

**VETERAN POLICE OFFICERS AND THREE-DOLLAR STEAKS:
THE SUBJECTIVE/OBJECTIVE DIMENSIONS OF PROBABLE
CAUSE AND REASONABLE SUSPICION**

*Kit Kinports**

ABSTRACT

This Article addresses two issues surrounding probable cause and reasonable suspicion that test the line between subjective and objective standards in Fourth Amendment jurisprudence: the extent to which a particular police officer's training and experience ought to be considered in measuring probable cause and reasonable suspicion, and the relevance of the officer's subjective beliefs about the presence of a weapon in assessing the reasonable suspicion required to justify a frisk. Although both questions have split the lower courts and remain unresolved by the Supreme Court, the majority of courts treat them inconsistently, recognizing the importance of an officer's training, experience, and even knowledge in making probable cause determinations but ignoring her actual beliefs about the absence of a weapon in evaluating the permissibility of a frisk. This Article maintains that there is a connection between the two concepts and rejects the prevailing view that the former is a permissible objective consideration and the latter an impermissible subjective inquiry. Rather, the Article equates the two scenarios, concluding that just as a particular police officer's knowledge, training, and experience can help inform the probable cause analysis, so too the officer's subjective belief that a suspect is unarmed should be considered in deciding whether she had the reasonable suspicion necessary to frisk.

"North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.

Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office."¹

* Professor of Law & Polisher Family Distinguished Faculty Scholar, Pennsylvania State University Dickinson School of Law.

¹ *Pennsylvania v. Dunlap*, 129 S. Ct. 448, 448–49 (2008) (Roberts, C.J., dissenting from denial of certiorari) (concluding that probable cause exists in cases where “experienced police officers observ[e] hand-to-hand exchanges of cash for small, unknown objects in high-crime neighborhoods”).

Thus begins Chief Justice Roberts' dissent from denial of certiorari in *Pennsylvania v. Dunlap*. Perhaps the Chief Justice's choice of language was merely a tongue-in-cheek effort to show his "playful side"² or his "flair for Sam Spade-style rhetoric."³ Perhaps instead he was deliberately courting "media attention" in the hopes that his opinion would be "read closely" by the lower courts.⁴ Whatever the explanation for the Chief Justice's colorful language, he clearly was of the view that Officer Devlin's experience on the police force and familiarity with the Philadelphia neighborhood were relevant in assessing probable cause.⁵

Although the opinion in *Dunlap* reflects the views of only two Justices—Justice Kennedy signed on to the Chief Justice's dissent—it is consistent with statements made by a majority of the Court in numerous opinions that apply the related concepts of probable cause and reasonable suspicion. In fact, just three months after the *Dunlap* dissent was issued, the five Justices in the majority in *Herring v. United States* mentioned in passing that "a particular officer's knowledge and experience" are relevant factors in assessing probable cause.⁶ Suggestions to the contrary have occasionally appeared, but the Court has been reasonably consistent in explicitly stating, or at least assuming, that a police officer's training and experience help support the existence of probable cause and reasonable suspicion. And the lower courts have followed suit.

Despite the courts' understandable use of police training and expertise to bolster claims of probable cause, their reliance on the characteristics of an individual police officer creates some tension with the Supreme Court's purported rejection of subjective considerations in Fourth Amendment jurisprudence generally—and, in particular, with the Court's admonition that probable cause and reasonable sus-

² Adam Liptak, *From the Bench, a Flair for Hard-Boiled Crime Writing*, N.Y. TIMES, Oct. 15, 2008, at A19.

³ Bill Mears, *Chief Justice Roberts Shows His Writing Chops*, CNN, Oct. 14, 2008, <http://www.cnn.com/2008/CRIME/10/14/roberts.mystery.writer/>.

⁴ Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/2008/10/14/interesting-comment-on-pennsylvania-v-dunlap/> (Oct. 14, 2008, 23:49 EST).

⁵ See *Dunlap*, 129 S. Ct. at 449 (relying on Officer Devlin's "experience as a narcotics officer and his previous work in the neighborhood").

⁶ 129 S. Ct. 695, 698, 703 (2009) (refusing to apply the exclusionary rule to cases involving "isolated [police] negligence attenuated from the arrest," in that case, a "negligent book-keeping error by another police employee"). For further discussion of *Herring*, see *infra* notes 106–113 and accompanying text.

picion are to be measured in objective terms.⁷ Allowing probable cause to turn on what a particular police officer knew, based on her training and on-the-job experience, injects a subjective inquiry into the analysis.

The line between subjectivity and objectivity in assessing probable cause and reasonable suspicion arises in another context that has split the lower courts and remains unresolved by the Supreme Court—the relevance of an officer’s subjective beliefs in assessing reasonable suspicion. This issue arises most frequently in evaluating the permissibility of a *Terry* frisk, i.e., in determining whether the requisite reasonable suspicion exists if the officer did not believe the suspect was armed. Although the majority of lower courts interpret Supreme Court precedent as mandating a strictly objective approach to reasonable suspicion, other courts disagree and define reasonable suspicion to incorporate both a subjective and an objective component. These courts take the position that a frisk is justified only if the officer in question subjectively believed the suspect was armed and that belief was a reasonable one. This minority view, I argue, is more consistent with the courts’ reliance on police training, experience, and knowledge in measuring probable cause and reasonable suspicion. Although it introduces a subjective element into the reasonable suspicion analysis, the courts have already started down that path, deviating from a strictly objective standard by acknowledging the relevance of the officer’s knowledge, training, and experience.

In sketching out my claims, Part I addresses the courts’ reliance on a police officer’s training and experience to support a finding of probable cause or reasonable suspicion. This Part describes the two different ways the courts incorporate that training and experience into the analysis, critiquing both approaches and pointing out that reliance on these factors introduces a subjective element into the probable cause/reasonable suspicion construct. Part II then explores the conflict surrounding the role subjective beliefs play in evaluating *Terry* frisks, arguing that a strictly objective approach to reasonable suspicion is not required by Supreme Court precedent and in fact contravenes the policy considerations the Court claims underlie the Fourth Amendment. Finally, Part III ties the issues together, maintaining that the majority position taken by the courts in the two sets of cases cannot be reconciled with one another. The Article con-

⁷ For a discussion of the fluctuation between objective and subjective standards characterizing the Supreme Court’s criminal procedure jurisprudence, see Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71 (2007).

cludes that just as a particular police officer's knowledge, training, and experience should be taken into account in measuring probable cause, so too that officer's subjective beliefs about the presence of a weapon should inform the courts' analysis of the permissibility of a frisk.

I. POLICE TRAINING/EXPERIENCE AND PROBABLE CAUSE

A. *The Supreme Court Decisions*

In defining the quantum of suspicion needed to justify a Fourth Amendment intrusion (whether the probable cause required to search or the reasonable suspicion needed to stop), the Supreme Court has endorsed "practical, common-sense" totality-of-the-circumstance tests.⁸ Specifically, the Court has instructed that the relevant inquiry is whether the "historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause."⁹ In adopting the perspective of the reasonable police officer, the Court has explained that "a trained officer draws inferences and makes deductions . . . that might well elude an untrained person," and therefore "the evidence . . . must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."¹⁰

In elaborating on the concept of an objectively reasonable police officer, the Court has often suggested that the training and experience of the particular officer involved in the case are relevant factors in making probable cause and reasonable suspicion determinations. As the Court simply stated in *United States v. Brignoni-Ponce*, an officer is "entitled to assess the facts in light of his experience."¹¹

Thus, for example, in *United States v. Arvizu*, the Court observed that the law enforcement official who stopped the defendant's car was "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants."¹² Relying on the officer's "experience as a border patrol agent," the Court pointed out that he found the defendant's failure

⁸ *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

⁹ *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

¹⁰ *United States v. Cortez*, 449 U.S. 411, 418 (1981); *see also Gates*, 462 U.S. at 231 (describing probable cause as a "practical, nontechnical conception" involving "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949))).

¹¹ 422 U.S. 873, 885 (1975).

¹² 534 U.S. 266, 276 (2002).

to look at him “suspicious” because “in his experience on patrol most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave.”¹³ Arvizu, by contrast, “seemed to be trying to pretend that [the officer] was not there.”¹⁴ “We think it quite reasonable,” the Court concluded, that “a driver’s slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as [the] remote portion of rural southeastern Arizona)” where Arvizu was stopped.¹⁵

Likewise, in *Ornelas v. United States*, the Court noted that “a police officer views the facts through the lens of his police experience and expertise,” and instructed appellate judges to accord “due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”¹⁶ Describing the officer who first spotted the defendants’ vehicle (“a 1981 two-door Oldsmobile with California license plates”) in a motel parking lot as “a 20-year veteran of the Milwaukee County Sheriff’s Department with 2 years specializing in drug enforcement,” the Court thought that “what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee.”¹⁷

Arvizu and *Ornelas* are not isolated examples. On numerous other occasions, the Court has likewise relied on the particular officer’s training and experience in evaluating probable cause and reasonable suspicion.¹⁸ The clear implication of these rulings is that the quan-

¹³ *Id.* at 277, 270.

¹⁴ *Id.* at 270.

¹⁵ *Id.* at 275–76.

¹⁶ 517 U.S. 690, 699 (1996) (holding that determinations of probable cause and reasonable suspicion are mixed questions of law and fact entitled to de novo review on appeal). *But cf.* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 292 (pointing out that while the *Ornelas* Court’s “two directives”—requiring de novo review on appeal as well as deference to the inferences made by judges and the police—can be “reconciled in spirit, . . . as a matter of simple logic it is hard to argue with Justice Scalia’s characterization of the Court’s opinion as ‘contradictory’” (quoting *Ornelas v. United States*, 517 U.S. 690, 705 (1996) (Scalia, J., dissenting))).

¹⁷ *Ornelas*, 517 U.S. at 691–92, 699.

¹⁸ *See, e.g.*, *United States v. Sharpe*, 470 U.S. 675, 682 n.3 (1985) (concluding that the facts there, “taken together as appraised by an experienced law enforcement officer,” gave rise to reasonable suspicion); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (per curiam) (noting in support of finding of reasonable suspicion, that “Officer McGee had special training in narcotics surveillance and apprehension” and was “‘carrying out a highly specialized law enforcement [drug] operation’” (quoting *United States v. Mendenhall*, 446 U.S. 544, 562 (1980) (Powell, J., concurring in part and concurring in the judgment))); *United States*

tum of suspicion arising from a particular set of facts may vary depending on what a police officer knew based on her training, experience, and familiarity with the neighborhood.

Admittedly, the Court's 2004 opinion in *Devenpeck v. Alford* points in the other direction.¹⁹ In the course of holding that an arrest is valid so long as probable cause exists to suspect the arrestee of *any* crime—even if not the particular charge the officer used to justify the arrest—the Court observed that a contrary holding would “ascribe to the Fourth Amendment . . . arbitrarily variable protection.”²⁰ For example, the Court feared, the permissibility of an arrest could “vary from place to place and from time to time,” and “[a]n arrest made by a knowledgeable, veteran officer would be valid, whereas an arrest made by a rookie in precisely the same circumstances would not.”²¹ Invoking the *Whren* line of cases,²² the *Devenpeck* Court concluded that “an arresting officer’s state of mind (*except for the facts that he knows*) is irrelevant” in assessing probable cause and thus it suffices that “the facts known to the arresting officers” give rise to probable cause.²³

Nevertheless, *Devenpeck* appears to be the outlier, given the statements made repeatedly in Supreme Court opinions predating it, and more recently by the *Herring* majority and the Chief Justice’s dissenting opinion in *Dunlap*. Moreover, even *Devenpeck* recognized in the

v. Cortez, 449 U.S. 411, 421–22 (1981) (characterizing “the question” to be asked in evaluating reasonable suspicion as “whether, based upon the whole picture, [the officers], as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity”); *United States v. Ortiz*, 422 U.S. 891, 897 (1975) (observing that the police “are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience with aliens and smugglers”); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (admonishing that “due weight must be given . . . to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience”).

