

Authoritarian Pretext and the Fourth Amendment

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The Supreme Court does not consider pretext relevant to a Fourth Amendment violation in almost any context. Although the Court’s focus on objectivity has drawn extensive academic criticism, there has been little attempt to disaggregate the subjective motives of law enforcement officers to identify those that most threaten Fourth Amendment values. This Article argues for a new role for motive in Fourth Amendment doctrine by drawing lessons from abusive executive enforcement practices in modern authoritarian states. The experiences of those societies show that the greatest risks to the rule of law arise when the executive selectively enforces the law for purposes of power, money, or dogma—a practice I term “authoritarian pretext.” This Article argues that a core purpose of the Fourth Amendment is to protect the balance of power between citizens and government, and that to prevent authoritarian abuse and arbitrariness, the Fourth Amendment should be interpreted to prohibit selective enforcement when motivated by the reasons that most threaten that balance. The Amendment’s text, purpose, and history show that authoritarian pretext should render a search or seizure constitutionally unreasonable.

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INTRODUCTION

The Fourth Amendment today has little to say about pretext. Constitutional doctrine has evolved to block selective enforcement of the law typically only when another constitutional amendment independently prohibits it. For example, the Fourteenth Amendment forbids targeting based on race or membership in another protected class, and accordingly, a police officer legally cannot make a traffic stop because the driver is African American.¹ An officer can, however, pull her over for expired tags even if his underlying motive is to look for drugs. The Fourth Amendment prohibits “unreasonable searches and seizures,”² and the Supreme Court has declared it normally reasonable to enforce the law for pretextual reasons.³

As the Court has embraced an objective approach to the Fourth Amendment, scholars have raised a number of theoretical⁴ and practical⁵ concerns about the decision to disregard police motives. The Court largely has ignored their objections. Instead, it has continued down the path of objectivity, most recently in *Heien v. North Carolina*,⁶ in which the Court held that an officer’s objectively reasonable mistake of law justifies a traffic stop under the Fourth Amendment.⁷ That decision carries troubling implications when considered in light of the Court’s earlier decisions and predictable cases yet to come. In a world where the Fourth Amendment has little to say

¹ See *Whren v. United States*, 517 U.S. 806, 813 (1996); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013).

² U.S. CONST. amend. IV.

³ See, e.g., *Whren*, 517 U.S. at 813.

⁴ See, e.g., Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1077–78 (2007) (arguing for a Fourth Amendment focus on restraint of police power rather than individual privacy); Daniel S. Jonas, Comment, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791, 1817 (1989) (“The unease comes when one views the fourth amendment as an integral part of the Constitution’s careful distribution of power between the state and the individual.”); see also Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 134 (2003).

⁵ See, e.g., Brian J. Foley, *Contraband Immunity: Updating Amsterdam, LaFave, and White’s ‘Use-Exclusion’ Proposal to Limit Police Pretext*, 17 BERKELEY J. CRIM. L. 195, 201–04 (2012) (“In the past three decades, the Supreme Court has developed a jurisprudence of search and seizure that permits police—using a bit of ingenuity—to conduct a full body and automobile search of practically anybody.”); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 329–32 (2002) (“The extremely broad arrest power recognized by the Court also creates a grave potential for abuse in light of the breadth of modern traffic laws . . . the broad search powers that accompany an arrest, the documented tendency for some officers to engage in pretextual investigations . . . and the absence of effective legal limits on pretexts and profiling.”); see also Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917, 928–32 & n.77 (2008) (surveying criticism of *Whren*).

⁶ 135 S. Ct. 530 (2014).

⁷ *Id.* at 536.

about pretext, citizens face substantial risks of increased arbitrariness and a weakening of the core values that the rule of law is meant to protect.⁸

This Article considers these risks in a new light. The United States is not the first country to encounter pretextual police enforcement, and sometimes dangers to liberty are starker when an executive branch manipulates the law far from home. A favorite tool of modern authoritarian governments is the selective enforcement of good laws for illegitimate ends.⁹ Whether that means charging political opponents with corruption, shutting down a university for fire code violations when election monitors use the buildings, or siphoning funds from disfavored groups, authoritarian power brokers selectively enforce laws to serve their own interests at the expense of democratic values. In these cases, the laws themselves are often desirable; citizens want their government to fight corruption and enforce the fire code. The problem comes when courts are powerless to ask *why* the executive enforced a law when and how he did.

Although there has been extensive academic criticism of this objective approach,¹⁰ there has been little attempt to distinguish among types of pretext to identify which motives most endanger Fourth Amendment values. Following the World War II tradition of courts drawing comparisons to Nazism and the Soviet Union to justify Fourth and Fifth Amendment restrictions on police action,¹¹ this Article argues from the experiences of modern authoritarian governments that particular law enforcement motives should render a search or seizure unreasonable under the Fourth Amendment. The clear-cut examples of abuse in those countries shed light on the law enforcement motives that can be particularly problematic.

Accordingly, this Article proposes a new analytical framework to identify and prohibit certain searches and seizures under the Fourth Amendment.

⁸ See *infra* Part III.

⁹ “Authoritarianism” can take a variety of meanings, and there is distinct variation among authoritarian governments. Lynne Henderson, for example, distinguishes “formal authoritarianism” from “substantive authoritarianism,” arguing that the former deals with the process of following authoritative commands, while the latter entails “oppression and punishment.” See Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 390 (1991). Mark Tushnet has recognized that there are substantial differences among authoritarian governments, including those that are not fully authoritarian but instead embrace a form of “authoritarian constitutionalism.” See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 394–97 (2015).

This Article uses “authoritarian” largely in the substantive sense, referring to a political system that is “characterized by ‘repression, intolerance, [and] encroachment on the private rights and freedoms of citizens.’” Henderson, *supra* note 9, at 396 (quoting AMOS PERLMUTTER, *MODERN AUTHORITARIANISM* 7–8 (1981)). In this way, “authoritarianism” is used here primarily in contrast to liberal constitutional democracy, which is characterized by free and fair elections, a separation of powers, protection for fundamental human rights, and the rule of law. See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF., NOV./DEC. 1997, at 22.

¹⁰ See sources cited *supra* notes 4–5.

¹¹ See Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1203–20, 1245 (1998) (“Totalitarian comparisons reflected a redefinition of ‘tyranny’ in light of current perceptions.”).

When police commit a search or seizure for the purpose of pursuing power, money, or dogma, they engage in what I term “authoritarian pretext.” Unlike general pretext, where the underlying motive to enforce a different law raises procedural issues but is not substantively problematic,¹² authoritarian pretext involves motives that are always substantively illegitimate. When police effectuate a traffic stop for the purpose of enforcing drug laws, for example, there is nothing inherently wrong with that purpose; officers *should* enforce drug laws, and the controversy is about whether pretextual stops allow officers to evade the Fourth Amendment’s procedural requirements. In contrast, authoritarian pretext involves motives that no society has an interest in furthering, no matter what procedural requirements are met. Authoritarian pretext is different because it involves subjective motives that are more troubling than others.

In the case of authoritarian pretext, the objective result is not the only problem. When police enforce the law for the purpose of consolidating political power, enriching themselves, or pursuing a particular social agenda outside the democratic process and at the expense of individual rights, they upend the balance of power between police and citizens that is contained within the Fourth Amendment’s requirement of “reasonableness.” A core purpose of that word is to limit encroachment of unjust governmental power, and that threat is what makes authoritarian pretext *unreasonable* under the Fourth Amendment.¹³ Focusing on the effect on the individual citizen, it is *also* troubling when an opposition candidate is inconvenienced or an innocent driver loses her property, but there is an additional *societal* Fourth Amendment problem that goes beyond the objective privacy invasion caused by any one stop or arrest. Accordingly, this Article argues that when enforcement authority is used in the same ways that allow leaders in Russia, Zimbabwe, and elsewhere to entrench their power (that is, when a search or seizure is motivated by the same concerns that drive abusive selective enforcement in authoritarian countries, as illustrated in the next section), it should be considered authoritarian pretext and unreasonable under the Fourth Amendment.

Part I begins by introducing examples of selective enforcement in modern authoritarian countries to illustrate how some governments have used good laws for improper purposes. Part II draws parallels to experiences in the United States and identifies times when traffic stops and warrantless arrests have involved troublingly similar motives of power, money, and dogma. It then traces the evolution of Fourth Amendment doctrine and examines the values served by the Court’s focus on objectivity. Part III offers a normative explanation for why the problems illustrated in Parts I and II

¹² See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) (enforcing traffic laws as a pretext to enforce drug laws).

¹³ See *infra* Section IV.A.2; see also Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (“[T]he central meaning of the Fourth Amendment is distrust of police power and discretion.”).

matter. By inviting authoritarian abuse and arbitrariness, the doctrine's current formulation involves real risks to the rule of law. Part IV suggests a way forward to better incorporate subjectivity into Fourth Amendment analysis while protecting the values that objectivity serves. This Part situates the problem in the origins of the Fourth Amendment and argues that prohibiting authoritarian pretext is faithful to its text, purpose, and history. This Part then outlines a workable test for courts to identify authoritarian pretext.

I. SELECTIVE ENFORCEMENT IN AUTHORITARIAN STATES

Today's authoritarian leaders are savvier than their predecessors. Where Joseph Stalin sent millions to the gulag and Mao Zedong launched broad public campaigns to squash dissent, leaders of modern authoritarian governments tend not to rely on the sweepingly brutal methods, such as mass arrests and summary executions, that sustained past dictatorships.¹⁴ The last century's totalitarianism is no longer today's greatest threat to democracy.¹⁵ Instead, most modern dictators have learned the art of subtlety, and they have harnessed the law for their own purposes.¹⁶ There is no shortage of modern authoritarian leaders who selectively enforce good laws for their own ends. Authoritarianism today survives by operating within the law in a way that appears almost democratic.¹⁷

Selective enforcement has a distinct flavor that depends on context, and this Part highlights different goals that modern authoritarian governments pursue: power, money, and dogma.¹⁸ Selective enforcement driven by any of these motives is what I term authoritarian pretext. The following examples are not meant to be exhaustive, but rather are intended to illustrate how authoritarian pretext has arisen in practice. Authoritarian pretext poses different threats in different places, but the following examples present a universal theme: No matter where power is concentrated, ignoring the motives

¹⁴ See WILLIAM J. DOBSON, *THE DICTATOR'S LEARNING CURVE: INSIDE THE GLOBAL BATTLE FOR DEMOCRACY* 2–7 (2012).

¹⁵ See *id.*

¹⁶ See, e.g., Mark Fathi Massoud, *Legal Poverty and the Rule of Law in Strife-Torn States*, 34 WHITTIER L. REV. 245, 251–52 (2013).

¹⁷ See DOBSON, *supra* note 14, at 5–6. Of course, there are distinct and relevant differences among authoritarian governments. See Tushnet, *supra* note 9, at 395–96. The examples in this Part are meant to highlight ways in which authoritarian governments can and do abuse their power when selectively enforcing the law, but I do not suggest that the problems or legal structures are uniform across countries.

¹⁸ In arguing for a Fourth Amendment theory built on trust between citizens and government, Scott Sundby also has recognized that “[t]otalitarian regimes maintain power not through the consent of the governed but by physical, economic, and psychological control over the populace. . . . Far from fostering trust, the government’s actions convey a message of distrust in order to perpetuate control of the citizenry.” Scott E. Sundby, “Everyman”’s Fourth Amendment: *Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1777–78 (1994). It is also important to recognize that often, political control can underlie selective enforcement even when other motives are present as well. See DOBSON, *supra* note 14, at 7 (“At its root, a dictatorship’s most inviolable principle is the centralization of power.”).

of the executive can allow it to wield power improperly, to its advantage and to the population's disadvantage, without the check that democratic values require.

