures of one's effects. Actual fear on the part of the police, who may be unreasonably fearless, surely should not be required,<sup>133</sup> despite language in *Terry* to the contrary.<sup>134</sup> But, in addition to objective grounds, should not the police have an actual subjective belief that the suspect really is committing (or has committed) a crime, that he really is armed, and that what they felt really is a weapon?

The answer, in my view, differs at each stage of the process. At the stop stage, just because someone looks like he is up to no good, the police should not be able to stop him unless they believe it. This is, as noted, what *Terry* seems to require. It is fruitless to argue that police intent is too hard to plumb. As already established, if the police *know* that the suspect is not, for example, a wanted criminal, even though he looks like one, an arrest, and therefore a stop, is no good.<sup>135</sup> Since police intent is thus already in play, why should not a determination of the police's good faith belief also be probed? That is, if the police see a person who looks like a wanted criminal, but do not believe that he is (even though they don't know it), this stop should also be no good. Of course this will be hard to determine and of course the police, once they know it is an issue, will lie about it. But the same objection applies to police knowledge, which the Court unanimously agreed in *Devenpeck* is always in issue.<sup>136</sup> Thus, for stops, as for arrests and searches, the police should have, as *Terry* suggested, an actual suspicion that is also reasonable. This limitation would reduce the use of stops for harassment purposes where police may have objective grounds for suspicion, but cannot convince the court that they actually suspected the individual stopped.<sup>137</sup>

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<sup>133</sup> This is the basis on which many courts have decided this issue. See LAFAYE, *supra* note 17, § 9.6(a), at 623 n.36.

<sup>134</sup> "[W]here nothing in the initial stages of the inquiry serves to dispel his reasonable fear for his own or others' safety, he is entitled . . . to conduct [a frisk]." *Terry*, 392 U.S. at 30.

<sup>135</sup> *Devenpeck v. Alford*, 543 U.S. 146 (2004).

<sup>136</sup> *Id.* at 153.

<sup>137</sup> See David Harris, *Factors for Reasonable Suspicion, When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994).

As to frisks, since we have now established a real suspicion standard for stops, and thus limited their scope somewhat,<sup>138</sup> I have no difficulty allowing an automatic frisk, even if the police do not believe the suspect to be armed, at least when the case involves a crime where it is objectively reasonable to suspect that a weapon might be involved.<sup>139</sup> Police protection figures into this equation, as it does not in the stop issue, and it is both unrealistic and dangerous to expect the police to forcibly stop and question many suspects without determining that they are unarmed at the outset. Without frisking, they cannot know whether the suspect is armed or not. (Of course, not every police inquiry of a citizen on the street is a stop based on “reasonable suspicion that criminal activity is afoot” and that the citizen in question is the suspected criminal.) Thus, I agree with LaFave that a subjective belief that the suspect is either armed or dangerous is not necessary for a frisk once a valid stop is made.

Seizures of objects found during the frisk pose a similar issue. Once the suspect has been stopped and frisked, the removal from his person of an object that could be a weapon, even though the police do not think it is, is a sufficiently small incremental intrusion into his liberty/privacy interests that it should be allowable, as *Holmes* held. The small chance that the police might be wrong could result in a policeman's being killed or injured. Also, hard objects, even if not designed to be weapons, can be dangerous in the hands of a person who realizes that he is about to be arrested. Only in a case like *Dickerson*, where the police “know” (which in the Model Penal Code includes “practically

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<sup>138</sup> Some courts, in imposing a real suspicion test for strip searches at the border, have assumed that this is also what is required for a frisk. *E.g.*, *United States v. Guadalupe-Garza*, 421 F.2d 876 (9th Cir. 1970).

<sup>139</sup> As LaFave notes, this is the way the lower courts have decided this issue. LAFAVE, *supra* note 17, § 9.6(a), at 625-26. In other cases, the courts look for additional circumstances. See *id.*, § 9.6(a), at 628, and cases cited therein. In the District of Columbia, where I was a prosecutor, the phrase used by police to justify frisks was “furtive movement.” *But see* David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 5 (1994) (decrying lower courts permissiveness in allowing frisks).

certain") that what they have felt is not a weapon and not dangerous, should the seizure be disallowed.

In sum, as to stops and frisks, the police must have a subjective suspicion that criminal activity is, or has been, afoot in order to stop someone, and that suspicion must be reasonable. They need not have a subjective fear or sense of danger in order to frisk if the nature of the crime suspected objectively suggests that the suspect may be armed. And they need not subjectively fear danger to seize something found on his person if it was reasonable to believe that the object might serve as a weapon.