19 543 U.S. 146, 153 (2004) (rejecting the state court’s position that the crime for which a suspect is arrested must be “closely related” to the offense for which probable cause actually exists).

20 *Id.* at 154.

21 *Id.* (emphasis omitted) (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)); cf. *Virginia v. Moore*, 128 S. Ct. 1598, 1605 (2008) (upholding the constitutionality of an arrest that was supported by probable cause but impermissible under state law, which allowed only the issuance of a summons for the offense, and noting that Fourth Amendment jurisprudence should not “vary from place to place and from time to time” (quoting *Whren*, 517 U.S. at 815)).

22 *Whren*, 517 U.S. at 810–13 (concluding, in response to defendants’ claim that a traffic stop was actually a pretextual search for drugs, that the stop was constitutional because the officers had probable cause of a traffic violation regardless of their underlying motivation for stopping the vehicle). For further discussion of *Whren* and its progeny, see *infra* text accompanying notes 83–87 & 137–143.

23 *Devenpeck*, 543 U.S. at 153, 155 (emphasis added).

dictum quoted above that a police officer's "knowledge" of "the facts" can be considered in assessing probable cause.²⁴ Not surprisingly, therefore, the lower courts have uniformly taken the position that a particular police officer's training, experience, and familiarity with the neighborhood help build the case for probable cause.²⁵ Those cases are the subject of the next section.

B. Police Experience as "Lens" or Independent Factor

Although the courts all ascribe importance to police training and experience in making determinations of probable cause and reasonable suspicion, a conflict has arisen in recent years concerning precisely how that training and experience are relevant to the analysis. A number of state and federal courts have expressly relied on the officer's training and experience as independent factors supporting the existence of probable cause and reasonable suspicion.²⁶ By contrast, a few courts have rejected the notion that police training and experience by themselves qualify as circumstances to be separately weighed in assessing probable cause. These courts do not deny the relevance of such experience but rather, picking up on the Supreme Court's reference in *Ornelas* to the "lens of . . . police experience and expertise,"²⁷ they take the position that the facts purportedly giving rise to probable cause are to be evaluated from the perspective of someone with the particular officer's training and experience.

Thus, for example, in *Commonwealth v. Dunlap*, the case that provoked Chief Justice Roberts' dissent from denial of certiorari, the Pennsylvania Supreme Court found that the lower court had erred in relying on Officer Devlin's experience and training as a "stand-alone factor" in assessing probable cause.²⁸ The state supreme court did not discount the relevance of the officer's training, observing that prob-

24 See also *id.* at 152 ("Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest."). For further discussion of the courts' reliance on police "knowledge," see *infra* text accompanying notes 59–76 and 142–153.

25 See 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION § 8.02[B] (4th ed. 2006); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2(c) (4th ed. 2004).

26 See, e.g., *United States v. Fiasche*, 520 F.3d 694, 697 (7th Cir. 2008); *Commonwealth v. Santaliz*, 596 N.E.2d 337, 340 (Mass. 1992); *State v. Moore*, 853 A.2d 903, 907 (N.J. 2004); *State v. Pineiro*, 853 A.2d 887, 895 (N.J. 2004); *People v. Jones*, 683 N.E.2d 14, 15 (N.Y. 1997); *State v. Bobo*, 524 N.E.2d 489, 491–92 (Ohio 1988); *State v. Maddox*, 98 P.3d 1199, 1205 (Wash. 2004); *Vassar v. State*, 99 P.3d 987, 994 n.7 (Wyo. 2004).

27 *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (quoted *supra* at text accompanying note 16).

28 *Commonwealth v. Dunlap*, 941 A.2d 671, 677 (Pa. 2007).

able cause “is to be viewed from the vantage point of a prudent, reasonable, cautious police officer on the scene at the time of the arrest guided by his training and experience.”²⁹ But, the court concluded, that training and experience are only “an aid” in evaluating probable cause or a “lens’ through which courts view the quantum of evidence observed at the scene.”³⁰ Accordingly, the court required proof of “a nexus” between the officer’s training and experience and the facts used to justify the presence of probable cause.³¹

The en banc Ninth Circuit came to a similar conclusion in *United States v. Montero-Camargo*.³² Though acknowledging that a police officer’s experience “may furnish the background against which the relevant facts are to be assessed,” the court nevertheless held that “‘experience’ does not in itself serve as an independent factor in the reasonable suspicion analysis.”³³ Still other recent court opinions mention the officer’s training or experience in analyzing the existence of probable cause, but do not clearly indicate which of these two positions they take.³⁴

There is much to be said in support of the Pennsylvania opinion maligned by the Chief Justice’s dissent from denial of cert in *Dunlap*. As the state supreme court pointed out, according a police officer’s training or experience independent status in evaluating probable cause and reasonable suspicion allows the officer to “bootstrap a hunch based on constitutionally insufficient objective evidence simply by adverting to his experience as the foundation of his suspi-

29 *Id.* at 675 (quoting *Commonwealth v. Norwood*, 319 A.2d 908, 910 (Pa. 1974)) (emphasis omitted).

30 *Id.*

31 *Id.* at 676.

32 208 F.3d 1122 (9th Cir. 2000) (en banc).

33 *Id.* at 1131; *cf.* *Ford v. State*, 158 S.W.3d 488, 494 (Tex. Crim. App. 2005) (recognizing that “law enforcement training or experience may factor into reasonable-suspicion analysis” but is “insufficient to establish reasonable suspicion absent objective factual support”; therefore, the police officer’s opinion that the defendant was “following another car too closely” in violation of state traffic rules did not give rise to reasonable suspicion absent evidence describing “what facts would allow [the officer] to objectively determine” a traffic violation was taking place).

34 *See, e.g.,* *Darling v. State*, 768 A.2d 463, 466 (Del. 2001) (concluding that “personal observations by an experienced police officer at a known open-air drug sale area constituted sufficient probable cause”); *State v. Ochoa*, 93 P.3d 1286, 1290 (N.M. 2004) (noting that a police officer’s “experience and training . . . may permit the officer to identify drug paraphernalia or drug packaging with a reasonable level of probability, sufficient for probable cause”); *State v. Castro*, 891 A.2d 848, 853 (R.I. 2006) (observing that “‘the mosaic of facts and circumstances [available to the arresting officer] must be viewed cumulatively ‘as through the eyes of a reasonable and cautious police officer on the scene, guided by his or her experience and training’” (quoting *In re Armand*, 454 A.2d 1216, 1218 (R.I. 1983) (quoting *In re John C.*, 425 A.2d 536, 538–39 (R.I. 1981))))).

cion.”³⁵ Despite the Supreme Court’s frequent admonition that police “hunches” are inadequate to satisfy even the lesser standard of reasonable suspicion,³⁶ relying on their training as a separate factor means that whenever “an experienced officer begins a shift, probable cause begins to be assessed against all citizens every time they fall under the watchful eye of a suspicious officer who has been on the job for a meaningful period of time.”³⁷

In *Dunlap* itself, for example, the Chief Justice would have summarily reversed the state supreme court’s decision based on his view that the probable cause requirement is satisfied when “experienced police officers observ[e] hand-to-hand exchanges of cash for small, unknown objects in high-crime neighborhoods.”³⁸ A surprising number of cases involve similar facts, and the question whether they give rise to probable cause is one that has split the lower courts.³⁹ Given

³⁵ *Dunlap*, 941 A.2d at 676–77.

³⁶ See, e.g., *United States v. Arvizu*, 534 U.S. 266, 274 (2002); *Terry v. Ohio*, 392 U.S. 1, 27 (1968). But cf. Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 415, 466 (2006) (calling the Court’s distinction between “mere hunches” and reasonable suspicion “untenable,” and advocating that the Court “abandon[] the distinction between ‘objective’ and ‘subjective’ evidence and [give] police hunches their due”).

³⁷ *Dunlap*, 941 A.2d at 677; cf. *Ford*, 158 S.W.3d at 493 (cautioning that “[a]llowing a police officer’s opinion to suffice in specific facts’ stead eviscerates *Terry*’s reasonable suspicion protection” and “remov[es] the ‘reasonable’ from reasonable suspicion”).

³⁸ *Pennsylvania v. Dunlap*, 129 S. Ct. 448, 449 (2008) (Roberts, C.J., dissenting from denial of certiorari).

³⁹ Compare *State v. Moore*, 853 A.2d 903, 907 (N.J. 2004) (holding that probable cause existed where an “experienced narcotics officer . . . saw defendant and his companion give money to [a] third person in exchange for small unknown objects” in a neighborhood where the officer “previously had made numerous drug arrests”), with *Cunha v. Superior Court*, 466 P.2d 704, 706–07 (Cal. 1970) (finding lack of probable cause where two people “looked around as they walked on a public sidewalk in broad daylight . . . in an area known for frequent narcotics traffic,” and then engaged in “an apparent exchange” involving “what appeared to be money” and some other object), and *Dunlap*, 941 A.2d at 679, 673 (ruling that “a single, isolated transaction” where money is exchanged for “small objects” in a “high crime area” does not constitute probable cause).

For opinions finding that the police had reasonable suspicion, but not probable cause, where they did not even see money change hands, see *People v. Ratcliff*, 778 P.2d 1371, 1373, 1378 (Colo. 1989) (concluding that “a brief exchange of some object or objects” in a “drug trafficking area” gave rise to only reasonable suspicion, despite the fact that one of the persons involved had an outstanding arrest warrant and was known to be “a user and seller of cocaine”); *State v. Pineiro*, 853 A.2d 887, 894, 896–97 (N.J. 2004) (deciding that “the passing of a cigarette pack in a high crime area between a known felon and a suspected drug dealer” created only reasonable suspicion, even though “[b]ased on his experience, [the officer] was aware that drugs sometimes are transported in cigarette packs”).