A. *The Pursuit of Power*

President Vladimir Putin dominates the Russian political scene, having consolidated his hold on power after the chaotic 1990s and effectively silenced any real challenge to his authority.¹⁹ Although he commands widespread domestic support, he has built that popularity partly through strict media control and intimidation of the political opposition.²⁰ The recent assassination of Boris Nemtsov, a leader of Russia's liberal opposition, was seen by many as an escalation of that intimidation and the Kremlin's history of violent political repression.²¹ Not everything the government does, however, is so direct. Selective enforcement has been one of Putin's most consistent tools to cement his political power at the expense of democratic values.²²

Anticorruption and tax laws are favorite levers of selective enforcement. One of Russia's most famous victims is Mikhail Khodorkovsky, former head of the Yukos Oil Company, who was imprisoned for ten years after being convicted of tax evasion, fraud, and embezzlement.²³ Khodorkovsky rose to the top of Russia's economic elite during the 1990s and, by 2003, was considered to be the world's 26th richest man, with private assets of \$8 billion and a company with \$11 billion in annual revenue.²⁴ He fell out of favor with Putin after he began funding nongovernmental organizations, human rights groups, and opposition political parties, leading to his eventual

¹⁹ See Brian Whitmore, *Russia: The New and Improved Single-Party State*, RADIO FREE EUROPE/RADIO LIBERTY (Apr. 15, 2008), <http://www.rferl.org/content/article/1109574.html>, archived at <https://perma.cc/M658-3FV8>.

²⁰ See Boris Kolonitskii, *Why Russians Back Putin on Ukraine*, N.Y. TIMES (Mar. 11, 2014), <http://www.nytimes.com/2014/03/12/opinion/why-russians-back-putin-on-ukraine.html>; see also PETER BAKER & SUSAN GLASSER, *KREMLIN RISING: VLADIMIR PUTIN'S RUSSIA AND THE END OF REVOLUTION* 294 (2005).

²¹ See *Uncontrolled Violence*, ECONOMIST (Mar. 7, 2015), <http://www.economist.com/news/europe/21645838-assassination-boris-nemtsov-leaves-liberal-russians-fear-new-wave-violent>, archived at <https://perma.cc/NE64-W4XG>.

²² See, e.g., WILLIAM ZIMMERMAN, *RULING RUSSIA: AUTHORITARIANISM FROM THE REVOLUTION TO PUTIN* 299 (2014) (discussing selective enforcement of tax laws).

²³ See David Holley, *Using the Law Selectively*, L.A. TIMES (Dec. 22, 2006), <http://articles.latimes.com/2006/dec/22/world/fg-selective22>, archived at <https://perma.cc/J393-S5L2>; Shaun Walker, *Mikhail Khodorkovsky on Life After Prison and Russia After Putin*, THE GUARDIAN (Dec. 26, 2014), <http://www.theguardian.com/world/2014/dec/26/mikhail-khodorkovsky-life-after-prison-russia-after-putin>, archived at <https://perma.cc/TT34-A869>.

²⁴ See Sung In Marshall, *Mikhail Khodorkovsky: Criminal or Political Prisoner (or both)?*, CTR. FOR STRATEGIC & INT'L STUDIES BLOG (May 7, 2012), <http://csis.org/blog/mikhail-khodorkovsky-criminal-or-political-prisoner-or-both>, archived at <https://perma.cc/NW59-LN6X>.

arrest and conviction.²⁵ Selective enforcement of tax laws similarly drove other oligarchs into exile or prison,²⁶ while money-laundering charges have become a weapon of choice against Putin's current political opponents.²⁷

Other examples abound. In addition to intimidating opposition leaders, the Kremlin restricts political activity by tightly controlling the media, in part by prosecuting owners of disfavored news organizations for software piracy or tax evasion.²⁸ Moscow has also targeted individuals linked to foreign countries when doing so furthers Russia's foreign policy goals,²⁹ and it has used mundane administrative laws to target opposition candidates,³⁰

²⁵ See *id.* Putin pardoned Khodorkovsky in 2013, and he has begun to reenter the political scene, declaring it "clear enough" what Russia needs to become: "a state governed by the rule of law. Full stop." Walker, *supra* note 23 (quoting Mikhail Khodorkovsky).

²⁶ See ZIMMERMAN, *supra* note 22, at 299.

²⁷ See Andrew S. Bowen, *How Putin Uses Money Laundering Charges to Control His Opponents*, THE ATLANTIC (July 17, 2013), <http://www.theatlantic.com/international/archive/2013/07/how-putin-uses-money-laundering-charges-to-control-his-opponents/277903/>, archived at <https://perma.cc/CNP3-A4RL> (discussing charges against Alexei Navalny).

²⁸ See, e.g., TINA BURRETT, TELEVISION AND PRESIDENTIAL POWER IN PUTIN'S RUSSIA 43–44 (2011) (describing Putin's first criminal prosecution against a media-owning oligarch, Vladimir Gusinsky, for fraudulently withholding \$10 million from the government in connection with a privatization deal, which the international community condemned as retaliation for television programming that criticized Putin and the war in Chechnya); Peter Finn, *Russia Casts a Selective Net in Piracy Crackdown*, WASH. POST (Nov. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111302070.html>, archived at <https://perma.cc/5EEM-792D> (detailing how the government has used piracy charges to undermine newspaper operations by seizing computers); HUMAN RIGHTS FIRST, A CAMPAIGN AGAINST DISSENT: SELECTIVE ENFORCEMENT OF ANTIPIRACY LAWS IN RUSSIA 4 (2011), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Msoft-Russia-report.pdf>, archived at <https://perma.cc/8CCR-X9VC> (describing how anti-piracy laws have been used systematically to target media outlets that support opposition candidates).

²⁹ See, e.g., Holley, *supra* note 23 (noting that Georgian-run businesses in Moscow have been charged with tax violations since 2004, when, to the Kremlin's dismay, former President Mikheil Saakashvili came to power); FREEDOM HOUSE, FREEDOM IN THE WORLD: RUSSIA, (2012), <https://freedomhouse.org/report/freedom-world/2012/russia-0#.VRXGPWR4ppY>, archived at <https://perma.cc/3Q6Q-DAA5> (recognizing that in conjunction with the war in Ukraine, the government has pressured organizations that advocate for the rights of Ukrainians living in Russia).

³⁰ See, e.g., EU-RUSSIA CTR. REV., RUSSIA ON THE EVE OF ELECTIONS 11 (2008), available at http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_review_XX_ENG.pdf, archived at <https://perma.cc/9TSD-N767> (noting that opposition candidates have been denied parade permits or relegated to protesting in obscure locations, while minor violations of campaign laws have been used to justify removing political candidates from the ballot); Luke Harding, *Supreme Court Ban on Liberal Party Wipes Out Opposition to Putin*, THE GUARDIAN (Mar. 24, 2007), <http://www.theguardian.com/world/2007/mar/24/russia.lukeharding>, archived at <https://perma.cc/9SRF-VWN3> (noting that in 2007, Russia's Supreme Court banned a leading opposition party from running in elections because it had too few members); Alexandr Litoy, *A Guide to Political Persecution in Russia*, OPEN DEMOCRACY (Mar. 13, 2015), <https://www.opendemocracy.net/od-russia/alexandr-litoy/guide-to-political-persecution-in-russia>, archived at <https://perma.cc/VB7T-AQYE> (reporting that politically motivated arrests are commonly based on a variety of Administrative Code articles, including "[c]rossing the road in an unauthorized place," "[s]moking in a public place," "[i]nfringement of road transport regulations by a pedestrian," and "[d]runkness"); see also Gordon B. Smith, *Legal Reform and the Dilemma of Rule of Law*, in DEVELOPMENTS IN RUSSIAN POLITICS 135, 147 (Stephen White et al. eds., 2010).

human rights groups,³¹ and election monitors.³²

Russia is not alone in engaging in politically motivated authoritarian pretext.³³ In most of these cases, the laws themselves are not the problem. All countries have an interest in fighting corruption and fraud. Likewise when governments prosecute software piracy or enforce administrative laws, such as the fire code, they are addressing real issues, particularly in Russia.³⁴ The problem arises when good laws are enforced for bad reasons (even against guilty people).³⁵ For example, like most oligarchs who joined Russia's economic elite during the upheaval of the 1990s, Khodorkovsky probably *did* commit tax fraud.³⁶ The difference is that in prosecuting only Khodorkovsky and other oligarchs who challenged Putin on the political scene, Putin announced that amnesty would come at the price of staying out of politics.³⁷ As Lev Ponomaryov, head of the For Human Rights movement, has described, the Kremlin is "acting within the law—the law they

³¹ See BELLONA, RUSSIAN NGOS UNDERGOING UNPRECEDENTED KREMLIN SWEEPS (Apr. 2, 2013), <http://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2013-04-russian-ngos-undergoing-unprecedented-kremlin-sweeps>, archived at <https://perma.cc/T664-HLLT> (reporting that under a new law requiring politically active foreign-funded nongovernmental organizations to register with the government, the first to be charged with failing to register was Golos, a major election monitoring organization that revealed widespread voter fraud in 2011); Holley, *supra* note 23 (reporting that Amnesty International and Human Rights Watch had their activities suspended when they failed to meet new re-registration requirements).

³² See DOBSON, *supra* note 14, at 27. Dobson describes one example in which, a month before the 2008 presidential election, government officials shut down the European University in St. Petersburg for fifty-two fire code violations, despite its having passed previous inspections. Shortly before, the university had accepted a large grant to research election monitoring. The university was undoubtedly out of compliance with the fire code (it is impossible to bring some of the historic buildings into compliance), but the Kremlin allowed the university to reopen after the elections had passed without remedying the identified violations. Subsequently, the university suspended its election monitoring research.

³³ See, e.g., Keith A. Darden, *Blackmail as a Tool of State Domination: Ukraine Under Kuchma*, 10 E. EUR. CONST. REV. 67, 69 (2001) (recounting that in Ukraine during the 1999 presidential election, "lower-level officials throughout the country were blackmailed and threatened with the selective enforcement of the law by the tax inspectorate, the interior ministry, and the SBU to secure a winning vote for Kuchma"); Joseph Kahn, *To Be Rich, Chinese and in Trouble: 3 Tales*, N.Y. TIMES (Oct. 13, 2002), <http://www.nytimes.com/2002/10/13/business/to-be-rich-chinese-and-in-trouble-3-tales.html> (describing China's selective enforcement of tax, securities, and zoning laws against wealthy entrepreneurs to send the message that Beijing retains control over powerful economic actors).

³⁴ See sources cited *supra* note 33; see also HUMAN RIGHTS FIRST, *supra* note 28, at 4.

³⁵ See William Partlett, *Vladimir Putin and the Law*, BROOKINGS (Feb. 28, 2012), <http://www.brookings.edu/research/opinions/2012/02/28-putin-law-partlett>, archived at <https://perma.cc/BH79-67GH> ("Mr. Putin's regime has followed the Russian tradition of using law to punish its opponents."); see also PAUL D'ANIERI, UNDERSTANDING UKRAINIAN POLITICS: POWER, POLITICS, AND INSTITUTIONAL DESIGN 62 (2015) (discussing how selective enforcement of criminal laws and administrative regulations has been used in Ukraine for political control).

³⁶ See Marshall, *supra* note 24.

³⁷ See *id.*; see also BAKER & GLASSER, *supra* note 20, at 272–92.

have tailored to their needs.”³⁸ This is politically motivated authoritarian pretext.

B. *The Pursuit of Money*

Authoritarian pretext can also have an economic dimension. Civil and criminal laws often carry hefty fines, and governments sometimes enforce the law as a pretext for economic gain. Of course, when an authoritarian government selectively enforces the law to extract financial penalties, there is often more at stake than just desire to make money. The financial gain may be little more than a side benefit for the regime, and its economic interests may be a thin layer on top of broader plans to consolidate power. For example, China has selectively enforced tax, securities, and zoning laws against wealthy entrepreneurs who publicly flaunted their wealth and independence, largely to send the message that Beijing retains ultimate control over powerful economic actors.³⁹ Money, however, is at least a partial driver for enforcement in some cases.⁴⁰

When an individual or company grows wealthy, it can become a target for criminal or civil charges that allow government officials to siphon money for their own benefit. Sometimes, these fines find their way directly into the pockets of enforcement officers. At other times, they go into a general pool of government revenue that supports the ruling elite. In these cases, the purpose behind enforcing the law is to generate revenue. For example, there is economy-wide evidence that the China Securities Regulatory Commission punishes private companies more severely than state-owned enterprises for regulatory violations.⁴¹

When officials selectively enforce the law for economic gain, they appear to do so in two main ways: (1) using legal violations for the purpose of extracting revenue, or (2) soliciting bribes in exchange for not enforcing the law. A famous case of the latter involves Jingyi Guo, a Chinese government regulator who was sentenced to death for soliciting millions of dollars in bribes.⁴² Guo approved a controversial acquisition of a major electronics retailer in 2006, working in tandem with a law firm partner to mask bribes as legal fees.⁴³ Bribery and blackmail are largely beyond the scope of this Article, but it is worth noting that in such cases, selective *non-enforcement* can be just as damaging to the rule of law as selective enforcement.

