Fourth Amendment Subjectivity and Its Undetermined Utility

Author : Guha Krishnamurthi

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Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 **Tex. L. Rev.** 447 (2021).

The Supreme Court stresses that the tests governing the Fourth Amendment are objective ones, looking to what reasonable officers would do and eschewing examination of the actual officers' subjective mental states. The Court has stated that this is because the law is not concerned with the officer's "state of mind, but the objective effect of his actions."[1] In this characteristically incisive article, Professor Orin Kerr provides good reason to doubt the Court's rhetoric. Kerr shows that the Court regularly looks to the subjective states of government officials in deciding the propriety of law enforcement conduct. Such subjective tests pepper the Fourth Amendment jurisprudence, regarding searches, seizures, their reasonableness, and their constitutional remedies.

That's not always a bad thing, according to Kerr. Nor is it always a good thing. Subjective tests can help us create narrow, more tailored rules that serve law enforcement benefits and protect our civil liberties. But that's highly dependent on their reliability; indeed, when we can't accurately determine officials' mental states, these tests are manipulable and can do serious harm. Figuring out when they work is a tough task, but Kerr provides us with useful guidance.

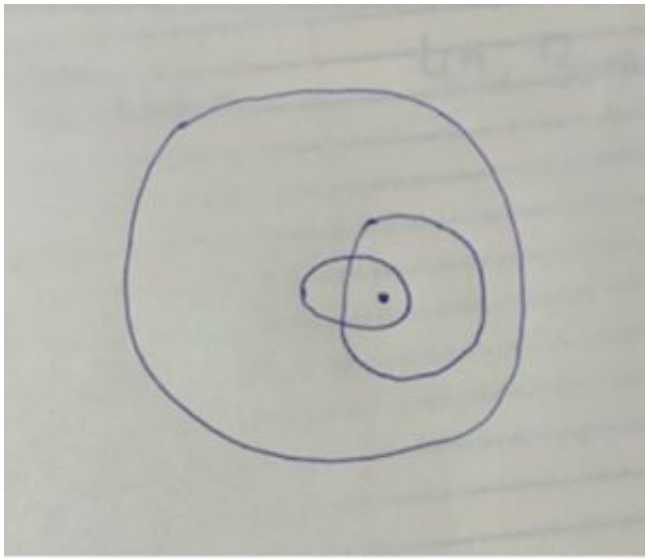
Kerr begins his analysis by defining what he means by doctrines that rely on "government subjectivity," which he takes to be "any legal test, rule or standard that incorporates a government official's actual state of mind." Then Kerr dutifully takes us through a dizzying number and variety of Fourth Amendment cases where the Court's analysis turns on government subjectivity. This part of the article might as well be a hornbook: government subjectivity pops up in all the major areas of Fourth Amendment law.

For example, regarding searches, in *United States v. Jones*, 565 U.S. 400 (2012) that dealt with a GPS tracking device attached to a car, the Court held that government conduct is only a search when it is "to obtain information." So, *Jones* requires judges to look at what law enforcement was actually *aiming* to do. On seizures, *Brower* v. County of Inyo, 489 U.S. 593 (1989), which considered whether a driver fleeing police who fatally crashed into a police roadblock, held that the driver was seized because the police intended to stop the driver and implemented means to that end. And concerning remedies, *Herring v. United States*, 555 U.S. 135 (2009) held that only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" triggers the exclusionary rule. Indeed, here's another from me: *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), held that it is a violation for an officer to stop a vehicle solely on the basis of appearance of being of a particular ethnicity (Mexican descent, in that case). In so doing, the Court focused on what the officers in fact considered in stopping the vehicle, and its test was formulated in terms of *actual* reasons. Furthermore, the Court emphasized that the officers' reasons were to be viewed through their perspective, including their training and experience. Thus, the Court injected subjectivity into the inquiry, by looking at officers' subjective beliefs and perceptions.

Yet the existing scholarship has failed to recognize the ubiquity of subjective tests. Much of the debate, Kerr observes, has assumed that objective rules define the Fourth Amendment and focused on the Court's insistence that these objective tests are preferable because they are evenhanded and promote uniformity. Critics have cast doubt on that, arguing that it allows for pretextual law enforcement conduct that is, in reality, often racially discriminatory. Kerr acknowledges the importance of this debate, but thinks the question of subjectivity has an even broader reach.