For decisions finding probable cause on somewhat more damning evidence, see, for example, *United States v. Green*, 670 F.2d 1148, 1150–51 & n.1 (D.C. Cir. 1981) (while noting that “[t]his court has never held that the observance of a suspicious transaction, without more, provides probable cause for arrest,” this case involved “the appearance of

that the character of the neighborhood itself does not create even reasonable suspicion,⁴⁰ the sale of a small, unidentified object is the only remaining suspicious circumstance if the officer's experience is not deemed an independent factor. Even when considered together, this combination of facts does not seem adequate to generate probable cause.⁴¹

But even the "lens" approach endorsed by the Pennsylvania Supreme Court and the Ninth Circuit is not free from difficulty. This assumes, of course, that there is a real distinction between using police experience as a "lens" and viewing it as an independent factor—and that the "police experience as lens" approach is not, as one of the dissenting state supreme court justices in *Dunlap* complained, simply a "post-New Age speak . . . Rorschach test."⁴² Even assuming the two approaches are substantively different, they share some of the same defects.⁴³

First, under either approach, police training and experience should cut both ways—both in the sense that an officer without specialized training or particular experiences might not be aware of the facts or inferences allegedly creating probable cause, and also that some circumstances might actually seem *less* suspicious to a highly trained officer than to an inexperienced one.⁴⁴ But it is the rare case

flight and evasion" and the exchange appeared to be a "two-party drug transaction," where one person held the drugs and the other made the exchange, thereby giving "the narcotics dealer some measure of protection from robbery"); *United States v. Smith*, No. 04-11-KAJ, 2006 U.S. Dist. LEXIS 2814, at *5-6 (D. Del. Jan. 26, 2006) ("experienced" officers "saw cash exchanged for a small object" in a neighborhood "with a reputation as an open-air drug market," and the suspected dealer "instantly fle[d] when they approached and identified themselves"); *Darling*, 768 A.2d at 466 (police observed two separate transactions at "a known open-air drug sale area," and some of the suspects were using bandanas as masks); *Commonwealth v. Santaliz*, 596 N.E.2d 337, 339-40 (Mass. 1992) (the suspected buyer was a passenger in a taxicab, the transferred object was concealed in the waistband of the defendant's companion's pants, and the transaction was "done in silence"); *People v. Jones*, 683 N.E.2d 14, 15 (N.Y. 1997) (following the exchange, the suspected dealer "suspiciously concealed a plastic bag among some nearby cinder blocks"); *Castro*, 891 A.2d at 851 (money was exchanged for "a white bag . . . a little bigger than a half-dollar").

40 See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

41 Cf. *id.* (finding the lesser reasonable suspicion standard satisfied by "headlong flight"—which the Court called "the consummate act of evasion"—in a "high crime area").

42 *Commonwealth v. Dunlap*, 941 A.2d 671, 682 (Pa. 2007) (Castille, J., dissenting).

43 For discussion of the merits of taking police training and experience into account in making probable cause determinations, see *infra* notes 66-76 and accompanying text.

44 See 2 LAFAVE, *supra* note 25, § 3.2(c), at 43-44; 4 *id.* § 9.5(a), at 474; Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 Miss. L.J. 339, 347 (2006) (positing a situation where a police officer's "specialized training" leads her to realize a plant is not marijuana even though "a reasonably well-trained officer could mistake it for that dreaded weed").

that sees police training and experience as a two-way street and relies on them to undercut a finding of probable cause.⁴⁵ Rather, the courts seem to use the officer's training and experience only as a "plus" factor bolstering the government's contention that sufficient cause existed to justify the police action.⁴⁶

Turnabout is fair play, however, and "a necessary corollary" of allowing the prosecution to cite these factors to support a claim of probable cause is that defendants should likewise be able to rely on their absence in challenging police intrusions.⁴⁷ Just as a veteran officer well "versed in the field of law enforcement" may be able to reach conclusions that would "elude an untrained" judge or layperson,⁴⁸ so too, "[b]y the same token,"⁴⁹ those same conclusions might well "elude" the rookie police officer or one without specialized training or experience.

45 For a few older cases and dissenting opinions that do, however, take this approach, see *United States v. Mendenhall*, 446 U.S. 544, 573 & n.10 (1980) (White, J., dissenting) (observing that "once [the narcotics agent] learned that [the defendant] only needed a boarding pass for her flight," "it should have been plain to an experienced observer that Ms. Mendenhall's failure to claim luggage was attributable to the fact that she was already ticketed through to Pittsburgh on a different airline," and thus the officer's "experience on airport detail" "negated any reasonable inference that she was traveling a long distance without luggage or changing her ticket to a different airline to avoid detection"); *United States v. Booker*, 496 F.3d 717, 729 (D.C. Cir. 2007) (Rogers, J., dissenting) (finding it "inconceivable" that "officers from the auto theft unit would not have noticed the rear [dealer's vehicle] tag," and that "a reasonable officer, particularly one trained to look for stolen cars and fraudulent tags, would not have glanced at the rear of Booker's car . . . to determine whether there was a rear tag" before erroneously stopping his car for displaying a temporary tag in the front windshield); *Reeves v. State*, 599 P.2d 727, 740-41 (Alaska 1979) (finding absence of the probable cause necessary to conduct plain view search of a balloon because, even though the officer "had 'a feeling'" it might contain contraband, "at no point did he testify that he had cause to believe the balloon contained contraband" and he had been "employed at the jail only two months and testified that he had had no 'experience in the past of people having balloons wrapped up in their pocket'"); *DeLao v. State*, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977) (reasoning that while it is a "well known fact that heroin is kept in balloons," there was no evidence that the officer was "cognizant of this 'well known' fact"); cf. *Wimberly v. Superior Court*, 547 P.2d 417, 422 (Cal. 1976) (cautioning that "[i]t is fundamental that an officer's observations can give rise to probable cause only if that officer had sufficient training and experience from which to draw the conclusions necessary to create a reasonable belief in the presence of contraband," but finding the officer had sufficient experience in that case even though he "would not be accepted as an expert at identifying marijuana").

46 Cf. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004) (seemingly acknowledging only the possibility that a "knowledgeable, veteran" police officer would be *more* likely to have probable cause than a "rookie" (quoted *supra* at text accompanying note 21)).

47 *Reeves*, 599 P.2d at 741 n.44.

48 *United States v. Cortez*, 449 U.S. 411, 418 (1981) (quoted *supra* at text accompanying note 10).

49 *Mendenhall*, 446 U.S. at 573 n.10 (White, J., dissenting).

Second, the notion of police training and experience is so amorphous that it inexorably tends to become a makeweight argument for the government in every case. Every police officer obviously receives some training, and most of them have had at least some on-the-job experience when they make a stop or arrest. How much training or experience is sufficient to count in evaluating probable cause? In *Dunlap*, for instance, Officer Devlin had been on the police force for five years but part of the Philadelphia Drug Strike Force for only nine months. During his career, he had made approximately fifteen or twenty narcotics arrests in “the general geographic area” where Dunlap was apprehended.⁵⁰ Did those statistics suffice to make Devlin “experienced” in recognizing drug deals?⁵¹

Similarly, in finding the stop at issue in *Terry* supported by reasonable suspicion that the defendants were “contemplating a daylight robbery,” the Supreme Court observed that “[i]t would have been poor police work indeed for an officer of 30 years’ experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.”⁵² Despite this reference to Officer McFadden’s purported expertise, the Court “failed to elaborate on [his] relevant experience,” and, in fact, the officer, “an expert at identifying shoplifters and pickpockets, testified that he had never apprehended a robber.”⁵³ Whether police training and experience are independent factors supporting the existence of probable cause, or merely the lens through which the court views the facts, they need to be refined more precisely if they are to carry any real weight in evaluating the constitutionality of police intrusions.

Third, the inference underlying both approaches—that a law enforcement official is more likely than a lay person to recognize crimi-

⁵⁰ Commonwealth v. Dunlap, 941 A.2d 671, 673 (Pa. 2007).

⁵¹ Cf. United States v. Montero-Camargo, 208 F.3d 1122, 1143 (9th Cir. 2000) (en banc) (Kozinski, J., concurring) (“[If] 32 arrests during the course of a decade is sufficient to turn the road here into a high crime area, then what area under police surveillance wouldn’t qualify as one?”).

⁵² Terry v. Ohio, 392 U.S. 1, 28, 23 (1968); see also *id.* at 5 (observing that Officer McFadden “had been a policeman for 39 years and a detective for 35 and . . . had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years”).

⁵³ Lewis R. Katz, Terry v. Ohio at *Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 490 (2004); see also Wayne R. LaFare, “Street Encounters” and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 39, 58 n.95 (1968) (pointing out that Officer McFadden “acknowledged that his thirty-nine years of police experience did not give him some special insight into the conduct of suspects, since he had been assigned to watch for shoplifters and pickpockets for thirty years and had not had occasion to witness the planning or execution of a robbery”); Lerner, *supra* note 36, at 419 (concluding that “McFadden had a hunch”).

nal behavior—is at least partially offset by the officer’s tendency to view everyone with suspicion. As Judge Kozinski pointed out in his concurring opinion in *United States v. Montero-Camargo*, police officers are “trained to detect criminal activity and . . . look at the world with suspicious eyes,” and “[j]ust as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area.”⁵⁴ Thus, assessing probable cause through the eyes of a trained officer may well become “a self-fulfilling prophecy.”⁵⁵

Finally, and most problematic for purposes of this Article, reliance on a police officer’s training and experience raises the spectre of the subjective standards the Court has purportedly rejected in this context. The subjective dimensions of police training and experience are explored in the following section.

C. *The Subjective Features of Police Training/Experience*

Even so-called objective tests are, of course, subjective in the sense that the reasonable person inquiry looks—and always has looked—at the reasonable person “under the circumstances.”⁵⁶ Thus, evaluating probable cause from the perspective of the reasonable police officer with the same training and experience as the one who confronted the defendant is arguably a run-of-the-mine application of an objective standard.⁵⁷ Still, as more of the particular officer’s characteristics are

⁵⁴ *Montero-Camargo*, 208 F.3d at 1143 (questioning the characterization of the site of the defendants’ arrest as a “high-crime” area).

⁵⁵ *Cunha v. Superior Court*, 466 P.2d 704, 708 n.1 (Cal. 1970) (commenting on the vagaries of a police officer’s “views of a location’s crime rate,” and noting that in the half hour before they arrested the defendant, the two officers there had “suspected four to six of the 10 to 20 people who walked by of possible dealings in narcotics” and “had between them participated in 45 to 60 arrests in the Telegraph Avenue area in six months,” although there was no indication “how many of those arrests actually vindicated the officers’ suspicions” and thus it was “impossible to determine how accurate their estimate of the local narcotics traffic was”).

⁵⁶ See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (defining custody for *Miranda* purposes by looking at “a reasonable person in the suspect’s situation”); *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (defining a *Terry* stop from the perspective of a reasonable “innocent person in [the defendant’s] position” (quoting *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting))); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.05[A][1], at 253 (4th ed. 2006) (noting that self-defense law asks whether a reasonable person would have believed that defensive force was “appropriate under the circumstances”).

⁵⁷ But compare Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 180 (1996) (arguing, in discussing use of a “reasonable officer” test to evaluate pretextual stops, that incorporating “a particular officer’s past stopping history” into the objective standard—as opposed to general police “prac-

considered relevant “circumstances” in defining the reasonable law enforcement official, the standard looks more and more like a subjective one. As George Fletcher has aptly noted, “[i]f the reasonable person were defined to be just like the defendant in every respect, he would arguably do exactly what the defendant did under the circumstances.”⁵⁸

Moreover, the Supreme Court has gone beyond simply incorporating a particular officer’s training and experience into the “reasonable police officer under the circumstances” test. Rather, the Court has indicated, the “circumstances” also “frequently include a particular officer’s knowledge,”⁵⁹ such that assessments of probable cause turn on “the facts known to the arresting officer at the time of arrest.”⁶⁰ Again, adding the officer’s “knowledge” as one of the relevant circumstances is arguably still a straight-forward application of the objective “reasonable person under the circumstances” approach, and does not turn the test into a subjective one.⁶¹ But an assessment of what a particular officer actually “knows” clearly depends upon that individual’s subjective state of awareness.⁶² Even the *Devenpeck* Court seemed to acknowledge as much, noting that “an arresting officer’s state of mind (*except for the facts that he knows*) is irrelevant” in assessing probable cause.⁶³

tices in a particular locality”—“dangerously approaches [a] purely subjective standard”), *with Sklansky, supra* note 16, at 310 n.189 (rejecting that distinction and arguing that the objective reasonable officer standard “can be illuminated by what the officer in fact has done”).