³⁸ Holley, *supra* note 23.

³⁹ See Kahn, *supra* note 33.

⁴⁰ See, e.g., Holley, *supra* note 23 (arguing that Russia accused a foreign company of environmental violations in order to avoid a contract that proved unprofitable).

⁴¹ See Donghua Chen et al., *Selective Enforcement of Regulation*, 4 CHINA J. ACCT. RES. 9 (2011).

⁴² See Angela H. Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULL. 631, 652 (2011).

⁴³ See *id.*; see also Darden, *supra* note 33, at 69 (discussing how official blackmail was a tool of political control in Ukraine).

Stories of the former often arise in less economically advanced countries. There, police sometimes enforce the law to extract money from citizens when their wages are insufficient to meet their costs of living. In Zimbabwe, for example, police have been reported to fine drivers for minor traffic infractions in part to supplement their meager earnings.⁴⁴ Wealthier countries, however, can also manipulate the law for financial gain. In Russia, for example, after a change in oil and gas prices made a contract with Royal Dutch Shell unprofitable, Moscow accused the company of environmental violations on Sakhalin Island.⁴⁵ Royal Dutch Shell faced revocation of its license or billions of dollars in fines, and the state-owned gas monopoly Gazprom subsequently took a majority stake in the project.⁴⁶ This is economically motivated authoritarian pretext.

C. *The Pursuit of Dogma*

The final type of authoritarian pretext is based on dogma. This broad category refers to ways in which the executive improperly exercises authority over social life. It includes deliberate repression on the basis of membership in certain groups, particularly along lines of race, ethnicity, national origin, religion, gender, or sexual orientation.⁴⁷ It also includes targeting on the basis of policy preferences that the ruling party disfavors, as distinct from the more basic driver of political power.⁴⁸ These are times when the government selectively enforces the law to promote a particular social or policy agenda at the expense of the democratic political process and individual rights.

The Russian government's treatment of ethnic Caucasians exemplifies this type of selective enforcement.⁴⁹ Police target ethnic Caucasians for enforcement of visitor registration laws and residence requirements, and discriminatory actions are particularly common in the southern provinces of Stavropol and Krasnodar.⁵⁰ Relatedly, researchers have found that police are

⁴⁴ See Martin Fletcher, *Zimbabwe's Inflation Means Jail Wardens Steal from Prisoners to Stay Alive*, *TIMES* (Dec. 22, 2008), <http://www.thetimes.co.uk/tto/news/world/africa/article2594027.ece>, archived at <https://perma.cc/9T7C-ZZTQ>.

⁴⁵ See Holley, *supra* note 23.

⁴⁶ See *id.*

⁴⁷ See, e.g., HUMAN RIGHTS WATCH, *RUSSIAN FEDERATION: ETHNIC DISCRIMINATION IN SOUTHERN RUSSIA* (1998), <http://www.hrw.org/legacy/reports98/russia/srusstest.htm>, archived at <https://perma.cc/2CY9-VG8J> (describing the Russian government's targeting of ethnic Caucasians). Admittedly, this is the least precise category of authoritarian pretext, in part because the precise goals of this type of enforcement will vary widely by context. This category is more about identifying improper control over social life at the expense of democratic processes and individual rights than it is about protecting specific classes of people.

⁴⁸ See, e.g., HUMAN RIGHTS FIRST, *supra* note 28, at 3 (describing the targeting of an organization that promotes ethnic tolerance and fights xenophobia).

⁴⁹ Ethnic Caucasians are people with ethnic origins linked to a country in the southern Caucasus (Armenia, Azerbaijan, or Georgia) or the Russian republics in the northern Caucasus (such as Chechnya and Ingushetiya). See HUMAN RIGHTS WATCH, *supra* note 47.

⁵⁰ See *id.*

more likely to stop and question Russians of non-European origins, and police are more likely to harass these immigrants for passport violations.⁵¹

Religious minorities are likewise common victims of selective enforcement in modern authoritarian governments. In Sudan, the government has been accused of using licensing regulations to shut down Christian churches.⁵² At times, these churches operate without proper licenses, but church officials claim the government makes it difficult for Christians to comply with the law.⁵³ The Sudanese government has bulldozed churches for lacking the necessary use permits, and church officials have protested that neighboring unlicensed buildings have been spared.⁵⁴ The government also has shuttered church-affiliated orphanages, community centers, and schools.⁵⁵

Gender discrimination offers another basis for selective enforcement, and women's rights groups are common targets. In Saudi Arabia, at least seven civil society and human rights activists were imprisoned in 2013 for "setting up an unlicensed organization" or similar charges.⁵⁶ The Chinese government also has arrested leading activists on charges of "causing public disorder" for their campaigns in support of women's rights.⁵⁷ China's crackdown on civil society drew sharp criticism from abroad, with former U.S. Secretary of State Hillary Clinton describing China's detention of women's rights activists as "inexcusable."⁵⁸ Those activists were since released.⁵⁹

Other groups are targeted on the basis of sexual orientation. For example, broadly written criminal laws in Turkey that prohibit indecency and offenses against public morality have been enforced selectively against gay

⁵¹ See OLGA B. SEMUKHINA & K. MICHAEL REYNOLDS, UNDERSTANDING THE MODERN RUSSIAN POLICE 224 (2013). To be sure, discrimination against ethnic Caucasians is tied partly to the Kremlin's broader campaign to consolidate and maintain political power, but racist enforcement also is linked to widespread xenophobia in the country. See Dewaine Farria, *Racism in Russia and the Caucasus*, WORLD POLICY BLOG (Jan. 13, 2012), <http://www.worldpolicy.org/blog/2012/01/13/racism-russia-and-caucasus>, archived at <https://perma.cc/L2CV-YBDF>.

⁵² See *Sudan Ramps Up Its Persecution of Christians*, AM. INTEREST (Mar. 4, 2013), <http://www.the-american-interest.com/2013/03/04/sudan-ramps-up-its-persecution-of-christians/>, archived at <https://perma.cc/B8PX-3XWX>.

⁵³ See Ulf Laessing, *Christians Grow Anxious in "100 Percent" Islamic Sudan*, REUTERS (Feb. 27, 2013), <http://www.reuters.com/article/2013/02/27/us-sudan-christians-idUSBRE91Q0QQ20130227>, archived at <https://perma.cc/4VRM-8AYM>.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ Adam Coogler, *The Limits of Reform in Saudi Arabia*, HUMAN RIGHTS WATCH (Oct. 13, 2013), <http://www.hrw.org/news/2013/10/13/limits-reform-saudi-arabia>, archived at <https://perma.cc/44HX-3M9Z>.

⁵⁷ Shannon Van Sant, *Women's Rights Activists Await Formal Arrest in China*, VOICE OF AM. (Apr. 11, 2015), <http://www.voanews.com/content/women-rights-activists-await-formal-arrest-in-china/2715368.html>, archived at <https://perma.cc/FJR9-7THU>.

⁵⁸ *Id.*

⁵⁹ See Joshua Keating, *Why Did China Release the "Feminist Five"?*, SLATE (Apr. 14, 2015), http://www.slate.com/blogs/the_slatest/2015/04/14/why_did_china_release_the_feminist_five.html, archived at <https://perma.cc/9DDL-C2WL>.

men and other sexual minorities.⁶⁰ Human rights activists also have complained that permits for gay pride parades have been denied for pretextual reasons. In Hungary, for example, the government explained its decision to deny a parade permit as necessary to “ensure the free flow of traffic.”⁶¹ Human Rights Watch dismissed that explanation, pointing to a recent pro-government march that attracted an estimated 100,000 participants, compared to the 1,500 expected at the gay pride event.⁶²

Other human rights groups and nongovernmental organizations are also frequent targets in countries where the executive wants to maintain strong control over the direction of social policy. In Russia, the Kremlin’s targeting of Anastasia Denisova, the president of a nongovernmental organization that promotes ethnic tolerance and fights xenophobia, is illustrative.⁶³ Between 2007 and 2010, the government filed criminal charges against Denisova for violations of tax and antipiracy laws, threatening her with up to six years in prison for using unlicensed Microsoft software.⁶⁴ The charges were later dropped for lack of evidence, but by then her organization had ceased to function.⁶⁵ Other nongovernmental organizations likewise have lost computer files and hardware, had their employees harassed and arrested, and at times had to close operations as a result of antipiracy investigations.⁶⁶ This is authoritarian pretext motivated by dogma.

II. SELECTIVE ENFORCEMENT IN THE UNITED STATES AND FOURTH AMENDMENT DOCTRINE

Similar dangers with selective enforcement creep up at home. In recent years, the headlines have been full of real or perceived examples of good laws being used for improper purposes, be it the pursuit of power, money, or dogma. When the Internal Revenue Service was accused of targeting Tea Party groups for heightened scrutiny, critics were concerned that the Administration was implementing the tax code selectively against political opponents to enhance President Obama’s political power.⁶⁷ Police departments have been criticized for making decisions about civil asset forfeiture based

⁶⁰ See Deniz Kiliç & Gaye Uncu, *Turkey*, in INTERNATIONAL GAY & LESBIAN HUMAN RIGHTS COMMISSION BOOK 203, 204 (2003), available at <http://www.iglhrc.org/sites/default/files/62-1.pdf>, archived at <https://perma.cc/2L6V-WGBL>.

⁶¹ Rkinga, *Challenge to Gay Pride Ban*, BUDAPEST TIMES (Apr. 18, 2012), <http://budapest-times.hu/2012/04/18/challenge-to-gay-pride-ban/>, archived at <https://perma.cc/FV55-DJ8V>.

⁶² See *id.*; *Hungary: Revoke Denial of Pride March Route*, HUMAN RIGHTS WATCH (Apr. 11, 2012), <http://www.hrw.org/news/2012/04/11/hungary-revoke-denial-pride-march-route>, archived at <https://perma.cc/7GCN-Q7YT>.

⁶³ See HUMAN RIGHTS FIRST, *supra* note 28, at 3.

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.* at 14–18.

⁶⁷ See Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 41–43 (2013), available at <http://cornelllawreview.org/files/2013/09/99CLRO411.pdf>, archived at <https://perma.cc/2X47-53N8>.

on “department wish lists” and allowing profit goals to outweigh public safety needs.⁶⁸ And mosques have been targeted for strict application of zoning laws.⁶⁹ In 2012, for example, a federal district court ordered the government of Rutherford County, Tennessee, to issue a certificate of occupancy necessary to use a mosque in Murfreesboro, finding the county judge held the mosque to higher public notice requirements than usually are applied in similar cases.⁷⁰

When police engage in authoritarian pretext by effectuating searches or seizures for motivations of power, money, or dogma, the First and Fourteenth Amendments at times forbid their actions,⁷¹ though not always.⁷² The tremendous growth of technical laws has given officers wide discretion that, at times, presents opportunities for abuse that a wholly objective Fourth Amendment does nothing to prevent. So long as an officer objectively has reasonable suspicion to believe a law is being violated, even if his interpretation of the law is wrong, he can effectuate a traffic stop.⁷³ And so long as an officer objectively has probable cause to believe someone has committed a crime (be it a violation of the traffic code, a no-eating rule on the subway, or something more serious), he can arrest the violator without a warrant.⁷⁴ This

⁶⁸ Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), http://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html?_r=0.

⁶⁹ Selective enforcement of laws against mosques often happens in Western Europe as well. See Stefano Allievi, *Conflicts over Mosques in Europe: Policy Issues and Trends*, NEF INITIATIVE ON RELIGION & DEMOCRACY IN EUROPE 67 (2009) (describing that in Italy, security and fire safety standards are selectively applied to mosques but not other religious buildings, schools, or private businesses), available at http://www.uclouvain.be/cps/ucl/doc/espo/documents/Religion_mosques.pdf, archived at <https://perma.cc/E8EA-PYFJ>; see also Engy Abdelkader, *Mosque Controversies in Europe (and Lessons Learned from the American Experience)*, WORLD POST (Jan. 2, 2014), http://www.huffingtonpost.com/engy-abdelkader/mosque-controversies-in-e_b_4528755.html, archived at <https://perma.cc/FP2C-QLPY>.