According to Kerr, Fourth Amendment law can be conceptualized as a way to "internalize the civil liberties harms of

government investigations." Specifically, Fourth Amendment law prohibits certain kinds of government conduct when the civil liberties harms outweigh the law enforcement benefits. Kerr then explains how this task generates "the scope problem": In deciding cases, judges must decide the level of generality with which they characterize the facts of a case and formulate the rule that decides the case. Very particularized characterizations and rules are good for the individual cases, but they may not provide the requisite *ex ante* clarity we desire. The facts and rules can be characterized with potentially infinite degrees of specificity. To this end, Kerr provides us with the following Figure 1 (Since first drafting of this jot, Kerr replaced this version of Figure 1 with a more elegant one, but I like the original):



The dot represents the particular case and the near-ovals are varying ways to characterize the facts and consequent rules of the case. Figure 1 reminds us that no matter how high tech the world is, Fourth Amendment law has answers that are intuitive and can be understood with a pad and pen (and no compass). Kerr's framing draws on a deep philosophical point: There is no ideal way of characterizing a case.[2] The way we do it must be analyzed in terms of our ends, or in Kerr's terms, our costs and benefits. The point then is using subjective mental states may help us to create narrow rules that better balance costs and benefits.

Consider the example of an officer who pulls someone over for a broken taillight, but the subjective reason is that the officer suspects the driver is a murderer. There are multiple ways to describe this action, ranging from "pulling someone over for a traffic violation" to "pulling someone over under the pretext of a traffic violation" to a very specific description detailing the conduct, the pretextual justification, and the actual reason of investigating murder. The objective formulations may be coarse and improperly tailored. But if we can determine subjective states accurately, more fine-grained formulations appealing to subjective states may be able to better balance civil liberties and investigatory benefit. Here's the rub: if we can't determine subjective states accurately, suppression of evidence may happen more frequently, resulting in "less usable evidence and less public benefit of enforcement of the law."

Kerr then goes through an assessment of subjective tests in various Fourth Amendment contexts. Very briefly, he thinks they are useful and beneficial in assessing searches, seizures, special needs, and parole limitations. He thinks they are problematic in assessing pretextual stops and the appropriate remedy for constitutional violations. The devil is in the details, but Kerr's analysis is nuanced and insightful. I see this article as a beginning, with many richly interesting questions demanding to be explored.

First, can Kerr's "government subjectivity" be further refined? What if we understand subjective tests as ones that look to *direct evidence* of a government official's actual state of mind, like testimony or evidence of actual behavior? That is, courts may be willing to look at facts about officer actions to make determinations about likely motivations. But they

won't just ask officers of their motivations. Kerr's examples suggest that the Supreme Court favors tests that reach to subjective mental states, but based on "objective," verifiable information. For example, in *Jones*, the Court determined that the government was seeking to obtain information based on the fact that agents attached a GPS device to a car and monitored it. This allowed the Court to infer the government's actual, subjective purpose—but based on objectively verifiable facts, rather than officer testimony as to their motivations. Second, in evaluating when subjective tests work in various Fourth Amendment contexts, Kerr focuses on features of the contexts: searches and seizures versus pretext and remedies. But what if we focus on the subjective states themselves? It may be that some subjective states are more accessible than others. For example, it might be that when looking at officer conduct, we are able to readily decipher the subjective aim of particular conduct. Again, in *Jones*, it's easy to infer that law enforcement wanted to obtain information. And in *Brower*, it's similarly pellucid that officers wanted to stop the driver. But it may be harder to determine why law enforcement engaged in the conduct—was it to investigate a promising lead or to fish for potential leads or to harass? And it may be still harder to determine if officers were motivated by animus or bigotry.

Third, how does recognizing Fourth Amendment subjectivity impact the traditional debate about officer motivations and the potentiality for illicit discrimination? As Kerr recognizes, his discussion here is broadly theoretical, and leaves open the important questions about racial discrimination. But bringing those questions back into focus, does recognizing subjectivity in Fourth Amendment decisions mean that courts should probe potential discrimination by law enforcement—both individualized and systemic? Often, such conduct is ignored precisely because of the objective frame that looks to what reasonable officers might have done. Moreover, when subjectivity is marshaled, it is often to immunize law enforcement conduct as good faith mistakes (like in *United States v. Leon*).

Finally, what would a genuinely objective Fourth Amendment law look like (and can an amendment that is explicitly rooted in reasonableness ever be objective)? Would it focus only the impacts of investigation on the targets? What would that do to the balance of investigatory interests and civil liberties?

This article brings great clarity to the Court's sometimes maddening Fourth Amendment jurisprudence. Kerr recognizes that the Court's mantra of "objectivity" is chanted but not followed. The meaning of the Fourth Amendment is up for debate, and its judicial application due for reform. This article is essential reading as we chart that course.

1. Bond v. United States, 529 U.S. 334, 338 (2000).
2. *See, e.g.*, Karl N. Llewellyn, **The Bramble Bush** 68 (11th ed. 2008).

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