58 GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 513 (1978).

59 *Herring v. United States*, 129 S. Ct. 695, 703 (2009); *cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 12 cmt. a (Proposed Final Draft No. 1, 2005) (observing that “knowledge and skills cannot be easily distinguished; what the professional . . . has is a combination of the two”).

60 *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (described *supra* at notes 19–24 and accompanying text); *cf.* *Valente v. Wallace*, 332 F.3d 30, 32 (1st Cir. 2003) (calling the definition of probable cause “objective,” though noting that it “turns on what a reasonable police officer would conclude based on the evidence actually available at the time (and not on unknown facts or subsequent events)”; *see also infra* note 146 (citing additional case law)).

61 *See Herring*, 129 S. Ct. at 703 (explaining that “includ[ing] a particular officer’s knowledge and experience” in applying the good-faith exception to the exclusionary rule “does not make the test any more subjective than the one for probable cause, which looks to an officer’s knowledge and experience, but not his subjective intent” (citing *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996))); 4 LAFAYETTE, *supra* note 25, § 9.5(a), at 474–75 (“[A] standard does not become subjective rather than objective merely because it takes into account the special skills and knowledge of the actor.”).

62 *See Bradley, supra* note 44, at 343, 345 (calling “police knowledge of the facts” an “inherently subjective” element of probable cause that “may require a probing of the policeman’s mind”).

63 *Devenpeck*, 543 U.S. at 153 (emphasis added).

In support of his position that reliance on an officer's knowledge does not require deviation from an objective standard, Wayne LaFave cites tort law, pointing out that "[t]his has never been questioned in the law of torts."⁶⁴ To be sure, tort law does consider an individual's superior "skills or knowledge" relevant in assessing how the reasonable person would have acted under the circumstances.⁶⁵ And there is good reason to do so, not only in evaluating tort liability but also in weighing probable cause. Just as a driver who "happens actually to know . . . that a deep pothole lurks in the road ahead . . . can be found negligent for failing to slow down . . . even though the typical motorist would be unaware of its existence,"⁶⁶ so too police officers gain knowledge about criminal behavior patterns and particular neighborhoods by virtue of their training and experience on the job.⁶⁷

Thus, for example, a police officer experienced in detecting particular crimes may know that drug dealers tend to use certain forms of packaging for their wares⁶⁸ or that prostitutes typically do not carry purses.⁶⁹ The veteran officer may be familiar with certain slang terms

⁶⁴ 4 LAFAVE, *supra* note 25, § 9.5(a), at 475 n.32 (citing 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 919 (1956)).

⁶⁵ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 12 (Proposed Final Draft No. 1, 2005) ("If an actor has skills or knowledge that exceed those possessed by most others, these skills or knowledge are circumstances to be taken into account in determining whether the actor has behaved as a reasonably careful person.").

⁶⁶ *Id.* § 12 cmt. a.

⁶⁷ *See, e.g.*, 2 LAFAVE, *supra* note 25, § 3.2(c), at 40 (observing that police officers, "particularly those assigned to specialized areas of enforcement, become familiar with the methods of those engaged in particular types of criminal activity"); *id.* § 3.6(g), at 370 (noting that an officer "assigned to patrol duty is expected to be familiar with the character of the area to which he is assigned"); Lerner, *supra* note 36, at 413 (pointing out that "[p]olice officers, like corporate executives, doctors, and even judges, get better at what they do with time").

⁶⁸ *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 700 (1996) ("To a layman [a] loose panel below the back seat armrest . . . may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel."); *Texas v. Brown*, 460 U.S. 730, 742-43 (1983) (officer "was aware, both from his participation in previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics"); *Commonwealth v. Evans*, 685 A.2d 535, 536 (Pa. 1996) (officer saw object "wrapped in yellowish tinted plastic" and "had personally seen, perhaps fifty . . . times or more, narcotics packaged in similar 'kilo' or 'brick type' wrappings"); *Vassar v. State*, 99 P.3d 987, 990 (Wyo. 2004) ("[b]ased on his knowledge, training and experience," officer believed that wooden box "propped up" in a car with the image of a marijuana leaf on top was "what is commonly known as a marijuana stash box").

⁶⁹ *See United States v. Martin*, 289 F.3d 392, 395 (6th Cir. 2002).

used to refer to contraband⁷⁰ or with particular evasive behaviors often used by those trying not to arouse suspicion.⁷¹ Likewise, an officer familiar with a certain neighborhood may be aware that a specific individual has a history of criminal behavior,⁷² or that legitimate activities are seldom conducted in a particular location at a particular time of day.⁷³

Of course, these factors alone may not give rise to probable cause or even reasonable suspicion, and law enforcement officials (and courts) must take care to avoid making hasty assumptions about objects that are in common use⁷⁴ or activities that often have an innocent explanation.⁷⁵ Similarly, they must recognize that “behavior is

70 See, e.g., *State v. Arthur*, 691 A.2d 808, 815 (N.J. 1997) (“‘[B]ottles’ is a slang expression that is understood to mean vials of cocaine in crack form.”).

71 See, e.g., *United States v. Arvizu*, 534 U.S. 266, 269 (2002) (border patrol agent “knew that alien smugglers did extensive scouting and seemed to be most active when agents were en route back to the checkpoint” for a shift change); *United States v. Soto*, 375 F.3d 1219, 1220–21 (10th Cir. 2004) (“in fairly large drug transactions . . . drug traffickers often set up . . . counter-surveillance to ensure that they are not being watched by law enforcement officers” and “frequently negotiate in one vehicle and store the drugs in another vehicle to reduce their risk”).

72 See, e.g., *State v. Ochoa*, 93 P.3d 1286, 1288 (N.M. 2004) (officer knew that weapons had been found in the defendant’s possession when he had been stopped “earlier in the week”); *State v. Maddox*, 98 P.3d 1199, 1205 (Wash. 2004) (officer was familiar with the defendant’s “long history as a drug dealer”).

73 See, e.g., *Arvizu*, 534 U.S. at 277 (border patrol agent knew the defendant was driving on “a little-traveled route used by smugglers to avoid the 191 checkpoint” and “had turned away from the known recreational areas accessible to the east,” and that other “recreational areas . . . would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads”); *United States v. Edmonds*, 240 F.3d 55, 60 (D.C. Cir. 2001) (officer saw “a van parked after hours in a school lot known to be the site of numerous drug transactions”); *United States v. Montero-Camargo*, 208 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (border patrol agents knew there were “no exits, driveways, or roads nearby that a driver might accidentally pass by” on the highway where suspects made a U-turn prior to immigration checkpoint).

74 See, e.g., *People v. Ratcliff*, 778 P.2d 1371, 1378 n.4 (Colo. 1989) (acknowledging that “some types of containers might be commonly associated with drug trafficking,” but here the officer found a plastic vial that he “merely described . . . as small, opaque, and similar to a ‘Tic-Tac’ box”); *Ochoa*, 93 P.3d at 1290 (citing by way of example diaper bags, taped cardboard boxes, and deodorizers). For examples of cases where courts have viewed common objects with suspicion, however, see *Arvizu*, 534 U.S. at 270 (noting that minivans were “a type of automobile that [the border patrol agent] knew smugglers used”); *United States v. Fiasche*, 520 F.3d 694, 695 n.1 (7th Cir. 2008) (“Those who watch the acclaimed HBO hit series, *The Wire*, know that these [prepaid cell] phones (usually called ‘burners’) are difficult to trace and a favored tool of drug dealers.”); *State v. Arthur*, 691 A.2d 808, 812 (N.J. 1997) (observing that “paper bags are often used to transport drugs”).

75 See, e.g., *Montero-Camargo*, 208 F.3d at 1136 (observing that “reliance upon ‘suspicious’ looks can so easily devolve into a case of damned if you do, equally damned if you don’t,” and that “it is a common, if not universal, practice for drivers and passengers alike to take note of a law enforcement vehicle coming up behind them” and “adjust their driving ac-

susceptible to different interpretations depending on one's culture."⁷⁶ Nevertheless, it seems reasonable to use these factors to help build a case for probable cause.

In the end, however, while reliance on a police officer's training and experience may be perfectly justifiable, it turns the inquiry into a more subjective one. And a standard that looks to a reasonable law enforcement official with the same "knowledge" as the officer involved in the case becomes inherently subjective—in the sense that it turns on, and requires proof of, a particular individual's subjective state of mind. Again, there is good reason to incorporate the police officer's knowledge in assessing probable cause and reasonable suspicion. But doing so makes it harder to defend the decision to ignore the officer's subjective beliefs in evaluating the reasonable suspicion necessary to conduct a *Terry* frisk. The courts' treatment of that question is considered in the section that follows.

II. SUBJECTIVE BELIEFS AND *TERRY* FRISKS

A second issue that tests the line between subjective and objective definitions of reasonable suspicion and probable cause is the permissibility of a *Terry* frisk in situations where a police officer does not subjectively believe the suspect has a weapon. Can the reasonable suspicion required to justify such an intrusion be satisfied so long as a reasonable police officer would have feared the suspect was armed under the same circumstances?⁷⁷ As discussed below, this question has split the lower courts.

cordingly"; concluding that it is "difficult to imagine what Renteria-Wolff could have done at that point that might *not* have appeared suspicious to a Border Patrol agent").

⁷⁶ *Id.* at 1136 n.27 (noting by way of illustration that "[i]n some cultures, to look directly at a person in a position of authority is deeply disrespectful; in others, *not* to look directly at that person gives rise to the impression that one is somehow dishonest").

⁷⁷ The same issue arises, although less frequently, in cases where an officer who does not actually believe the suspect was involved in a crime nevertheless makes a stop (or arrest) under circumstances that would give rise to reasonable suspicion (or probable cause) in the mind of the reasonable police officer. *See, e.g., Commonwealth v. Smigliano*, 694 N.E.2d 341, 344 (Mass. 1998) (officer stopped the defendant because he thought the defendant was lost, though a reasonable officer could have had reasonable suspicion that the defendant's vehicle was illegally parked); *State v. Hawley*, 540 N.W.2d 390, 392 (N.D. 1995) (officer "did not form any suspicions of criminal activity," but rather "believed he was acting in a community caretaker role" in stopping the defendant); *Wilson v. State*, 874 P.2d 215, 218, 224, 225 (Wyo. 1994) (officer made the stop "to inquire about [the defendant's] condition and ensure his safety" and had "no suspicions" that he was involved in a crime, although "[h]ypothetically, a police officer could have possessed reasonable suspicions at the time"); *cf. Florida v. Royer*, 460 U.S. 491, 507 (1983) (plurality opinion) ("[T]he fact that the officers did not believe there was probable cause and proceeded on a consensual or *Terry*-stop rationale would not foreclose the State from justifying Royer's

A. *The Conflict in the Lower Courts*

The Supreme Court has treated the concept of probable cause and the “obviously less demanding”⁷⁸ requirement of reasonable suspicion similarly,⁷⁹ and perhaps it is therefore unsurprising that the majority of courts have adopted a purely objective approach in applying *Terry*. According to these courts, a frisk is permissible even where the officer in question did not subjectively believe the suspect had a weapon.⁸⁰ Although these opinions tend to be rather terse in their

custody by proving probable cause . . .”). See generally 2 LAFAVE, *supra* note 25, § 3.2(b), at 35–39 (discussing probable cause); 4 *id.* § 9.5(a), at 472 & n.22 (discussing reasonable suspicion necessary to stop).