⁷⁰ See *United States v. Rutherford Cty.*, No. 3:12-0737, 2012 WL 2930076, at *1 (M.D. Tenn. July 18, 2012); see also Kim Severson, *Judge Allows Muslims to Use Tennessee Mosque*, N.Y. TIMES (July 18, 2012), <http://www.nytimes.com/2012/07/19/us/judge-allows-muslims-to-use-murfreesboro-mosque.html>.

⁷¹ See, e.g., *Watkins v. United States*, 354 U.S. 178, 197 (1957) (“Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. . . . The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.”); *Warden v. Hayden*, 387 U.S. 294, 321–23 (1967) (Douglas, J., dissenting) (discussing the interaction of multiple amendments); cf. *United States v. Hastings*, 126 F.3d 310, 313 (4th Cir. 1997) (“A prosecution also cannot be motivated by a suspect’s exercise of constitutional rights through participation in political activity.”); Margaret E. McGhee, *Prosecutorial Discretion*, 88 GEO. L.J. 1057, 1060 & n.645 (2000).

⁷² Note that where amendments provide overlapping protection, there can be a Fourth Amendment violation as well. See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49–50 (1993) (“We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.”). As the Court has recognized, “[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution’s commands.” *Soldal v. Cook Cty.*, 506 U.S. 56, 70 (1992).

⁷³ See *Heien v. North Carolina*, 135 S. Ct. 530, 534. (2014).

⁷⁴ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); Brief Amicus Curiae of the American Civil Liberties Union & The ACLU of Texas et al. in Support of Petitioners,

Part explores how Fourth Amendment doctrine has evolved, what opportunities for abuse it allows, and what values are served by an objective approach.

A. *Traffic Stops and Warrantless Arrests: The Pursuit of Power, Money, and Dogma in the United States*

A core rationale for separate legislative and judicial branches is to check the abuse that can follow unrestrained executive power.⁷⁵ At times, however, courts are left to check that abuse only after the fact through judicial review. Traffic stops and warrantless arrests provide two of the clearest examples. In these moments, when executive discretion is at its highest, selective enforcement can be motivated by the pursuit of power, money, or dogma. This is when there is the greatest need for the Fourth Amendment to say something about police motives.

1. *Power*

Watergate is a powerful reminder for anyone who doubts that desire for political power can motivate executive action in the United States.⁷⁶ More recently, New Jersey Governor Chris Christie faced scandal when his aides ordered lane closures on the George Washington Bridge as retaliation against Fort Lee Mayor Mark Sokolich for endorsing one of Christie's political opponents.⁷⁷ Often, however, politically motivated enforcement is more mundane. In small towns across the United States, local government officials have targeted political opponents for traffic stops and warrantless arrests. Nevertheless, an officer's underlying motive is often legally irrelevant and rarely proven when a stop is justified by a minor traffic violation.

Consider, for example, a traffic stop conducted in Bergen County, New Jersey, on August 14, 2013. Police stopped Maura DeNicola, a local government official, for "driving too slowly in the passing lane."⁷⁸ The stop was conducted amid controversy over whether to merge the county police force and the sheriff's office, a move that DeNicola vocally opposed.⁷⁹ County

Atwater, 532 U.S. 318 (No. 99-1408), 2000 WL 1341276, at *7-8 ("Infractions today's legislatures have already constituted as arrestable offenses, and which have actually led to full custodial arrests, include, in addition to the Texas seat belt offense, eating on the subway, failure to have a bell or gong on one's bicycle, failure to obtain a license for a telemarketing business, littering, and 'walking as to create a hazard.'" (citations omitted)).

⁷⁵ See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006).

⁷⁶ See John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 646-48 (2000).

⁷⁷ See Kate Zernike, *Christie Faces Scandal on Traffic Jam Aides Ordered*, N.Y. TIMES (Jan. 8, 2014), <http://www.nytimes.com/2014/01/09/nyregion/christie-aide-tied-to-bridge-lane-closings.html>.

⁷⁸ John C. Ensslin, *Traffic Stop of Bergen County Freeholder DeNicola Not Political, Investigation Says*, NORTHJERSEY.COM (Dec. 6, 2013, 6:31 PM), <http://www.northjersey.com/news/traffic-stop-of-bergen-county-freeholder-denicola-not-political-investigation-says-1.674123>, archived at <https://perma.cc/R5PF-3UU9>.

⁷⁹ See *id.*

Police Chief Brian Higgins described the incident as part of “a troubling pattern of behavior” by sheriff’s officers to conduct politically motivated traffic stops, but an internal investigation by the sheriff’s office concluded the stop was proper.⁸⁰ DeNicola responded with a lack of surprise that “an internal investigation of the sheriff’s department has led to findings of no wrongdoing by one of its own members.”⁸¹ She remained concerned, however, that “political interference is influencing county law enforcement[,] . . . despite what sheriff’s political appointee says.”⁸²

A 2010 traffic stop in Hightstown, New Jersey, offers a similar example, but in that case the issue reached a judge who concluded the stop was politically motivated.⁸³ A mayoral candidate, Robert Thibault, favored sharing police services with a neighboring town, a controversial position that garnered significant local publicity.⁸⁴ In retaliation, police targeted him for a traffic stop in a move that the municipal court judge reasoned was “all about politics.”⁸⁵ That stop gave rise to a civil suit for violation of Mr. Thibault’s First and Fourteenth Amendment rights.⁸⁶

Other drivers have raised the possibility of politically motivated warrantless arrests. In Montana, Shannon Augare, an outgoing state senator and Blackfeet councilman, accused police of political motives for his arrest in 2014.⁸⁷ He was charged with driving under the influence, evading police, and speeding, but a tribal judge threw out the charges.⁸⁸ As in the New Jersey cases, his stop occurred in the context of clashing with police interests, particularly over the current police chief’s appointment.⁸⁹ Other politically active drivers also have accused police of targeting them for DUI stops and arrests when their political positions conflict with those of police.⁹⁰

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Dan Ivers, *Bergen County Freeholder’s Traffic Stop Not Politically Motivated, Probe Finds*, NJ.COM (Dec. 7, 2013, 10:12 AM), <http://www.nj.com/bergen/index.ssf/2013/12/bergen-county-freeholders-traffic-stop-not-politically-motivated-probe-finds.html>, archived at <https://perma.cc/V4SB-B64H>.

⁸³ See Ashley Peskoe, *Judge Drops Evidence in “Politically Motivated” Traffic Stop*, E. WINDSOR PATCH (Dec. 23, 2011, 5:20 AM), <http://patch.com/new-jersey/eastwindsor/judge-calls-2010-traffic-stop-politically-motivated-de5fd5cb1ff>, archived at <https://perma.cc/XV7A-PLFC>.

⁸⁴ See *Thibault v. Borough of Hightstown*, 2012 WL 1948630, at *1 (N.J. Super. Ct. App. Div. May 31, 2012).

⁸⁵ Peskoe, *supra* note 83.

⁸⁶ See *Thibault*, 2012 WL 1948630, at *1. Thibault is reported to have settled with the town for \$200,000. Nicole Mulvaney, *Hightstown Councilman Thibault Enters Borough Mayoral Race as Independent*, NJ.COM (June 3, 2014, 9:50 PM), <http://www.nj.com/mercer/index.ssf/2014/06/hightstown-councilman-thibault-enters-borough-mayoral-race-as-independent.html>, archived at <https://perma.cc/M2Q9-2GTP>.

⁸⁷ See Justin Franz, *DUI Turns Political on Blackfeet Reservation*, FLATHEAD BEACON (Dec. 1, 2014), <http://flatheadbeacon.com/2014/12/01/dui-turns-political-blackfeet-reservation/>, archived at <https://perma.cc/8ZPY-MRYE>.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See, e.g., David Garrick, *Barron says July DUI Arrest Was Politically Motivated*, SAN DIEGO UNION-TRIB. (Oct. 7, 2010), <http://www.utsandiego.com/news/2010/oct/07/escondido->

2. Money

At other times, the motive to enforce the law is money rather than power. Civil asset forfeiture provides one of the clearest examples, and it has come under intense scrutiny in recent years.⁹¹ The practice allows police to seize private property suspected of having been used in connection with a crime,⁹² and federal law requires “substantial connection between the property and the offense.”⁹³ While state requirements vary, the usual procedure allows an officer to seize property for which there is probable cause to believe that it was used in connection with a crime.⁹⁴ Some states require a judge to review the forfeiture decision, while others allow police to declare the property forfeited on their own.⁹⁵ In the latter case, the owner can bring an action to recover the property. To keep it, the government needs to show, by a preponderance of the evidence, only that the property was used in connection with a crime, and the owner need not ever be convicted. Indeed, one study found that about 80% of owners are never charged.⁹⁶

Asset seizure has exploded in recent years. In 1986, the Department of Justice Assets Forfeiture Fund had \$93.7 million in proceeds from forfeited property, while in 2008 it claimed more than \$1 billion.⁹⁷ By 2012, the value of seized assets reached \$4.3 billion.⁹⁸ It is more difficult to estimate prevalence at the state and local levels, because only about half of states require law enforcement agencies to report how much property they seize and how they spend the proceeds.⁹⁹ A *Washington Post* investigation found that there have been almost 62,000 warrantless cash seizures since September 11, 2001, and that they generated \$1.7 billion for state and local authori-

barron-says-july-dui-arrest-was/, archived at <https://perma.cc/DWD7-J4TS> (claiming targeting because his truck had a sign supporting a city council candidate who criticized the police chief and his blood alcohol level was below legal limit); Carly Q. Romalino, *Jury Clears Washington Twp. Officer in Moriarty Case*, *COURIER-POST* (Mar. 4, 2015, 9:30 AM), <http://www.courierpostonline.com/story/news/2015/03/03/washington-township-police-officer-not-guilty-in-assemblyman-dui-case/24315835/>, archived at <https://perma.cc/B2LU-6FB7> (finding the arresting officer not guilty of fourteen criminal charges related to allegedly politically motivated DUI stop and arrest of state Assemblyman Paul Moriarty).

⁹¹ See, e.g., Dewan, *supra* note 68; Sarah Stillman, *Taken*, *NEW YORKER* (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>, archived at <https://perma.cc/HVY5-SANB>; see also Michael Sallah et al., *Stop and Seize*, *WASH. POST* (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>, archived at <https://perma.cc/FEQ4-TF7H>.

⁹² See MARIAN R. WILLIAMS ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 10 (2010).

⁹³ See *United States v. \$3,000 in Cash*, 906 F. Supp. 1061, 1065 (E.D. Va. 1995); see also *Civil Asset Forfeiture Reform Act*, 18 U.S.C. § 981 (2012).

⁹⁴ See WILLIAMS ET AL., *supra* note 92, at 15.

⁹⁵ See *id.*

⁹⁶ See *id.* at 9, 13.

⁹⁷ See *id.* at 11.

⁹⁸ See Dewan, *supra* note 68.

⁹⁹ See WILLIAMS ET AL., *supra* note 92, at 13.

ties and \$800 million for the federal government. Of the cash seizures, half were each for less than \$8,800.¹⁰⁰

Most civil forfeiture laws are written in ways that give law enforcement a financial incentive to seize property. They allow police to seize assets without convicting the owner of a crime, or even charging her with one.¹⁰¹ Law enforcement agencies in forty-two states keep at least some of the confiscated property, which gives them a financial stake in the seizure decision.¹⁰² Even where state law does not give forfeiture proceeds to police departments, federal law sometimes can do so under “equitable sharing.”¹⁰³ So long as the property was used in violation of federal law, the state or local agency can transfer the property to federal officials, who in turn give back as much as 80% of proceeds.¹⁰⁴ Accordingly, some police advocate using traffic stops to raise revenue for municipalities.¹⁰⁵

Evidence from national studies suggests that the incentives are playing out in dangerous ways. One study of 800 law enforcement executives found that nearly 40% of them reported that civil forfeiture proceeds are “necessary” for their budgets.¹⁰⁶ Another study of fifty-two law enforcement agencies in Texas found that forfeiture proceeds account for 14% of budgets on average, while another found the percentage was one-third for some Texas sheriffs’ departments.¹⁰⁷ According to researchers at the University of Texas at Dallas and Appalachian State University, the national data suggest that police agencies respond to the financial incentives by seizing more property when laws allow the agencies to keep a greater percentage and when procedures make it easier for the agencies to do so.¹⁰⁸ As FBI agent Gregory Vecchi and Professor Robert Sigler explain, it is “evident” from police behavior that “federal, state, and local governments use assets forfeiture to generate revenue, despite their claims otherwise.”¹⁰⁹

Some property owners successfully contest these seizures. Although only about one-sixth of seizures are challenged, the government returns seized cash in 41% of contested cases.¹¹⁰ When the pattern of law enforcement suggests racial bias, some property owners have used civil rights laws

¹⁰⁰ See Sallah et al., *supra* note 91.