### III. OTHER SITUATIONS

Once one starts thinking in these terms, he realizes that there is no such thing as a purely objective inquiry; the subjective beliefs of the police are potentially present in every kind of case. For example, in order to make a valid entry into a home to execute an arrest warrant, the Supreme Court, in *Payton v. New York*,<sup>140</sup> held that not only must the officer have a warrant based on probable cause (subject to the considerations already discussed), but also that he must have "reason to believe the suspect is within."<sup>141</sup> But surely this is not intended as a purely objective test. If the officer knows that the suspect is not there, even though objective evidence exists to suggest that he might be, an entry would be improper.<sup>142</sup> The result should be the same if the officer does not believe the suspect to be there. Reason to believe should be read literally to require a belief based on reason.

In a similar vein, in *Richards v. Wisconsin*,<sup>143</sup> the Court rejected Wisconsin's blanket rule that a no-knock entry was always allowed in felony drug cases. Instead, the Court required a case-

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<sup>140</sup> 445 U.S. 573 (1980).

<sup>141</sup> *Id.* at 603. As LaFave points out, "what this means continues to be a matter of considerable uncertainty." LAFAVE, *supra* note 17, § 6.1(a), at 265; *see also* Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 394 (2002) (noting that courts are lenient with police on the reason to believe standard).

<sup>142</sup> LaFave agrees. LAFAVE, *supra* note 17, § 6.1(a), at 268.

<sup>143</sup> 520 U.S. 385 (1997).

by-case consideration of whether “the police . . . have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”<sup>144</sup> The *Richards* Court cited *Maryland v. Buie*,<sup>145</sup> where a protective sweep of a house during an arrest was allowed where the officers had a “reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.”<sup>146</sup>

Since *Richards* rejected an objective approach offered by Wisconsin, it would seem that the test adopted by the Court was intended to be both subjective and objective. That is, one could argue, as Wisconsin did, that there is *always* a reasonable basis to fear danger or destruction of evidence in a felony drug case. In rejecting that approach and in finding that the officers had reason to believe that evidence might be destroyed if they knocked, the Court suggested that there must be a subjective belief that is reasonable for a no-knock entry to be valid.

Likewise in *Buie*, where the police would no doubt prefer a rule that would allow them to sweep the rest of a house during every home arrest, the court required a reasonable belief that such a sweep is necessary. However, as argued above with regard to frisks, since police safety is involved in both the *Richards* and *Buie* situations, I would not require the police to have a subjective apprehension of danger in these cases. As long as the objective facts would create such an apprehension in a reasonable officer, this should be sufficient. By contrast, if the police concern is with preservation of evidence, they must have a subjective belief that evidence is about to be destroyed.<sup>147</sup>

By the same reasoning, application of the exigent circumstance

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<sup>144</sup> *Id.* at 394.

<sup>145</sup> 494 U.S. 325 (1990).

<sup>146</sup> *Id.* at 337.

<sup>147</sup> See *Davis v. Washington*, 126 S. Ct. 2266 (2006), where the Court makes a similar distinction.

exception, of which *Richards* and *Buie* are essentially subclasses, should depend on the nature of the police activity in question. If the police are in hot pursuit of a fleeing felon, then an actual belief in the guilt of the suspect and that he is really fleeing should be required before police can enter a building to find him. Likewise, if the police seek to enter a house without a warrant to avoid the destruction of evidence, an actual belief that the evidence is there and is likely to be destroyed is necessary. The police should not be able to thrust themselves into these privacy-destroying situations without the requisite good faith beliefs.

If, on the other hand, police hear a shout of "Help!" issuing from an apartment, an entry to check it out is appropriate, even if the police admit that they thought it more likely that the shout came from a loud TV program. Unless they "know" (*i.e.*, are practically certain) that this was not a real cry for help, it makes sense to allow them to err on the side of action rather than inaction. Thus, if police are acting for the protection of themselves or others, more leniency should be allowed than when they are involved in crime detection. This is now the Court's position, as *Brigham City v. Stuart* adumbrates.<sup>148</sup>

In summary, issues concerning police intent are present in virtually every Fourth Amendment case. Thus, there is no such thing as a purely objective Fourth Amendment inquiry. Once one concedes, as the Court does in *Devenpeck*, that what the police know is part of the probable cause equation, the genie of police intent is out of the bottle. And it follows, from this concession, as well as from a proper understanding of the history of the Fourth Amendment, that if police knowledge is required as a basis for searches and seizures, then police belief in the facts, and the implications from those facts, is also a prerequisite of a valid search or seizure.

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<sup>148</sup> 126 S. Ct. 1943 (2006); *see also* *Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that the validity of a roadblock depends on whether it is for traffic safety or crime detection purposes).

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