78 United States v. Sokolow, 490 U.S. 1, 7 (1989). For a discussion of the Court’s recent tendency to conflate the two concepts, however, see Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649 (2009) (analyzing the appearance of terms like “reasonable belief” in several recent Supreme Court opinions). Cf. Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009) (allowing police to search a vehicle incident to arrest “when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle”).

79 For cases where the Court has relied on its reasonable suspicion precedents in analyzing probable cause and vice versa, see, for example, Illinois v. Gates, 462 U.S. 213, 231–33 (1983) (quoting several reasonable suspicion precedents in redefining probable cause); Terry v. Ohio, 392 U.S. 1, 22, 27 (1968) (citing several probable cause precedents in explaining reasonable suspicion standard).

80 See, e.g., United States v. Rowland, 341 F.3d 774, 783 (8th Cir. 2003) (“In this Circuit, the validity of a *Terry* search does not depend upon the searching officer actually fearing the suspect is dangerous; rather, such a search is valid if a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous.”); United States v. Tharpe, 536 F.2d 1098, 1101 (5th Cir. 1976) (en banc) (“We know of no legal requirement that a policeman must feel ‘scared’ by the threat of danger . . . so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger.”); People v. Altman, 938 P.2d 142, 146 (Colo. 1997) (“Although the troopers in the current case may not have been subjectively concerned for their safety . . . , we nevertheless conclude that the search was objectively reasonable”); State v. Dumas, 786 So. 2d 80, 81–82 (La. 2001) (“The reasonableness of a frisk . . . is . . . governed by an objective standard,” and thus “[t]he relevant question is not whether the police officer subjectively believes he is in danger, or whether he articulates that subjective belief in his testimony at a suppression hearing.”); Smigliano, 694 N.E.2d at 344 (“Because the facts and circumstances known to the officer are sufficient to create a reasonable suspicion of operating under the influence in a reasonable police officer, a *Terry* stop is justified regardless of the officer’s subjective state of mind.”); State v. Wallace, 772 A.2d 892, 896 (N.H. 2001) (describing the defendant’s position that “the officer must subjectively suspect the defendant of a crime” as “mistaken” given that the court has “adopted an objective test for determining whether a specific and articulable basis for the requisite suspicion existed at the time of the stop”); State v. Hawley, 540 N.W.2d 390, 392 (N.D. 1995) (“[T]he reasonable-and-articulable-suspicion standard is objective, and it does not hinge upon the subjective beliefs of the arresting officer.”); State v. Evans, 618 N.E.2d 162, 169 (Ohio 1993) (rejecting the notion that “a critical factor in determining whether the officer had reasonable suspicion that the detainee was armed is whether the officer is in fear for his or her safety”); State v. Vento, 604 N.W.2d 468, 470 (S.D. 1999) (whether “reasonable suspicion existed when the stop was made is a determination based on an objective

analysis, they rely on the Supreme Court decisions adopting the perspective of “an objectively reasonable police officer” in defining probable cause and reasonable suspicion,⁸¹ as well as precedents like *Whren v. United States* that purportedly consider a police officer’s subjective state of mind irrelevant to Fourth Amendment analysis.⁸²

Whren, of course, is the case in which the Supreme Court put a resounding halt to claims of pretext searches. In unanimously rejecting the defendants’ contention that the undercover narcotics officers who stopped their vehicle were really interested in investigating drug activity, rather than enforcing the traffic laws,⁸³ the Court simply responded that the Fourth Amendment’s “concern with ‘reasonableness’” permits certain law enforcement actions “*whatever* the subjective intent” of the individual police officers involved.⁸⁴ Concluding that the traffic stop was reasonable because the officers had probable cause regarding a traffic violation, the Court “flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification.”⁸⁵ “[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal

standard,” and therefore the officer’s “subjective beliefs were irrelevant”); *O’Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000) (“[U]nder an objective analysis, it does not matter whether [the police officer] testified that he was afraid or was not afraid.”).

81 *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (quoted *supra* at text accompanying note 9).

82 *Whren v. United States*, 517 U.S. 806 (1996). *But cf.* *Kinports*, *supra* note 7, at 77–95 (pointing out that the Court’s Fourth Amendment jurisprudence shifts opportunistically between subjective and objective standards).

83 For evidence supporting this claim, see, e.g., David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 550 & n.39 (1997) (noting that the primary officer testified he was “out there almost strictly to do drug investigations” and that he stop[ped] drivers for traffic offenses “[n]ot very often at all,” and concluding “there was no doubt that their traffic enforcement actions were a pretext for drug investigation without probable cause or reasonable suspicion”); Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 MISS. L.J. 553, 591 (2004) (describing inconsistencies in the officers’ testimony concerning what traffic violations they observed and why they decided to stop the vehicle).

84 *Whren*, 517 U.S. at 814.

85 *Id.* at 812. In subsequent cases, the Court has not limited *Whren* to searches based on probable cause. *See United States v. Knights*, 534 U.S. 112, 122 (2001) (finding “no basis for examining official purpose” in a case involving warrantless search of the apartment of a probationer based only on reasonable suspicion); *Bond v. United States*, 529 U.S. 334, 337, 338 n.2 (2000) (noting, in analyzing whether the “tactile examination” of a bus passenger’s luggage constituted a Fourth Amendment search, that “the issue is not [the officer’s] state of mind, but the objective effect of his actions”); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) (acknowledging that “the analytical rubric of *Bond* was not ‘ordinary, probable-cause Fourth Amendment analysis’” (quoting *Whren*, 517 U.S. at 813)).

justification for the officer's action," the Court famously concluded, "does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."⁸⁶

Citing the Supreme Court's refusal to look at the police officer's subjective intent in *Whren* and other Fourth Amendment decisions,⁸⁷ the majority of lower courts have adopted a completely objective standard in analyzing the constitutionality of a *Terry* frisk. Nevertheless, a number of lower court opinions interpret *Terry*'s reasonable suspicion standard as requiring both that the officer in question actually believe the suspect is armed and that the belief be a reasonable one.⁸⁸ Still other courts have staked out an intermediate position: these courts view the relevant standard as essentially an objective one, but consider the officer's subjective beliefs to be a relevant factor in determining how the reasonable police officer would have interpreted the circumstances.⁸⁹

⁸⁶ *Whren*, 517 U.S. at 813 (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

⁸⁷ *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 400, 405 (2006) (concluding that the exigent circumstances exception applies so long as the police have "an objectively reasonable basis for believing that an occupant is seriously injured," irrespective of whether their "subjective motives" for entering were to "gather evidence" or "assist the injured"); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (holding that the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause"); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (noting that "the subjective intentions" underlying the officer's decision to prolong the traffic stop by asking *Robinette* to get out of his car "did not make the continued detention of respondent illegal under the Fourth Amendment"); *United States v. Leon*, 468 U.S. 897, 919 n.20, 922 n.23 (1984) (observing that the good faith exception to the exclusionary rule does not "turn on the subjective good faith of individual officers," but instead on "the objectively ascertainable question" whether "a reasonably well trained" police officer would have realized the search was unconstitutional).

⁸⁸ *See, e.g.*, *United States v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989) (requiring that police "must have an actual suspicion that weapons are present before a *Terry* search can be made"); *State v. Chapman*, 495 A.2d 314, 317 (Me. 1985) ("A finding that a *reasonable person could have had* a reasonable suspicion on the given facts is not *alone* sufficient"; in addition, "the court clearly must find that the police *actually had* such a suspicion at the time of the investigatory stop."); *State v. Lozada*, 748 N.E.2d 520, 523 (Ohio 2001) (observing that "this is not a *Terry* case because there was no evidence that Trooper Davies believed that the defendant was armed and dangerous"); *Wilson v. State*, 874 P.2d 215, 224–25 (Wyo. 1994) (concluding that stop was impermissible where police officer "admitted in his testimony that at no time . . . did he possess any articulable facts sufficient to create a reasonable suspicion," even though "[h]ypothetically, a police officer could have possessed reasonable suspicions"); *cf.* *State v. Miller*, 191 P.3d 651, 658 (Or. 2008) (defining probable cause to require both that the police officer "acted on the belief that there was a legal justification for [the arrest] (the subjective component) and the officer's belief was objectively reasonable (the objective component)").

⁸⁹ *See, e.g.*, *United States v. Roggeman*, 279 F.3d 573, 580 n.5 (8th Cir. 2002) (observing that "the objective approach the Supreme Court has mandated" did not require the court to "ignore all evidence of Trooper Moore's thought processes" because his "conclusions . . . are at least some evidence of what a reasonable officer in [his] position would

Given the Supreme Court's general hostility to subjective standards in its Fourth Amendment precedents, it is perhaps safer to assume that the Court would side with the majority of lower courts and consider the perceptions of a reasonable police officer controlling in assessing the validity of a *Terry* frisk.⁹⁰ Nevertheless, as discussed in the section that follows, support for the minority position can be found in some of the Court's stop-and-frisk rulings.

B. *The Supreme Court's Stop-and-Frisk Cases*

Although the Supreme Court has insisted that the definition of reasonable suspicion is an objective one,⁹¹ beginning with *Terry* itself, the Court created ambiguity as to whether reasonable suspicion incorporates any element of subjectivity. On the one hand, the *Terry* Court called the relevant inquiry an "objective standard" and framed it in objective terms, asking "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."⁹² Several pages later, however, the Court used more subjective language in summarizing its opinion as "merely hold[ing]" that a frisk is permissible if "a police officer observes unusual conduct *which leads him reasonably to conclude* in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently danger-

have inferred from the facts and circumstances of the encounter"); *United States v. Prim*, 698 F.2d 972, 975 (9th Cir. 1983) ("Although the existence of reasonable suspicion or probable cause is judicially viewed under an objective standard, it is a standard applied to the actual and/or perceived belief of the law enforcement officer as he either stops and detains or engages in search and seizure."); *People v. Flowers*, 688 N.E.2d 626, 630 (Ill. 1997) ("Although the standard is an objective one, the officer's subjective belief regarding the safety of the situation is one of the factors that may be considered in determining whether a weapons frisk was valid under *Terry*."); *State v. Warren*, 78 P.3d 590, 592 (Utah 2003) (Even though "an objective standard must be applied to determine the reasonableness of a *Terry* frisk under the totality of the circumstances," the officer's "subjective belief may nevertheless be factored into the objective analysis, though it is never alone determinative."); *State v. Kyles*, 675 N.W.2d 449, 458, 452 (Wis. 2004) ("[A]n officer's own evaluation of the circumstances may provide insight to factor into the objective analysis. . . . A court may therefore consider an officer's belief that his or her safety or that of others was or was not in danger in determining whether the objective standard of reasonable suspicion was met.").

⁹⁰ *But cf. infra* notes 137–143 and accompanying text (suggesting that the minority view is not inconsistent with a narrow reading of the *Whren* line of cases).

⁹¹ *See supra* notes 9–10 and accompanying text.

⁹² *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968); *see also id.* at 21–22 ("[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925))).

ous.”⁹³ Although this language mandates that the officer’s belief must be objectively reasonable, it also seems to envision that the circumstances must actually “lead” the particular officer to “conclude” that the suspect is armed.