¹⁰¹ See WILLIAMS ET AL., *supra* note 92, at 9.

¹⁰² See *id.* at 9, 11.

¹⁰³ *Id.* at 12. Note, however, that, because of budgetary reasons, the federal government deferred equitable sharing at the end of 2015, recognizing that “there is a possibility” it will “resume its sharing on some or all of the deferred payments if there are sufficient funds in the budget.” Letter from U.S. Dep’t of Justice to State, Local and Tribal Law Enf’t Agencies (Dec. 21, 2015), available at <http://www.theiacp.org/portals/0/documents/pdfs/RescissionImpactonEquitableSharing122115.pdf>, archived at <https://perma.cc/6BK4-34ML>.

¹⁰⁴ See WILLIAMS ET AL., *supra* note 92, at 12.

¹⁰⁵ See Sallah et al., *supra* note 91.

¹⁰⁶ WILLIAMS ET AL., *supra* note 92, at 12.

¹⁰⁷ See *id.* at 12, 17.

¹⁰⁸ See *id.* at 9.

¹⁰⁹ GREGORY M. VECCHI & ROBERT T. SIGLER, ASSETS FORFEITURE: A STUDY OF POLICY AND ITS PRACTICE 75 (2001).

¹¹⁰ See Sallah et al., *supra* note 91.

to challenge civil forfeiture.¹¹¹ For example, law enforcement officials in Tenaha, Texas, are accused of systematically stopping drivers, mostly African Americans, and demanding they relinquish cash in exchange for not being charged with money laundering.¹¹² Drivers, mostly from out of the state, complain that officers seized money, cars, cell phones, jewelry, and sneakers and threatened to file charges unless the drivers relinquished their right to contest the seizure of their property.¹¹³ Tenaha officials are accused of taking an estimated \$3 million of improperly seized property between 2006 and 2008.¹¹⁴ A separate study of 400 federal court cases in which people successfully challenged a seizure revealed that the majority of plaintiffs were African American, Hispanic/Latino, or of another minority group.¹¹⁵

Civil forfeiture laws have a longstanding history in the United States, dating to the Founding era.¹¹⁶ Accordingly, the Court has given police wide latitude to engage in civil forfeiture and repeatedly has upheld police action against due process and takings claims.¹¹⁷ Even where civil forfeiture is proper, however, a traffic stop made for the *purpose* of taking property, rather than for enforcing a legitimate law from which the forfeiture derives, is problematic. Videos of law enforcement seminars reveal that civil asset forfeiture can be driven by “profit motives” that “outweigh public safety.”¹¹⁸ In Ferguson, Missouri, the Department of Justice has found that this type of emphasis on generating revenue can operate at the expense of public safety and “undermine community trust and cooperation.”¹¹⁹

3. Dogma

Police targeting also can focus on membership in certain groups or support for particular social or policy preferences. For example, targeting can fall along lines of race, ethnicity, national origin, religion, gender, or sexual orientation, while at other times enforcement can be driven by a person’s support for certain policies, such as gun ownership or opposition to unions. As with political or monetary motives, it can be unclear in a given case whether targeting is misperceived or real, but there is certainly a national problem.¹²⁰

¹¹¹ See Stillman, *supra* note 91.

¹¹² See WILLIAMS ET AL., *supra* note 92, at 16.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See Sallah et al., *supra* note 91.

¹¹⁶ See Williams et al., *supra* note 92, at 10.

¹¹⁷ See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 449 (1996).

¹¹⁸ Dewan, *supra* note 68.

¹¹⁹ U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), <http://apps.washingtonpost.com/g/documents/national/department-of-justice-report-on-the-ferguson-mo-police-department/1435/>.

¹²⁰ See, e.g., LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS, RESTORING A NATIONAL CONSENSUS: THE NEED TO END RACIAL PROFILING IN AMERICA 9–12 (2011), available at http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.

Racial profiling offers a clear example. Empirical studies have found rampant racial profiling in traffic stops across the country, with minority drivers significantly more likely to be arrested or searched in connection with a stop.¹²¹ For example, the Department of Justice has found that police in Ferguson, Missouri, disproportionately stop and arrest African Americans out of “discriminatory intent in violation of the Fourteenth Amendment.”¹²² A district court judge in New York likewise concluded that racial profiling in the New York City Police Department’s stop-and-frisk program violated the Fourteenth Amendment.¹²³

Other types of profiling also appear to be practiced routinely. The Obama Administration recently released guidelines to prohibit profiling by federal law enforcement on the basis of religion, national origin, gender, sexual orientation, and gender identity.¹²⁴ Especially since 9/11, however, Arabs, Muslims, South Asians, and Sikhs have been targeted for traffic stops and arrests.¹²⁵ For example, New York City Police Department internal records show that the department has targeted entire Muslim neighborhoods for surveillance.¹²⁶ A 2011 arrest in Boston also “reviv[ed] fears in the gay community that the police were once again targeting gay men” when they arrested 31 men at a park, primarily for trespassing.¹²⁷

Concerns over selective enforcement also have touched politically conservative priorities. Maryland has strict gun control laws and does not recognize out-of-state carry licenses.¹²⁸ Gun owners have raised the possibility of selective enforcement of traffic laws by Maryland police to target people with licenses to carry concealed weapons.¹²⁹ Maryland internal police investigations concluded the stops were legitimate and conducted only against people who had committed traffic violations.¹³⁰ One gun owner, however,

pdf, *archived at* <https://perma.cc/UB52-WBGN> (providing statistical evidence of racial profiling in traffic stops).

¹²¹ *See id.*

¹²² U.S. DEP’T OF JUSTICE, *supra* note 119, at 4–5.

¹²³ *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 562. (S.D.N.Y. 2013).

¹²⁴ *See* Eric Tucker, *White House Issues Guidelines to Ban Racial and Religious Profiling*, PBS NEWSHOUR (Dec. 8, 2014, 10:17 AM), <http://www.pbs.org/newshour/rundown/white-house-issues-guidelines-ban-racial-religious-profiling/>, *archived at* <https://perma.cc/E8EX-XVHB>.

¹²⁵ *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, *WRONG THEN, WRONG NOW: RACIAL PROFILING BEFORE & AFTER SEPTEMBER 11, 2001* 22–24 (2003), *available at* http://www.civilrights.org/publications/wrong-then/racial_profiling_report.pdf, *archived at* <https://perma.cc/NB7C-XJGC>.

¹²⁶ *See* Eileen Sullivan, *N.J. Muslims File Federal Suit to Stop NYPD Spying*, WASH. TIMES (June 6, 2012), <http://www.washingtontimes.com/news/2012/jun/6/nj-muslims-file-federal-suit-stop-nypd-spying/>, *archived at* <https://perma.cc/X9SF-V2QT>.

¹²⁷ Maria Cramer, *Arrests Raise Concern on Gay Profiling*, BOS. GLOBE (Nov. 11, 2011), <http://www.bostonglobe.com/metro/2011/11/11/arrests-raise-concern-gay-profiling/tYA6Wym4tBk4X9jhlybsMN/story.html>.

¹²⁸ *See* Kelly Riddell, *Gun Owners Fear Maryland Cops Target Them for Traffic Stops*, WASH. TIMES (Dec. 30, 2014), <http://www.washingtontimes.com/news/2014/dec/30/gun-owners-fear-maryland-cops-target-them-for-traffic/>, *archived at* <https://perma.cc/E27J-WDAW>.

¹²⁹ *See id.*

¹³⁰ *See id.*

claims that when he was pulled over for speeding, the officer knew about his gun ownership and asked where the gun was.¹³¹ Even though his gun was at home, he reported that the officer subjected his car to a thorough search that lasted at least an hour before he and his family were allowed to leave.¹³²

Warrantless arrests likewise present opportunities for targeting based on the driver's social activities or policy preferences. These arrests often overlap with those effectuated for reasons of political power. For example, a jury found former Wisconsin state senator Randy Hopper not guilty after he was arrested and charged with driving under the influence.¹³³ Hopper successfully argued that the stop was motivated by his support for restricting public employee collective bargaining rights. He claimed that union members had threatened to "destroy [his] life," and the arresting officer, Deputy Nick Venne, had signed a recall petition against Hopper when he was a state senator.¹³⁴ These types of policy-motivated enforcement undermine the democratic political process at the expense of individual rights.

B. Objectivity as Fourth Amendment Orthodoxy

The Fourth Amendment today has very little to say about these problems. At times, other constitutional amendments provide redress for authoritarian pretext, such as the First Amendment for politically motivated searches and seizures or the Fourteenth Amendment for racially motivated ones. Fourth Amendment doctrine, however, has developed in such a way as to forego almost any inquiry into police motives.¹³⁵ Instead, the Court has held repeatedly that an officer's subjective intent for effectuating a traffic stop or a warrantless arrest rarely can render that stop or arrest unreasonable. The refusal to look at police motives is the orthodoxy of objectivity.

1. Traffic Stops

In 1996, the Court in *Whren v. United States*¹³⁶ unanimously concluded that pretext is usually not a Fourth Amendment problem.¹³⁷ *Whren* holds that in an ordinary case, a police officer's subjective motives cannot by them-

¹³¹ See Bob Unruh, *Out-of-State Gunowner Profiled for Traffic Stop*, WORLDNETDAILY (Jan. 17, 2014, 8:19 PM), <http://www.wnd.com/2014/01/out-of-state-gunowner-profiled-for-traffic-stop/>, archived at <https://perma.cc/39QK-STYE>.

¹³² See *id.*

¹³³ See Eric Kleefeld, *Randy Hopper Found Not Guilty of DUI Charge, After Union-Conspiracy Defense*, TPM MUCKRAKER (Mar. 23, 2012, 9:28 PM), <http://talkingpointsmemo.com/muckraker/randy-hopper-found-not-guilty-of-dui-charge-after-union-conspiracy-defense>, archived at <https://perma.cc/GP52-4T4V>.

¹³⁴ *Id.*

¹³⁵ Note that the same action can violate more than one constitutional amendment. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49–50. (1993).

¹³⁶ 517 U.S. 806 (1996).

¹³⁷ See *id.* at 813.

selves render a traffic stop unreasonable under the Fourth Amendment.¹³⁸ Instead, the inquiry is objective. Courts are to ask whether it was objectively reasonable for the police to believe that a law was being violated. If so, the stop is supported by reasonable suspicion, and the Fourth Amendment is satisfied. Whatever an officer's true motives for making the stop, there is no Fourth Amendment violation. As Justice Antonin Scalia declared, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹³⁹

Last Term, in *Heien v. North Carolina*,¹⁴⁰ the Court went one step further.¹⁴¹ *Heien* asked the Court to decide whether a traffic stop is unreasonable when the officer is mistaken about the meaning of the law that would provide reasonable suspicion for the stop.¹⁴² In *Heien*, the officers made a traffic stop because of the car's single burnt-out taillight, believing that North Carolina's traffic code required all taillights to be working.¹⁴³ In reality, the law required only one.¹⁴⁴ The Court considered the North Carolina statute to be sufficiently ambiguous, however, and held that the officer's mistake of law was reasonable.¹⁴⁵ After *Heien*, a police officer making a traffic stop needs only an objectively reasonable belief that a law is being violated—even if the law in fact does not exist. Put another way, if it is objectively reasonable for a police officer to think that the law prohibits X, even though it prohibits Y, he can effectuate a traffic stop with reasonable suspicion to believe the driver is doing X or Y.