Likewise, in *Sibron v. New York*, one of the companion cases to *Terry*, the Court suggested the importance of the police officer’s subjective beliefs, noting that the officer “must be able to point to particular facts from which *he reasonably inferred* that the individual was armed and dangerous.”⁹⁴ Moreover, in applying the reasonable suspicion standard and finding inadequate support for the frisk conducted in that case, the Court examined the particular police officer’s subjective intent. Specifically, the Court observed that Officer Martin never “seriously suggest[ed] that *he was in fear* of bodily harm and . . . searched Sibron in self-protection to find weapons,” but rather “made it abundantly clear” that he frisked Sibron because he “sought narcotics.”⁹⁵

Language to similar effect in subsequent Supreme Court decisions likewise seems to assume that the officer in question must subjectively believe the suspect is armed in order to satisfy the reasonable suspicion standard. Thus, in *Maryland v. Buie*, the Court characterized the reasonable suspicion needed to conduct a protective sweep as requiring that “the searching officer *possesses* a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger.”⁹⁶ Likewise, *Michigan v. Long* allowed a *Terry* “frisk” of a car so long as “the police officer *possesses* a reasonable belief based on ‘specific and articulable facts which . . . reasonably warrant’ the officer in *believing* that the suspect is dangerous and . . . may gain immediate control of weapons.”⁹⁷ And in *Adams v. Williams*, the Court described the purpose of a frisk as “allow[ing] the officer to pursue his investigation *without fear* of violence,” “not to discover evidence of crime.”⁹⁸

93 *Id.* at 30 (emphasis added); *see also id.* (requiring as well that “nothing in the initial stages of the encounter serves to *dispel [the officer’s] reasonable fear* for his own or others’ safety” (emphasis added)).

94 392 U.S. 40, 64 (1968) (emphasis added).

95 *Id.* at 46, 64 (emphasis added).

96 494 U.S. 325, 337 (1990) (emphasis added); *see also id.* at 337 (Stevens, J., concurring) (pointing out that “Officer Rozar testified that he was not worried about any possible danger when he arrested Buie”).

97 463 U.S. 1032, 1049 (1983) (emphasis added) (quoting *Terry*, 392 U.S. at 21).

98 407 U.S. 143, 146 (1972) (emphasis added); *see also* *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009) (“To justify a patdown . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”); *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (requiring that the officer “must have a particularized and objec-

Although these cases obviously have an objective component—they require that the officer’s suspicions be reasonably grounded—they seem to require as well an actual subjective fear on the part of the officer. As the First Circuit succinctly pointed out, “[a]n officer cannot have a *reasonable* suspicion that a person is armed and dangerous when he in fact has *no* such suspicion.”⁹⁹

Nevertheless, as noted above, the contrary position is the prevailing view among the lower courts, and it likewise enjoys some scholarly support. Thus, for example, Wayne LaFave describes the *Terry* standard as “*purely* objective,” incorporating “no requirement that an actual suspicion by the officer be shown.”¹⁰⁰ But even he paraphrases *Terry* in subjective terms—as allowing a stop when the officer “reasonably *believes* that the person *may be* guilty of a crime.”¹⁰¹ Moreover, he reaches his conclusion in responding to the “concern” that *Terry* stops not be allowed based on “the subjective judgment” of the police, thus according them “carte blanche to detain ‘on a purely subjective reaction.’”¹⁰² In viewing the *Terry* analysis as strictly objective, however, LaFave makes the jump from the noncontroversial proposition that a police officer’s subjective belief in the permissibility of her actions is by itself *insufficient* to support their constitutionality to the very different point—the one in question here—that the officer’s subjective beliefs are completely *irrelevant*.

The language in *Terry* cited in support of a purely objective approach to reasonable suspicion arose in a similar context. In explaining the need for an objective inquiry, the Court reasoned that “it is

itive basis for suspecting the particular person stopped of criminal activity”); *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (summarizing *Terry* as allowing an officer, “for his own protection and safety, [to] conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted”).

⁹⁹ *United States v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989).

¹⁰⁰ 4 LAFAVE, *supra* note 25, § 9.5(a), at 472; *see also id.* § 9.6(a), at 623 (likewise assuming that “[t]he test [for a frisk] is an objective rather than a subjective one, just as with the probable cause needed to arrest or search, and thus it is not essential that the officer actually have been in fear”); *cf.* 1 DRESSLER & MICHAELS, *supra* note 25, § 8.02[B], at 122 (noting that “an officer’s *lack* of belief that she has probable cause does not foreclose a finding to the contrary”). *But cf.* 2 LAFAVE, *supra* note 25, § 3.2(b), at 38 (recognizing that “a purely objective test” might not make sense in one type of scenario—where an officer seized a container that “he did not know nor even suspect . . . contained anything other than cigarette tobacco”—though finding it “debatable” “[w]hether such a fine distinction is sound” (quoting *DiPasquale v. State*, 406 A.2d 665, 667 (Md. Ct. Spec. App. 1979))); Bradley, *supra* note 44, at 356–69 (advocating an objective standard to evaluate frisks, but a more subjective approach in measuring probable cause and the reasonable suspicion necessary to stop).

¹⁰¹ 4 LAFAVE, *supra* note 25, § 9.5(a), at 472.

¹⁰² *Id.* at 471–72 (quoting N.Y. STATE BAR ASS’N, REPORT OF THE COMMITTEE ON PENAL LAW AND CRIMINAL PROCEDURE (1964)).

imperative that the facts be judged against an objective standard” because “simple ‘good faith on the part of the arresting officer is not enough.’”¹⁰³ “If subjective good faith alone were the test,” the Court continued, “the protections 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.”¹⁰⁴ Thus, as the Supreme Court and LaFare both recognize, a police officer’s subjective good faith is insufficient to validate law enforcement techniques that do not satisfy objective standards of conduct. That observation, however, provides no basis for preferring a purely objective test and ignoring the police officer’s subjective beliefs. Moreover, the policies underlying the Fourth Amendment discussed in the next section suggest the importance of retaining *both* objective and subjective considerations in analyzing reasonable suspicion.

C. Fourth Amendment Policies

Just because a strictly objective definition of reasonable suspicion is not mandated by Supreme Court precedent does not, of course, make it wrong. In fact, however, it is wrong, even taking the views of the Fourth Amendment favored by the current Court. Much has been made of the single-minded emphasis on deterrence in contemporary Fourth Amendment jurisprudence.¹⁰⁵ In recent years, that emphasis has led the Court to focus in some cases on reasonableness and in others on the police officer’s culpability. But whether one views police culpability, deterrence, or general notions of reasonableness as preeminent, the purely objective approach to reasonable

103 Terry v. Ohio, 392 U.S. 1, 21–22 (1968) (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964) (quoting Henry v. United States, 361 U.S. 98, 102 (1959))).

104 *Id.* at 22 (quoting Beck, 379 U.S. at 97); see also United States v. Leon, 468 U.S. 897, 915 n.13 (1984) (making the same point).

105 See, e.g., Herring v. United States, 129 S. Ct. 695, 700 (2009) (observing that the Court has “focused on the efficacy of the [exclusionary] rule in deterring Fourth Amendment violations”); Hudson v. Michigan, 547 U.S. 586, 591 (2006) (calling the exclusionary rule “our last resort, not our first impulse . . . applicable only . . . ‘where its deterrence benefits outweigh its “substantial social costs”” (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (quoting Leon, 468 U.S. at 907))); Leon, 468 U.S. at 916 (noting that “the exclusionary rule is designed to deter police misconduct”). But see Herring, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (expressing the views of four Justices and endorsing “a more majestic conception” of the exclusionary rule (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting))). For criticism of both the Herring dissent and the views of the majority, see Donald A. Dripps, *The “New” Exclusionary Rule Debate: From “Still Preoccupied with 1985” to “Virtual Deterrence”* (San Diego Legal Studies, Paper No. 09-009, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1376480 (concluding that “both blocs are wrong”).

suspicion is flawed. The policies the Court claims underlie the Fourth Amendment therefore suggest that a frisk cannot be justified where the police officer actually believed the suspect posed no danger.

In its opinion last Term in *Herring v. United States*, the Supreme Court focused on the personal culpability of the particular police officer involved in the case, refusing to apply the exclusionary rule to an “isolated” case of police “negligence.”¹⁰⁶ Rather, the Court restricted the exclusionary remedy to “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”¹⁰⁷ Using the culpability rubric, an officer who proceeds to frisk a suspect without any belief that the suspect is armed is clearly acting with a culpability greater than negligence. The limitations of *Terry* are well known, and a police officer who conducts a frisk to uncover evidence¹⁰⁸ or out of habit¹⁰⁹—and with no fear for her safety—cannot be considered merely negligent.¹¹⁰

106 129 S. Ct. at 698 (involving a situation where officer reasonably believed there was an outstanding warrant for the defendant’s arrest, but in fact the warrant had been recalled and never deleted from the police department’s computer database). The Court also mentioned that the officer’s negligence was “attenuated from the arrest” in *Herring*, but did not elaborate further or indicate how important the notion of “attenuation” was to its conclusion. *Id.* For a discussion of *Herring*’s attenuation language, see Posting of Richard McAdams to the University of Chicago Faculty Blog, http://uchicagolaw.typepad.com/faculty/mcadams_richard/ (Jan. 17, 2009, 0:06 CST).

107 *Herring*, 129 S. Ct. at 702 (reasoning that “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system”). For a trenchant attack on *Herring*, see Wayne R. LaFare, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

108 *See, e.g.*, *United States v. Nee*, 261 F.3d 79, 83 (1st Cir. 2001) (pointing out that the district court found that the frisk was actually “an intentional search for evidence of a crime”); *United States v. Prim*, 698 F.2d 972, 977 (9th Cir. 1983) (“[Officer] really expected to find narcotics . . . and used the pat-down as a ruse.”); *People v. Altman*, 938 P.2d 142, 146 (Colo. 1997) (“[T]he district court determined that the troopers’ motive in searching Altman’s vehicle was to determine what Altman had put underneath his seat, not to conduct a protective search due to safety concerns.”); *cf.* *Florida v. Royer*, 460 U.S. 491, 504–05 (1983) (plurality opinion) (concluding that police exceeded the permissible scope of *Terry* because there was “no indication” that “reasons of safety and security” “prompted [them] to transfer the site of the encounter”; instead, their “primary interest” was in searching the defendant’s luggage).

109 *See, e.g.*, *People v. Flowers*, 688 N.E.2d 626, 631 (Ill. 1997) (officer performed frisk “simply because it was his routine to frisk persons stopped for investigatory questioning”); *State v. Lozada*, 748 N.E.2d 520, 522 (Ohio 2001) (officer admitted that his “standard practice” was to conduct a frisk during a traffic stop); *O’Hara v. State*, 27 S.W.3d 548, 549 (Tex. Crim. App. 2000) (officer’s “standard procedure” was to frisk the driver and then “have the individual sit inside his patrol car”); *State v. Warren*, 78 P.3d 590, 593 (Utah 2003)

Admittedly, the Court asserted somewhat mysteriously in *Herring* that “[t]he pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers.’”¹¹¹ But it is difficult to reconcile that comment with the Court’s acknowledgment just two sentences later that an officer’s “knowledge” is relevant in assessing good faith—as well as in evaluating probable cause.¹¹² In addition, the very notion of culpability seems to be a subjective one, and in fact the Court drew a distinction in *Herring* between a “negligen[t] or innocent mistake” and one that is “‘deliberate’” or “‘knowing[.]’” a distinction phrased explicitly in subjective terms.¹¹³ Despite the Court’s reference to objective analytical frameworks, then, an officer who frisks a suspect she does not believe to be armed does not seem to fall on the negligence side of *Herring*’s culpability line.

A purely objective approach to reasonable suspicion is similarly indefensible under the notion of deterrence simpliciter. Using deterrence as the starting point, the judicial system *can* hope to influence the conduct of the police officer who conducts a frisk despite her subjective belief that the suspect is unarmed. Although the Court asserted in *United States v. Leon* that “[g]rounding [Fourth Amendment doctrine] in objective reasonableness . . . retains the value of the exclusionary rule as an incentive” for the police to comply with constitutional dictates,¹¹⁴ its opinion in *Herring* recognized that deterrence is actually *easier* to achieve when an officer acts with subjective awareness than when her actions fail to satisfy an objective standard

(officer “performs a *Terry* frisk as a matter of routine on anyone he orders out of a vehicle”).

110 Cf. Craig M. Bradley, *Red Herring or the Death of the Exclusionary Rule?*, TRIAL, Apr. 2009, at 52, 53–54 (taking the position that police misconduct will “likely” be considered merely negligent so long as the officers “thought their conduct was consistent with constitutional requirements,” and predicting that “in most cases, it will be impossible” for defendants to prove “systemic error or reckless disregard of constitutional requirements” (quoting *Herring*, 129 S. Ct. at 702)).

111 *Herring*, 129 S. Ct. at 703 (quoting petitioner’s reply brief).

112 *Id.* (quoted *supra* at note 61). For further discussion of police knowledge as an element of an objective standard, see *supra* notes 59–76 and accompanying text.

113 *Herring*, 129 S. Ct. at 703 (quoting *Franks v. Delaware*, 438 U.S. 154, 171 (1978)); cf. *id.* at 710 n.7 (Ginsburg, J., dissenting) (pointing out that “[i]t is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police” (citing *Whren v. United States*, 517 U.S. 806, 812–13 (1996))).

114 *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring in the judgment)).

of reasonableness.¹¹⁵ This is a lesson that criminal law has long recognized as well.¹¹⁶

Finally, the Court described its “general Fourth Amendment approach” in *Samson v. California* not in terms of deterrence or police culpability, but as a free-wheeling balancing test, pursuant to which the Court “‘examin[es] the totality of the circumstances’ to determine whether a search is reasonable within the meaning of the Fourth Amendment.”¹¹⁷ “Whether a search is reasonable,” the Court continued, turns on balancing the “‘intru[sion] upon an individual’s privacy’” against “‘the promotion of legitimate governmental interests.’”¹¹⁸ Given the current Court’s view that deterring impermissible police behavior is the predominant “legitimate governmental interest[.]” underlying the Fourth Amendment, in theory the results of this balancing process should not be much different from a deterrence-driven approach (especially when coupled with *Herring*’s emphasis on culpability).¹¹⁹

Arguably, however, *Samson*’s ad hoc balancing test could be used to defend a purely objective definition of reasonable suspicion—by characterizing a frisk as a minor intrusion and finding that “legiti-

115 See *Herring*, 129 S. Ct. at 702 (observing that the “deterrent value of the exclusionary rule is most likely to be effective’ when ‘official conduct was flagrantly abusive of Fourth Amendment rights’” (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part)); see also *United States v. Henry*, 447 U.S. 264, 282 n.6 (1980) (Blackmun, J., dissenting) (commenting that “focusing on deliberateness” reaches the “conduct that is most culpable . . . and most susceptible to being checked by a deterrent”). At times, even the *Leon* Court seemed to acknowledge this point. See *Leon*, 468 U.S. at 919 (pointing out that “[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in *willful, or at the very least negligent, conduct*” (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)) (emphasis added)); *id.* (noting that if the exclusionary rule is intended to deter constitutional violations, it should apply “only if” the police “had knowledge, or may properly be charged with knowledge, that the search was unconstitutional” (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)) (emphasis added)).

116 See MODEL PENAL CODE § 210.4 cmt. at 86–87 (Proposed Official Draft 1962) (describing the view that “inadvertent negligence is not a sufficient basis for criminal conviction, both on the utilitarian ground that threatened sanctions cannot influence the inadvertent actor and on the moral ground that criminal punishment should be reserved for cases involving conscious fault”).

117 *Samson v. California*, 547 U.S. 843, 848 (2006) (relying on general notions of reasonableness in upholding the warrantless, suspicionless search of a parolee whose release had been conditioned on his submission to a broad range of searches) (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)).

118 *Id.* (quoting *Knights*, 534 U.S. at 118–19).

119 See *Herring v. United States*, 129 S. Ct. 695, 702 n.4 (2009) (refusing to apply the exclusionary rule to cases of isolated police negligence, despite acknowledging that the exclusionary remedy could have some “deterrent effect” in such cases, because “exclusion is not worth the cost” under the balancing test).

mate governmental interests” are served so long as a reasonable officer would have deemed a frisk to be necessary. On the other hand, allowing an officer with no subjective fear of a suspect to conduct a *Terry* frisk does not sound particularly “reasonable.” If the officer’s “mere ‘hunch’” would not qualify as reasonable suspicion,¹²⁰ then the construct of the hypothetical reasonable police officer cannot justifiably be used to “convert[]” that “hunch . . . into a ‘reasonable suspicion’ by second thoughts developed at the suppression hearing.”¹²¹

Principles of tort and criminal law confirm this view. In these areas of the law, objective standards supplement rather than supplant subjective inquiries. Thus, a self-defense claim is unavailable to a criminal defendant who does not actually believe her victim constitutes a threat, even if the reasonable person confronting the same circumstances would fear for her life.¹²² Likewise, one who is unperturbed by provocation that would enrage a reasonable person cannot take advantage of the heat of passion defense and is therefore convicted of murder rather than voluntary manslaughter.¹²³ In the realm of tort law, as discussed above, the driver who is aware of a pothole and fails to take appropriate precautions can be held to be negligent even if a reasonable person would not have realized there were any defects in the road.¹²⁴ Given that the objective standards used in tort and criminal law are likewise designed to assess culpability¹²⁵ and de-

120 United States v. Arvizu, 534 U.S. 266, 274 (2002) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

121 *State v. Chapman*, 495 A.2d 314, 317 (Me. 1985); *cf.* *United States v. Lott*, 870 F.2d 778, 784 (1st Cir. 1989) (observing that “where a search has been made without any legal basis, we do not think that an ex post facto reconstruction based upon an argument of objective reasonableness can validate the search” because “[w]hile other officers might have viewed the situation differently, it is the conduct of these officers which we are judging”); *Wilson v. State*, 874 P.2d 215, 225 (Wyo. 1994) (noting, in rejecting an objective definition of reasonable suspicion, that “[o]ur constitutional guarantees would mean little if any search or seizure which produced evidence of criminal conduct was justified post hoc”).

122 See 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 10.4(c), at 147–50 (2d ed. 2003).

123 See *id.* § 15.2(c), at 506.

124 See *supra* text accompanying note 66; see also PROSSER AND KEETON ON THE LAW OF TORTS 212–13 (W. Page Keeton et al. eds., 5th ed. 1984) (observing that willful, wanton, or reckless conduct constitutes “an aggravated form of negligence, . . . which is so far from a proper state of mind that it . . . may justify a broader duty, and more extended liability for consequences”).

125 See, e.g., Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789 (1994) (describing “the moral norm implicit in the reasonable person test” used to evaluate self-defense claims); George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1290 (1974) (“[T]he standard of the reasonable person provides a substitute for inquiries about the actor’s character and culpability.”).

ter undesirable behavior,¹²⁶ here, as well, the police officer who does not actually believe a suspect is armed should not be deemed to have the reasonable suspicion necessary to frisk.

Even though balancing tests like the one applied in *Samson* are notoriously subject to manipulation,¹²⁷ a strictly objective definition of reasonable suspicion comes up short whether one focuses on police officer culpability, deterrence of unconstitutional police behavior, or even general notions of reasonableness. Allowing frisks of suspects who an officer does not subjectively believe to be dangerous is problematic for yet another reason: coming back full circle to the question discussed in Part I, a purely objective approach to reasonable suspicion cannot be reconciled with the notion that police training and experience are relevant in making probable cause and reasonable suspicion determinations. The link between the two issues is addressed in the following section.

III. CONNECTING THE DOTS

Although both of the issues discussed above have generated a conflict among the lower courts, the majority of them treat the two issues differently, considering a police officer's training, experience, and knowledge in assessing probable cause and reasonable suspicion, but ignoring the officer's subjective beliefs in analyzing the permissibility of a *Terry* frisk. But the same reasoning that has led the courts to take a police officer's training and experience into account in measuring probable cause dictates that the officer's fear of the suspect should be considered in evaluating the justifications for a *Terry* frisk. If it is appropriate in *Pennsylvania v. Dunlap* to credit what Officer Devlin subjectively knew about drug deals and the particular Philadelphia neighborhood in deciding whether his observations gave him probable cause to arrest,¹²⁸ then it is likewise appropriate in *Sibron v. New*

126 See, e.g., *Regina v. Morhall*, (1996) 1 A.C. 90, 97–98 (H.L.) (pointing out that the purpose of the reasonable person test in voluntary manslaughter cases is “to introduce, as a matter of policy, a standard of self-control which has to be complied with if provocation is to be established in law”); PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 124, at 173 (noting that “[t]he whole theory of negligence presupposes some uniform standard of behavior”).

127 See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974) (concluding that a “sliding scale approach . . . converts” the Fourth Amendment into “one immense Rorschach blot,” which can “only produce more slide than scale” and “means in practice . . . that appellate courts defer to trial courts and trial courts defer to the police”).

128 See *supra* text accompanying notes 1 & 28–31 (discussing *Pennsylvania v. Dunlap*, 129 S. Ct. 448 (2008) (Roberts, C.J., dissenting from denial of certiorari)).

York to acknowledge that Officer Martin did not subjectively believe Sibron was armed in evaluating the frisk at issue there.¹²⁹

One conceivable objection to equating the two scenarios might be that there is a distinction between relying on an officer's "knowledge" in assessing probable cause and considering her subjective "beliefs" in evaluating reasonable suspicion. Even without going as far as the postmodern position that all knowledge is contingent,¹³⁰ this purported distinction quickly breaks down.¹³¹ In *Dunlap*, Officer Devlin may have actually "known" where he was conducting surveillance and how many prior drug arrests he had made in the area. But, Chief Justice Roberts' assertion notwithstanding, the officer did not "know" the neighborhood was "[t]ough as a three-dollar steak."¹³² Nor did he "know" that Dunlap "wasn't buying bus tokens"¹³³ or "making change for a dollar."¹³⁴ Rather, it was the officer's "belief" that he had just witnessed a drug transaction. Likewise, in *Herring*, Investigator Anderson could not have "known" there was an outstanding warrant for Herring's arrest, when the warrant had in fact been recalled some months earlier.¹³⁵

This is not to say, of course, that Officer Devlin needed to know for certain what "small objects" had been exchanged in order to

129 See *supra* text accompanying notes 94–95 (discussing *Sibron v. New York*, 392 U.S. 40 (1968)). For an opinion drawing this link, see *State v. Warren*, 78 P.3d 590, 596 (Utah 2003) (noting—in support of its observation that the officer involved in the case is "in the best position to evaluate the circumstances and determine the reasonableness of a *Terry* frisk"—that "[i]n fact, in other situations, an officer's subjective factual determination based on experience and specialized training has been given due weight as part of the objective analysis" and the Supreme Court "[t]hus . . . has demonstrated that there are subjective elements that may be considered in an otherwise objective analysis" (citing *United States v. Arvizu*, 534 U.S. 266 (2002))); cf. *State v. Kyles*, 675 N.W.2d 449, 457 (Wis. 2004) (rejecting the State's contention that police officers should not even be questioned about their subjective fears of the suspect, though declining to "address the defendant's litany of unintended consequences"—i.e., that "under the State's position, . . . an officer's particular training, experience, and perceptions [could not] be considered in determining the reasonableness of a protective search for weapons" (citing *Arvizu*, 534 U.S. at 270–71, for the proposition that an officer's "subjective interpretation of the facts is considered as part of the totality of circumstances"))).