Heien raises the specter of a predictable future case for the Court: what to do when a police department identifies the full range of ambiguous laws and instructs officers that they constitutionally can make a stop whenever they observe an identified possible violation. In that case, the department would instruct officers that a stop is permissible if the facts they observe suggest that X or Y is happening, because the law could be read to prohibit either. Even if the police department considers Y to be the better reading of the law, X would still be objectively reasonable—and *Whren* stands for the proposition that what the officer is thinking is irrelevant under the Fourth Amendment. When *Whren* and *Heien* are combined, there is no constitutional problem with a police department instructing its officers to enforce what it is fairly certain is not the law, so long as there is a reasonable argument the department is wrong.¹⁴⁶

¹³⁸ See *id.*

¹³⁹ *Id.*

¹⁴⁰ 135 S. Ct. 530 (2014).

¹⁴¹ See *id.* at 531.

¹⁴² See *id.* at 534.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.* at 540.

¹⁴⁶ See *id.* at 543 (Sotomayor, J., dissenting) ("Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpreta-

2. Warrantless Arrests

Just as *Whren* and *Heien* create an objective framework for evaluating Fourth Amendment violations in traffic stops, *Atwater v. City of Lago Vista*¹⁴⁷ establishes a similar approach for warrantless arrests.¹⁴⁸ In *Atwater*, the Court considered whether the Fourth Amendment places any limitations, beyond probable cause, on the discretion of police making a custodial arrest for a minor traffic offense.¹⁴⁹ *Atwater* was arrested for not wearing her seatbelt, and the violation was punishable only by fine.¹⁵⁰ In a 5-to-4 decision, the Court held that so long as an officer has probable cause to believe that the suspect has committed a criminal offense in his presence, no matter what kind of criminal offense it is, a custodial arrest is valid under the Fourth Amendment.¹⁵¹

As in the traffic stop context, the officer's motives are irrelevant here as well. In *Arkansas v. Sullivan*,¹⁵² the Court squarely confronted *Whren*'s implications for *Atwater*. The police had pulled over Sullivan while he was driving, arrested him for minor traffic infractions, and proceeded to search him and his car.¹⁵³ Sullivan successfully argued to the Arkansas Supreme Court that his arrest was a pretext to effectuate a search under the warrant exception for searches incident to arrest.¹⁵⁴ The incentive for police to make such a pretextual custodial arrest is particularly strong after *Knowles v. Iowa*,¹⁵⁵ in which the Court held that police may make a search incident to arrest only if the officer actually makes a custodial arrest, not if he issues a citation or summons for an arrestable offense.¹⁵⁶ The Arkansas court was unwilling "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity."¹⁵⁷ The Supreme Court unanimously reversed, holding that *Whren* applies to custodial arrests as much as to traffic stops and precludes any inquiry into the actual motives of the arresting police officers.¹⁵⁸

tion (or misinterpretation) that suggests a law has been violated significantly expands this authority [from *Whren*].").

¹⁴⁷ 532 U.S. 318 (2001).

¹⁴⁸ *Id.* at 323.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 323–24.

¹⁵¹ *See id.* at 354.

¹⁵² 532 U.S. 769 (2001) (per curiam).

¹⁵³ *Id.* at 770–71.

¹⁵⁴ *Id.* at 770.

¹⁵⁵ 525 U.S. 113, 118–19 (1998).

¹⁵⁶ *See id.*

¹⁵⁷ *Sullivan*, 532 U.S. at 773 (Ginsburg, J., concurring) (quoting *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000)).

¹⁵⁸ *Id.* at 772.

These cases rest on a solid foundation of precedent holding that the Fourth Amendment “regulates conduct rather than thoughts.”¹⁵⁹ In that sense, what is reasonable is almost always an “objective inquiry”¹⁶⁰ that asks “whether ‘the circumstances, viewed objectively, justify [the challenged] action.’”¹⁶¹ In the vast majority of Fourth Amendment cases, the “‘subjective intent’ motivating the relevant officials” simply does not matter.¹⁶²

3. *When Actual Motives Matter*

There are three exceptions to the general rule of objectivity: cases that involve special needs,¹⁶³ administrative and inventory searches,¹⁶⁴ and general schemes of searches without individualized suspicion.¹⁶⁵ In these cases, the Court has recognized that the purpose behind enforcement is relevant to the Fourth Amendment question.¹⁶⁶ Beyond the violation, motives also can be relevant to the remedy question and can justify suppression of evidence under the exclusionary rule.

Special Needs. When a search or seizure is justified by a reason other than “the normal need for law enforcement” and when it would be impracticable to require a warrant and probable cause, the Court balances the governmental and privacy interests at stake to determine whether the police action was reasonable under the Fourth Amendment.¹⁶⁷ For example, safety regulations for railroad employees, supervision of probationers, and operation of government offices, schools, and prisons can all present special needs situations.¹⁶⁸ The asserted “special need,” however, must be substantial, and the Court will invalidate a search when the governmental interest is not

¹⁵⁹ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

¹⁶⁰ *Id.* (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000)).

¹⁶¹ *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

¹⁶² *Id.* (quoting *Whren v. United States*, 517 U.S. 806, 814; (1996)); see also, e.g., *Scott*, 436 U.S. at 138; *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983); *United States v. Robinson*, 414 U.S. 218, 236 (1973).

¹⁶³ See, e.g., *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619–20 (1989). Note, however, that other similar exceptions to the warrant requirement, such as “community caretaking,” remain objective. *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (“It therefore does not matter here—even if their subjective motives could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent future violence.”).

¹⁶⁴ See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

¹⁶⁵ See, e.g., *Edmond*, 531 U.S. at 45–46.

¹⁶⁶ See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011) (“[T]hose exceptions do not apply where the officer’s purpose is not to attend to the special needs or to the investigation for which the administrative exception is justified.”).

¹⁶⁷ See *Skinner*, 489 U.S. at 619.

¹⁶⁸ *Id.* at 620.

weighty enough to override individual privacy interests.¹⁶⁹ In these cases, pretext is forbidden.¹⁷⁰

Administrative and Inventory Searches. At other times, a search or seizure is justified by more mundane needs of law enforcement. Warrantless administrative and inventory searches are carried out in the absence of probable cause, and while they can be justified by the governmental interests at stake, they “must not be a ruse for a general rummaging in order to discover incriminating evidence.”¹⁷¹ Administrative searches are required for enforcing a pervasive regulatory scheme, such as business inspections to enforce health and safety standards.¹⁷² Similarly, police conduct inventory searches when taking custody of property, and the governmental interests in protecting police from danger and keeping track of property, generally make those searches reasonable.¹⁷³ The Court has recognized, however, that the inventory exception is not available to police who act “in bad faith or for the sole purpose of investigation.”¹⁷⁴

General Schemes. The final category involves searches that are carried out for programmatic purposes in the absence of individualized suspicion. In *City of Indianapolis v. Edmond*,¹⁷⁵ the Court held that a city’s drug interdiction checkpoints violated the Fourth Amendment because the city’s primary purpose was “indistinguishable from the general interest in crime control.”¹⁷⁶ The Court declared that “programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.”¹⁷⁷ The Court later emphasized that the inquiry into “programmatic purpose” has “nothing to do with discerning what is in the mind of the individual officer conducting the search,”¹⁷⁸ and the doctrine’s driving justification is the lack of individualized suspicion rather than the lack of probable cause.¹⁷⁹

Remedy. An officer’s enforcement motive is usually irrelevant to the remedy question (such as the suppression of evidence), just as it is to the rights question (whether the Fourth Amendment has been violated in the first place).¹⁸⁰ Sometimes, however, an officer’s subjective intentions can justify

¹⁶⁹ *Chandler v. Miller*, 520 U.S. 305, 318 (1997) (holding that the state’s interest in suspicionless drug testing of political candidates does not fall within the special needs exception to the Fourth Amendment).

¹⁷⁰ See *al-Kidd*, 131 S. Ct. at 2082.

¹⁷¹ See *Whren v. United States*, 517 U.S. 806, 811 (1996) (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

¹⁷² See *Whren*, 517 U.S. at 811–12 & n.2; *Donovan v. Dewey*, 452 U.S. 594, 598 (1981).

¹⁷³ See *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

¹⁷⁴ *Id.*

¹⁷⁵ 531 U.S. 32 (2000).

¹⁷⁶ *Id.* at 48.

¹⁷⁷ *Id.* at 45–46.

¹⁷⁸ *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006).

¹⁷⁹ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011).

¹⁸⁰ See *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984). The Court expressly rejected dicta from *Scott*, in which the Court had stated that “[i]n view of the deterrent purposes of the exclusionary rule, consideration of official motives may play some part in determining

suppression of evidence following a Fourth Amendment violation. First, when considering whether the “taint” of a constitutional violation is “sufficiently attenuated” to admit evidence, the Court considers the totality of the circumstances and treats as relevant “the purpose and flagrancy of the official misconduct.”¹⁸¹ Second, the Court has recognized that officer motives can factor into the “independent source” doctrine as well,¹⁸² and it is generally accepted that the doctrine entails a subjective inquiry.¹⁸³ Beyond these limited exceptions, however, the Court has been adamant that it will not assess an officer’s subjective intent.¹⁸⁴

C. Values Served by Objectivity

What is the Court concerned about in these cases? Why are the subjective motives of law enforcement officers almost always off limits? To be sure, *Whren* began with a categorical declaration that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”¹⁸⁵ The Court’s starting place is simply that subjective intent is not a Fourth Amendment question, much like racial discrimination is not a Third Amendment question. But if one is open to the idea that *some* motives *could* play a role, there are practical issues to keep in mind that weigh in favor of an objective standard. This Section discusses four issues.

First, administrability is the central concern. As Justice David Souter wrote in *Atwater*, the rules for police to follow must be “sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.”¹⁸⁶ Professor Wayne LaFave has warned that injecting subjectivity into Fourth Amendment reasonableness would require officers to “act on necessary spurs of the moment with all the knowledge and acuity of constitutional lawyers.”¹⁸⁷ Even the ACLU argued in an early case for a predominantly objective view of the Fourth Amendment, reasoning that “[s]ubjective standards are difficult to abide by” and “hard to administer,” in part because “[j]udicial in-

whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established.” *Scott v. United States*, 436 U.S. 128, 135–36 (1978). Instead, the inquiry is typically whether a reasonable officer would have known that the search was illegal, and the “good faith” exception to the exclusionary rule is something of a misnomer. See George E. Dix, *Subjective “Intent” as a Component of Fourth Amendment Reasonableness*, 76 *Miss. L.J.* 373, 400–05 & n.125 (2006).

¹⁸¹ *Brown v. Illinois*, 422 U.S. 590, 592, 603–04 (1975).

¹⁸² See *Murray v. United States*, 487 U.S. 533, 542 (1988) (reasoning that there would not have been a “genuinely independent source of the information . . . if the agents’ decision to seek the warrant was prompted by what they had seen during the initial entry”).

¹⁸³ See Dix, *supra* note 180, at 408.

¹⁸⁴ See, e.g., *Whren v. United States*, 517 U.S. 806, 814 (1996).

¹⁸⁵ *Id.*

¹⁸⁶ *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

¹⁸⁷ WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 125 (4th ed. 2004) (quoting *State v. Romeo*, 203 A.2d 23, 32 (N.J. 1964)).

vestigation of police purpose is a frustrating, ordinarily futile endeavor; and the policeman cannot predict its outcome.”¹⁸⁸

Second, there is a related evidentiary consideration for courts.¹⁸⁹ How are they to discern an officer’s true motives that are often secret and hidden from view?¹⁹⁰ Critics worry that a subjective inquiry would be costly, time consuming, and often inaccurate.¹⁹¹ The costs of asking courts to undertake that inquiry partly motivated the Court’s decision in *Harlow v. Fitzgerald*¹⁹² to create a purely objective standard for qualified immunity.¹⁹³ The Court reasoned that “it now is clear that substantial costs attend the litigation of the subjective good faith of government officials.”¹⁹⁴ These costs stem from “the decisionmaker’s experiences, values, and emotions,” which “almost inevitably” influence discretionary action.¹⁹⁵ These factors may “entail broad-ranging discovery” that “can be peculiarly disruptive of effective government” and create an inquiry “in which there often is no clear end to the relevant evidence.”¹⁹⁶ When the Court made the exclusionary rule an objective inquiry, it likewise reasoned “that ‘sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.’”¹⁹⁷

Third, asking about intent could cause unacceptable variation in the Fourth Amendment’s application. The Court has explained that its focus on objectivity is designed to promote “evenhanded, uniform enforcement of the law.”¹⁹⁸ In *Whren*, the Court rejected an inquiry into police enforcement practices because they “vary from place to place and from time to time.”¹⁹⁹ The Court has shied away from embracing rules that would create “arbitrarily variable protection,” whereby one officer making an arrest would violate the Fourth Amendment while another officer doing so “*in precisely the same circumstances*” would not.²⁰⁰

Finally, the Court is worried about practical effects beyond the costs for courts. In *Atwater*, the Court was wary of opening officers to personal lia-

¹⁸⁸ Brief of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts as Amici Curiae at 9, *Massachusetts v. Painten*, 389 U.S. 560 (1968) (No. 37); see also *Dix*, *supra* note 180, at 385 n.45.

¹⁸⁹ *Whren*, 517 U.S. at 814–15.

¹⁹⁰ This was an early concern presented to the Court. See Brief for the Petitioner at 9, *Painten*, 389 U.S. 560 (No. 37) (“How can one possibly ascertain the real motives of any person, including a police officer, for doing what he does?”); see also *Dix*, *supra* note 180, at 384.

¹⁹¹ See *Dix*, *supra* note 180, at 472.

¹⁹² 457 U.S. 800 (1982).

¹⁹³ See *id.* at 816–17.

¹⁹⁴ *Id.* at 816.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 816–17.

¹⁹⁷ *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

¹⁹⁸ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

¹⁹⁹ *Whren v. United States*, 517 U.S. 806, 815 (1996).

²⁰⁰ *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004).

bility, increasing litigation, excluding evidence, and disincentivizing necessary arrests.²⁰¹ These concerns speak broadly to the costs for society of any rule that would expand constitutional rights in the context of searches and seizures. Given these weighty reasons to craft an objective standard for Fourth Amendment violations, why should the Court consider a new role for authoritarian pretext?

III. WHY MOTIVES MATTER FOR THE RULE OF LAW

In the wake of World War II, Justice Robert Jackson declared that the Fourth Amendment is “one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”²⁰² The Fourth Amendment is at the center of maintaining rule of law in the United States. But what role does motive play in the divide between authoritarian governments and those that are accountable to their populations? And how does selective enforcement undermine the rule of law?²⁰³ This Part explores two normative considerations for why motive deserves a place in Fourth Amendment analysis: (1) preventing a slide into authoritarian government, and (2) protecting citizens from the arbitrary use of executive power. These values are partly why authoritarian pretext should render a search or seizure unreasonable under the Fourth Amendment.

A. Preventing Authoritarian Rule

The starting point when thinking about modern authoritarian governments and trying to understand how they build and retain power is to recognize that just as the law can serve democratic goals, so too can it undermine them.²⁰⁴ As one prominent Chinese environmental attorney described,

²⁰¹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 350 (2001).

²⁰² *Johnson v. United States*, 333 U.S. 10, 17 (1948).

²⁰³ Of course, there is substantial disagreement over what the rule of law means and what elements are central to its realization. See, e.g., Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1, 7–8 (1997). This Part focuses on two primary elements: one that is more procedural (avoiding arbitrariness) and one that is more substantive (avoiding authoritarianism). The former is commonly identified as a core rule of law value. See *id.* at 8 n.26. The latter is particularly relevant for a country, like the United States, that identifies its constitutional democracy in part by its fidelity to a democratic and non-authoritarian form of government. It also finds support in Lon Fuller’s work on the “inner morality of law.” See LON L. FULLER, *THE MORALITY OF LAW* 42–44 (1964) (arguing that law is a moral commitment, and setting forth eight standards by which excellence in legality can be tested for a moral legal system).

²⁰⁴ See DOBSON, *supra* note 14, at 52 (“Most governments—whether authoritarian or not—appreciate the value of an impartial judicial system. Reliable and professionally administered courts offer a way for citizens to resolve conflicts and reduce the desire to seek redress through protests or public demonstrations.”); Henderson, *supra* note 9, at 383 (“Because law is a major tool of social and political power, and because it is the primary instrument for a government to legitimate itself and accomplish its objectives, law is vulnerable to ‘capture’ for substantively authoritarian purposes.”).

“[t]he Communist Party always talks about law; they want to rule the country by law.”²⁰⁵ Sometimes, a law—such as Saudi Arabia’s ban on political parties²⁰⁶ or statutes in Sudan and Nigeria that make homosexual acts punishable by death²⁰⁷—is facially unjust and overtly serves authoritarian interests. But the way a good law is misused can be just as important as a bad law’s content.

Often, an authoritarian regime uses selective enforcement to punish people for violating the government’s unwritten rules connected to the government’s hold on power. In this way, the government prosecutes someone who has violated both a formal law and an informal law. While the government justifies prosecution with the formal one, its true motive is the informal violation. By using formal laws to punish violations of unwritten rules, leaders use legal structures to achieve their personal goals. William Partlett has observed that for Putin, “strong legal institutions were a means to an end—a tool for ensuring that he could punish those who did not comply with his informal rules of the game through selective prosecution.”²⁰⁸ For example, a university might be punished under the fire code—for a violation of the formal rule—as a pretext to punish its election-monitoring activities—for a violation of Putin’s informal rule against challenging his political power.

The key to preventing a system of informal rules is to protect the proper relationship between citizens and the state. The rule of law is partly about that relationship, and a society that achieves rule of law rather than rule by law does so by enshrining the right balance between the government and those governed.²⁰⁹ When that relationship breaks down and stops being mutually supportive, the “culture of lawfulness” can disappear even when the laws remain.²¹⁰ When citizens do not view their government as faithful to the rule of law, they expect the same of their leaders, and they come to see corruption, state overreach, and inequality in enforcement as inevitable.²¹¹ When a state practice threatens to erode widespread cultural values among the population about how the government should behave, it risks undermin-

²⁰⁵ DOBSON, *supra* note 14, at 52.

²⁰⁶ See *Saudi Arabia Country Profile*, BBC (Apr. 2, 2015), <http://www.bbc.com/news/world-middle-east-14702705>, archived at <https://perma.cc/L3NE-HLR8>.

²⁰⁷ See Terri Rugar, *Here Are the 10 Countries Where Homosexuality May Be Punished by Death*, WASH. POST (Feb. 24, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/02/24/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death>.

²⁰⁸ See Bowen, *supra* note 27.

²⁰⁹ See RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* 99–103 (2012).

²¹⁰ *Id.* at 99.

²¹¹ See *id.* at 101.

ing the foundation for rule of law in society.²¹² In this way especially, appearances matter.²¹³

These risks are all the more prevalent when the reasons behind enforcement are particularly insidious. Not all subjective motives are equivalent. Allowing the government to enforce a law for the purpose of consolidating political power, increasing its wealth, or enforcing a particular social agenda at the expense of democratic processes and individual rights is especially dangerous to the rule of law. Other types of pretextual enforcement at least involve a valid substantive enforcement purpose. When police effectuate a traffic stop for the purpose of enforcing drug laws, for example, there is nothing inherently wrong with that purpose; society wants officers to enforce drug laws, and the controversy is about whether these stops allow police to evade the Fourth Amendment's procedural requirements. In contrast, there are certain substantive enforcement goals that society *never* has an interest in achieving, no matter what procedural requirements are met. This is true of authoritarian pretext.

Politically motivated enforcement offers the clearest example. Selective enforcement allows authoritarian states to block access to power, derail opposition advocacy or mobilization, and exclude from politics anyone deemed a threat to the executive's hold on power.²¹⁴ A hallmark of an authoritarian government is its refusal to entertain any genuine challenge to its political control. The legal system that allowed Putin to consolidate his power through politically motivated selective enforcement directly contributed to his ability to establish and exercise control over Russian politics.²¹⁵ To be sure, the magnitude of politically motivated enforcement in the United States is nowhere near that degree. But when U.S. police departments target politicians who oppose the local police chief, their use of authoritarian pretext poses a similar type of threat to democracy and undermines the basic relationship between citizens and the state.²¹⁶

So, too, with money. One quality of authoritarian governments is that they can expropriate property at will.²¹⁷ While that creates clear problems of arbitrariness, it also gives authoritarian governments the economic resources that support their survival. In Zimbabwe, for example, money-driven traffic stops sustain the police who in turn sustain President Mugabe.²¹⁸ When authoritarian leaders consider it to be in their advantage simply to take prop-

²¹² See *id.* at 103.

²¹³ Cf. LISA WEDEEN, *AMBIGUITIES OF DOMINATION: POLITICS, RHETORIC, AND SYMBOLS IN CONTEMPORARY SYRIA* 6–12 (1999) (arguing that the Syrian regime supports itself in part by producing “compliance through enforced participation in rituals of obeisance”).

²¹⁴ See, e.g., Massoud, *supra* note 16, at 252–53 (discussing how the government of Sudan targets disfavored non-governmental organizations for punitive action and uses administrative regulations to prosecute pro-democracy lawyers).

²¹⁵ See *supra* Section I.A.

²¹⁶ See *supra* Section II.A.

²¹⁷ See Tushnet, *supra* note 9, at 424.

²¹⁸ See *supra* Section I.B.

erty they desire, nothing stops them from doing so, as dictators have done in Uganda, Tunisia, and elsewhere.²¹⁹ In the United States, civil forfeiture-motivated traffic stops may sustain police departments that are not otherwise authoritarian. That exercise of authority, however, can be just as arbitrary, and it can be just as dangerous to the balance of power between police and citizens.²²⁰

Authoritarian leaders also have social agendas that are inconsistent with liberal democratic governance.²²¹ Authoritarianism is marked by a subversion of individual rights, is “intolerant of difference,” and is “likely to be prejudiced against racial, religious and ethnic ‘outgroups.’”²²² Accordingly, “[a]uthoritarian political systems are characterized by ‘repression, intolerance, and encroachment on the private rights and freedoms of citizens.’”²²³ As Lon Fuller argued in defense of a thick conception of the rule of law, the law has an “inner morality” without which rules cease to really be law at all.²²⁴ Without this sense that the rule of law must “include the substantive requirements of reciprocity, fairness, and respect for persons on the part of the state, there is little to prevent authoritarian abuses under law.”²²⁵ When selective enforcement in the United States is motivated by discriminatory reasons or is used to punish individuals for their policy preferences, it similarly supports authoritarian outcomes and an undemocratic process of creating social policy.²²⁶

To be sure, sometimes these problems are at least partly the legislature’s responsibility to fix.²²⁷ For example, Ukraine’s overly complicated tax code has made it practically impossible for firms to be in total compliance. As Paul D’Anieri has argued, “by creating a system where everyone is guilty of something, all the power lies in the hands of those who decide whom and what to investigate, and whom to prosecute.”²²⁸ In general, however, society

²¹⁹ See Tushnet, *supra* note 9, at 426 & n.179; *supra* Section I.B.

²²⁰ See *supra* Section II.A.

²²¹ See *supra* Section I.C.

²²² Henderson, *supra* note 9, at 394.

²²³ *Id.* at 396 (quoting A. PERLMUTTER, MODERN AUTHORITARIANISM 7–8 (1981)).

²²⁴ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 660 (1958); see also Fallon, *supra* note 203, at 21–24 (summarizing proponents of a substantive conception of rule of law).

²²⁵ Henderson, *supra* note 9, at 402.

²²⁶ See *supra* Section II.A.

²²⁷ To some extent, there are the same problems with judicial review here that accompany judicial review more generally. As Louis Jaffe recognized, there is “great room for corruption, favoritism, inefficiency, and irresponsibility” in judicial review, in response to the concern that “[j]udicial review is too occasional and cursory, and is exercised too remote a point, to supply an adequate corrective for arbitrary administration.” Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 407 (1958). But there is a “basic role of the courts in our system”: to review “the question of illegality or arbitrariness.” *Id.* at 407, 409. Constitutional courts simply “are the acknowledged architects and guarantors of the integrity of the legal system.” *Id.* at 409.

²²⁸ D’ANIERI, *supra* note 35, at 62; see also HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT xxxvi (2011) (“[I]t is only a slight exaggeration to say that the average busy professional in [the United States] wakes up in the morning, goes

should not have to choose between foregoing a needed law and tolerating authoritarian abuse. The fact that speed limits often lend themselves to legal violations does not mean the legislature should forego all speed limits. Not only does public safety demand them, but enforcement risks also are not unique to the traffic code; a creative executive who is set on abuse will be able to bend almost any law to ill purposes.²²⁹ The answer to abusive enforcement is not to make everything legal, but rather to prohibit directly authoritarian pretext as the type of abuse that most carries authoritarian risks.