130 See generally JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* xxiv (Geoff Bennington & Brian Massumi trans., 1984) (defining postmodernism as "incredulity toward metanarratives").

131 Cf. Bradley, *supra* note 44, at 363 (observing that "[i]t cannot, or at least should not, be said that facts are 'known' to the officer if he does not believe those 'facts'").

132 *Dunlap*, 129 S. Ct. at 448 (Roberts, C.J., dissenting from denial of certiorari).

133 *Id.*

134 *Commonwealth v. Dunlap*, 941 A.2d 671, 681 (Pa. 2007) (Saylor, J., concurring).

135 *Herring v. United States*, 129 S. Ct. 695, 698 (2009) (discussed *supra* at notes 106–113 and accompanying text).

make an arrest.¹³⁶ But just as Officer Devlin's trained beliefs about drugs deals and neighborhoods can help give rise to probable cause, so Officer Martin's trained belief that Sibron was unarmed suggests an absence of the reasonable suspicion required to frisk.

Introducing this element of subjectivity in measuring probable cause and reasonable suspicion can arguably be reconciled even with much of the Court's reasoning in the *Whren* line of cases. Criminal law typically considers a defendant's *motives* for acting irrelevant in assessing *mens rea*,¹³⁷ and so too much of the Court's discussion of "intent" and "subjective" considerations in *Whren* and its progeny really involves the police officer's underlying motives, rather than her knowledge (or even her purpose).¹³⁸ In *Whren* itself, for example, the Court rejected the defendants' claim that undercover narcotics officers had an "ulterior motive" for stopping the vehicle that had nothing to do with enforcing the traffic laws.¹³⁹ Likewise, in *Brigham City v. Stuart*, the Court refused to limit the exigent circumstances exception to cases where the "subjective motives" of the police who made a warrantless entry were to "assist the injured" rather than "gather evidence."¹⁴⁰ Thus, a narrow reading of *Whren* and its ilk—as foreclosing consideration of police motives in ruling on Fourth Amendment challenges¹⁴¹—is not inconsistent with taking into account an officer's

136 See, e.g., *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) (noting that "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity").

137 See, e.g., *United States v. Pomponio*, 429 U.S. 10, 11–12 (1976) (per curiam) (refusing to require evidence of evil motive to prove "willful" filing of false tax returns); *Boyle v. State*, 214 S.W.3d 250, 254 (Ark. 2005) (refusing to credit evidence of good motive on the grounds that an intentional killing qualifies as murder even if "motivated by love rather than malice"). See generally 1 LAFAYETTE, *supra* note 122, § 5.3(a), at 358 (discussing the relationship between a defendant's motive and criminal intent).

138 In criminal law parlance, a defendant acts knowingly if she was aware of what she was doing and purposely if she wanted to act in the way she did (irrespective of her underlying motive for doing so). See, e.g., MODEL PENAL CODE § 2.02, at 225 (Proposed Official Draft 1962).

139 *Whren v. United States*, 517 U.S. 806, 812 (1996) (described *supra* at notes 83–86 and accompanying text).

140 *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (discussed *supra* at note 87); cf. *Herring v. United States*, 129 S. Ct. 695, 703 (2009) (distinguishing permissible inquiries concerning a police officer's "knowledge" from impermissible consideration of her "subjective intent") (quoted *supra* at note 61); see also *supra* note 87 (citing additional Supreme Court opinions).

141 Further evidencing the Court's lack of consistency in this area, it has even made reference to police motive in Fourth Amendment rulings subsequent to *Whren*. See *Kinports*, *supra* note 7, at 84–86 & nn.59 & 66 (citing cases where the Supreme Court has evaluated the subjective motivations of officers). The most recent example is *Arizona v. Gant*, 129 S. Ct. 1710 (2009), where the Court noted that searches incident to arrest are "reasonable 'in order to remove any weapons [the arrestee] might seek to use' and 'in order to prevent

knowledge and beliefs, either in assessing probable cause or in evaluating the reasonableness of a *Terry* frisk.

Admittedly, some Supreme Court opinions contain more sweeping language, suggesting the irrelevance of *any* subjective factors in Fourth Amendment cases.¹⁴² But these more expansive statements cannot be reconciled with the Court's express recognition that a police officer's knowledge is important, for example, in assessing probable cause. As discussed above, asking what a particular police officer knew is quintessentially a subjective inquiry.¹⁴³

In fact, a standard framed in purely objective terms would analyze—in evaluating the reasonable suspicion necessary to conduct a *Terry* frisk, for instance—whether a reasonable police officer would have feared the suspect was armed given what that reasonable officer knew based on *her* particular training and experience. That is, reasonable suspicion would exist if the officer actually involved in the case *should* have been aware of evidence giving rise to a reasonable belief that the suspect was carrying a weapon.¹⁴⁴ A truly objective standard would therefore focus entirely on the reasonable police officer—and what she would have believed based on the information she would have had.

That, of course, is not the position the courts have taken in Fourth Amendment cases. Instead, the courts—including the Supreme Court¹⁴⁵—require that probable cause and reasonable suspicion determinations be made based on the information available to the particular officer in question.¹⁴⁶ And they are correct in doing so. If a

[the] concealment or destruction' of evidence," and warned that "a broad reading of [these rules would] give[] police limitless discretion to conduct exploratory searches." *Id.* at 1716, 1720 n.5 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969) (emphasis added)).

142 *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000) (citing *Whren* in support of the more general proposition that a police officer's "subjective intent . . . is irrelevant in determining whether that officer's actions violate the Fourth Amendment"); *Maryland v. Macon*, 472 U.S. 463, 470–71 (1985) (noting that "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken" (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978))).

143 *See supra* notes 59–76 and accompanying text.

144 *Cf.* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 12 cmt. A (Proposed Final Draft No. 1, 2005) (noting that "[t]ort law has always inquired into what the actor 'knew or should have known'").

145 *See supra* notes 59–63 and accompanying text.

146 *See, e.g.*, *United States v. McKie*, 951 F.2d 399, 402 (D.C. Cir. 1991) (explaining that the objective definition of reasonable suspicion requires courts to "look to the record as a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious"); *United States v.*

particular officer, for example, associated a “rusty” screw and a “somewhat loose” panel in a car with normal “wear and tear” rather than hidden contraband,¹⁴⁷ or thought that the best route to a popular tourist attraction was the “unpaved and primitive” one the suspect was taking,¹⁴⁸ then the fact that some other officer could reasonably have drawn a different inference should not help provide the necessary quantum of suspicion.¹⁴⁹ Applying a strictly objective standard and upholding a stop or arrest on the theory that some reasonable police officer might have had the information necessary to justify it would allow prosecutors and courts to speculate about an infinite number of potentially suspicious circumstances and would thereby go a long way towards eliminating any sort of suspicion requirement.

Thus, taking into account a particular police officer’s knowledge, training, and experience injects a subjective inquiry into the probable cause analysis that as a matter of consistency should also be imported into the reasonable suspicion standard applied to *Terry* frisks. Admittedly, the result is, as the *Devenpeck* Court feared, that probable cause and reasonable suspicion determinations may “vary” depending on the location and timing of the incident in question and the officer’s status as a veteran or a rookie.¹⁵⁰ But those same variations became a distinct possibility as soon as the Court acknowledged the relevance of the officer’s training and experience—and (as even *Devenpeck* itself recognized)¹⁵¹ her knowledge—in evaluating probable cause. More-

Tharpe, 536 F.2d 1098, 1100–01 (5th Cir. 1976) (en banc) (endorsing an objective approach to reasonable suspicion, but demanding proof that the officer was “aware of specific facts which would warrant a reasonable person to believe he was in danger”); *State v. Kyles*, 675 N.W.2d 449, 453 (Wis. 2004) (noting that “[i]n determining whether a frisk was reasonable, a court may look ‘to any fact in the record, as long as it was known to the officer at the time he conducted the frisk’” (quoting *State v. McGill*, 609 N.W.2d 795, 802 (Wis. 2000))).

147 *Ornelas v. United States*, 517 U.S. 690, 693, 700 (1996) (described *supra* at notes 16–17 and accompanying text).

148 *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (described *supra* at notes 12–15 and accompanying text).

149 Even the “collective knowledge” doctrine, which allows the courts to pool the knowledge of different police officers in assessing probable cause, insists that the officers involved in the case must have actually been aware of the suspicious circumstances. *See, e.g.*, *United States v. Madroza-Acosta*, 221 F. App’x 756, 761 n.3 (10th Cir. 2007) (applying the “fellow officer rule,” and examining in detail precisely what information was “actually provided” to the police); *United States v. Parra*, 402 F.3d 752, 764–65 (7th Cir. 2005) (observing that the “collective knowledge doctrine” requires the courts to ascertain “what knowledge can be imputed to the officers at the time that they arrested” the suspect).

150 *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004) (quoted *supra* at text accompanying note 21).

151 *See id.* at 152, 155 (quoted *supra* at notes 23–24 and accompanying text).

over, they are no more open to criticism as “arbitrarily variable”¹⁵² than other differences in outcome that result because of some factual peculiarity in the case, and that predictably occur in applying the fact-intensive, totality-of-the-circumstances definitions of probable cause and reasonable suspicion the Court has given us.¹⁵³

CONCLUSION

Recent years have seen the Supreme Court fluctuating inexplicably between objective and subjective standards in articulating the Fourth Amendment rules that govern police searches and seizures. The Court now has an opportunity to repair some of the damage and begin to move toward greater consistency by resolving the conflict that has arisen in the lower courts concerning the relevance of a police officer’s subjective beliefs in analyzing the permissibility of a *Terry* frisk. Just as the Court has repeatedly indicated that a particular police officer’s knowledge, training, and experience help inform determinations of probable cause and reasonable suspicion, so too the officer’s subjective belief that a suspect was unarmed should be considered in assessing the reasonable suspicion required to justify a frisk.

152 *Id.* at 154 (quoted *supra* at text accompanying note 20).

153 *See, e.g., Illinois v. Gates*, 462 U.S. 213, 232, 238 n.11 (1983) (describing probable cause as “a fluid concept” that “turn[s] on the assessment of probabilities in particular factual contexts [and is] not readily, or even usefully, reduced to a neat set of legal rules,” and cautioning that “[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful ‘precedent’ for another”).