B. Preventing Arbitrariness

A second core value of the rule of law is protection against arbitrary government.²³⁰ The Declaration of Independence recognized arbitrariness as one of the core evils of an abusive government.²³¹ Proponents of even thin conceptions of the rule of law who focus on procedural regularity argue that the rule of law is meant to constrain arbitrariness “in the sense of whim and caprice.”²³² Although authoritarian governments at times act within the formal legal rules they create,²³³ particularly in routine management of society, they are prone to arbitrary action in politically sensitive areas of public life.²³⁴

Protection against arbitrary government is a constitutional norm that sweeps across doctrines.²³⁵ In 1819, the Court recognized that the Magna

to work, comes home, takes care of personal and family obligations, and then goes to sleep, unaware that he or she likely committed several federal crimes that day.”).

²²⁹ See *supra* Part I.

²³⁰ The distinction in U.S. law has a long history. In 1884, the Court described how the Magna Carta’s provisions were given broader meaning in written state constitutions than under English constitutional history and law. See *Hurtado v. California*, 110 U.S. 516, 532 (1884) (“Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”).

²³¹ THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

²³² Tushnet, *supra* note 9, at 420–21.

²³³ See Henderson, *supra* note 9, at 402 (“Authoritarianism is *not* arbitrariness, whim, or caprice—it is unremitting insistence on obedience and punishment of those who disobey.”). When “authoritarianism” is used in a more substantive sense, however, it is often associated with unrestricted power. See Tushnet, *supra* note 9, at 421 (“If constitutionalism entails limitations on government, and authoritarian regimes are ones in which government is unlimited, why do such regimes even have constitutions?”).

²³⁴ See ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* 62 (1941).

²³⁵ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 809 (1994) (“Rule-of-law values affirmed in various constitutional ways—the Due Process, Equal Protection, and Attainder Clauses, and the more general separation of powers—teach us to be especially wary of searches and seizures that allow too much arbitrariness and ad hocery”); see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 502 (2003) (arguing that preventing arbitrariness is a “foremost consideration” across all areas of law in a liberal democracy).

Carta was “intended to secure the individual from the arbitrary exercise of the powers of government.”²³⁶ Alexander Bickel has called “abhorrence of caprice” a “fundamental” value of law,²³⁷ and Lisa Bressman has argued that avoiding arbitrariness is a purpose underlying the entire constitutional structure, which serves to ensure government is not only responsive to the wishes of the majority but follows a “good government paradigm” as well.²³⁸ As the Court has declared, the Constitution condemns “all arbitrary exercise of power.”²³⁹ Indeed, in 1884, the Court went so far as to say that “[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law.”²⁴⁰

Arbitrariness is a particularly relevant concern in selective enforcement cases brought under the Equal Protection Clause of the Fourteenth Amendment. Beginning with *Yick Wo v. Hopkins*,²⁴¹ the Court’s decisions on discriminatory enforcement contain a strong normative understanding of why arbitrary enforcement undermines the rule of law. In *Yick Wo*, the Court struck down a San Francisco ordinance that restricted licenses for laundry operators. The law in question, a facially neutral regulation of fire hazards that was enforced in a discriminatory manner against Chinese laundry operators, gave city officials “a naked and arbitrary power to give or withhold consent” in a “purely arbitrary” fashion.²⁴² The Court recognized that where the law is applied “with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution.”²⁴³ Accordingly, where discriminatory enforcement arbitrarily distinguishes among certain groups, it can be a denial of equal protection.²⁴⁴

Preventing arbitrary enforcement, particularly by police officers, likewise underlies much of the Court’s understanding of why vague laws violate due process.²⁴⁵ As the Court recently affirmed, a core due process concern behind the void for vagueness doctrine is that “precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or dis-

²³⁶ *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

²³⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 55 (1962).

²³⁸ Bressman, *supra* note 235, at 495, 500.

²³⁹ *Interstate Commerce Comm’n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913); *see also* Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 56–57 (1965) (“There is no place in our constitutional system for the exercise of arbitrary power.” (quoting *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908))).

²⁴⁰ *Hurtado v. California*, 110 U.S. 516, 536 (1884).

²⁴¹ 118 U.S. 356 (1886).

²⁴² *Id.* at 366–67.

²⁴³ *Id.* at 373–74.

²⁴⁴ *See id.*; Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 743.

²⁴⁵ *See* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 290 (2003).

criminary way.”²⁴⁶ One problem with catch-all criminal statutes, for example, is that they encourage “arbitrary and erratic arrests and convictions.”²⁴⁷ As one Justice recognized in an early argument to consider arbitrariness in due process jurisprudence, because “misuse of the criminal machinery is one of the most potent and familiar instruments of arbitrary government, proper regard for the rational requirement of definiteness in criminal statutes is basic to civil liberties.”²⁴⁸

Much of administrative law also is based on the need to protect regulated parties from arbitrary government action. The Administrative Procedure Act²⁴⁹ (“APA”) is written to prohibit arbitrary decisionmaking, with even lenient standards of judicial review designed to direct courts to overturn arbitrary and capricious agency choices.²⁵⁰ The problem with arbitrary administrative action, like all arbitrary government action, is that it is irrational, unpredictable, and unfair.²⁵¹ Beyond the APA, some have argued that these protections are such a core part of our system of governance that there should be a constitutional right to judicial review of arbitrary agency action.²⁵²

Those Justices who have dissented from the Court’s Fourth Amendment holdings have raised similar concerns. In *Atwater*, four Justices worried that permitting warrantless arrests for misdemeanors punishable only by fine risked giving officers “unfettered discretion” to effectuate arrests for minor traffic violations.²⁵³ “Such unbounded discretion,” the dissenters warned, “carries with it grave potential for abuse” and the possibility that minor traffic infractions would become “an excuse for stopping and harassing an individual.”²⁵⁴

Authoritarian pretext creates problems of arbitrary enforcement similar to those created by other forms of pretext: a citizen feels singled out for police contact not because of the formal law he violated, but for a separate, unmentioned reason. There is, however, one key difference between authoritarian pretext and other forms of pretext. The population notices selective enforcement and feels particularly aggrieved when the government’s underlying motive is entirely illegitimate. In Russia, for example, mistrust charac-

²⁴⁶ *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012).

²⁴⁷ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); see also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 595–608 (1997).

²⁴⁸ *Screws v. United States*, 325 U.S. 91, 149 (1945) (Roberts, J., dissenting); see also Goldsmith, *supra* note 245, at 287.

²⁴⁹ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

²⁵⁰ See 5 U.S.C. § 706 (2012) (“The reviewing court shall— . . . (2) . . . hold unlawful and set aside agency action, findings, and conclusions found to be— . . . (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

²⁵¹ See Bressman, *supra* note 235, at 496.

²⁵² See, e.g., Berger, *supra* note 239, at 57–58, 88–93.

²⁵³ *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O’Connor, J., dissenting).

²⁵⁴ *Id.*

terizes the relationship between citizens and government, with the vast majority of people convinced the government selectively enforces the law.²⁵⁵ Someone with drugs in his car may object to a traffic stop because he believes that police are circumventing procedural limitations, but the problem is not inherent with drug enforcement. With authoritarian pretext, the total illegitimacy of the underlying reason—in any context, and following any procedure—heightens the belief that police are targeting citizens for an improper purpose. Perceptions matter to the rule of law, and public understanding can be essential to maintaining a democratic system of governance that protects individual rights.²⁵⁶

IV. AUTHORITARIAN PRETEXT: A NEW ROLE FOR MOTIVE IN FOURTH AMENDMENT DOCTRINE

Today, selective enforcement is forbidden only when driven by one of three motives: (1) a suspect classification such as race or religion; (2) a desire to block the exercise of constitutional rights, usually under the First Amendment; or (3) personal animosity.²⁵⁷ In other words, pretext is typically a problem only when a constitutional amendment other than the Fourth prohibits it. Motives are relevant for a Fourth Amendment violation only in the limited contexts of special needs,²⁵⁸ administrative and inventory searches,²⁵⁹ and general schemes of searches without individualized suspicion.²⁶⁰

This Part argues that the Fourth Amendment itself should limit authoritarian pretext. The Fourth Amendment prohibits “unreasonable” searches and seizures, and those words should be understood independently to prohibit searches and seizures when police motives undermine the rule of law and threaten the balance of power between citizens and the government.²⁶¹ Without this check on the executive, the risks of authoritarianism and arbitrariness are too high. Because these values go to the heart of the Fourth Amendment and speak to its core purposes, courts should embrace a new, if limited, role for subjectivity. This Part answers two key questions for defin-

²⁵⁵ See Jeffrey Kahn, *The Search for the Rule of Law in Russia*, 37 GEO. J. INT’L L., 353, 354–55 & n.3 (2006) (reporting that ninety-one percent of respondents in 2004 “believe state officials selectively enforce the law”).

²⁵⁶ See J. Harvie Wilkinson III, *The Dual Lives of Rights: The Rhetoric and Practice of Rights in America*, 98 CALIF. L. REV. 277, 279 (2010).

²⁵⁷ See Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1372 (1987).

²⁵⁸ See, e.g., *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619–20 (1989).

²⁵⁹ See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

²⁶⁰ See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 45–46 (2000).

²⁶¹ For a similar argument, see Sundby, *supra* note 18, at 1777 (arguing that the “vision of the Fourth Amendment’s purpose is founded upon the idea that integral to the Constitution and our societal view of government is a reciprocal trust between the government and its citizens”).

ing this role: First, which motives should be unreasonable under the Fourth Amendment? And second, what is a workable process for implementation?

A. *Defining Unreasonable Motives*

Authoritarian pretext is special. When a law is enforced not for its intended purpose, but for reasons of power, money, or dogma, selective enforcement undermines the proper distribution of authority between the state and its citizens, and the search or seizure should be considered unreasonable under the Fourth Amendment. This understanding comports with the Fourth Amendment's text, purpose, and history, and it offers a way forward to incorporate subjectivity into Fourth Amendment doctrine without overruling the Court's precedents.

1. *When Is Pretext Special?*

The selective enforcement motives that most endanger the balance of power between citizens and the state are pursuit of power, money, and dogma. At times, other constitutional amendments prohibit enforcement for these reasons, and Akhil Amar has argued that when a search or seizure "comes close to the limits set by one of these independent clauses," it can be constitutionally unreasonable in light of those other protections.²⁶² That a search might *also* violate another constitutional amendment is no bar to a Fourth Amendment violation as well.²⁶³ As the Court has recognized, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."²⁶⁴ If anything, unconstitutional behavior seems particularly unreasonable. But even where authoritarian pretext does not violate the First, Fifth, or Fourteenth Amendments, constitutional values contained in those amendments could render unreasonable a search or seizure intended to enhance executive political power, acquire property without process or compensation, or repress particular groups on the basis of their status or policy preferences.

These motives are unreasonable for a more fundamental problem as well. They are the core levers of power that authoritarian governments use to maintain control at the expense of democratic values, and authoritarian pretext is the type of governmental abuse that the Fourth Amendment was

²⁶² Amar, *supra* note 235, at 804–11; *see also* Boyd v. United States, 116 U.S. 616, 633 (1886) ("[C]ompelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the fourth amendment."), *overruled in part on other grounds*, Warden v. Hayden, 387 U.S. 294, 318 (1967).

²⁶³ *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 49–50 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another.")

²⁶⁴ Soldal v. Cook Cty., 506 U.S. 56, 70 (1992).

crafted to prevent.²⁶⁵ The Court is right that in the ordinary case, an objective test adequately protects the citizen's privacy interests. But where the risk is not primarily to privacy, but rather to the balance of authority between citizens and the state, the objective circumstances do little to prevent abuse. To be a true check on executive power and to cement a limited, democratic relationship between the people and their government, the Fourth Amendment must have something to say about these motives.

This is particularly true for traffic stops and warrantless arrests. In the typical case, the Fourth Amendment demands a warrant so that a "neutral and detached magistrate" can evaluate the validity of the officer's actions, rather than the officer himself who is "engaged in the often competitive enterprise of ferreting out crime."²⁶⁶ For traffic stops and warrantless arrests, the absence of a neutral magistrate between the officer and the citizen presents a heightened risk of abuse.²⁶⁷

The lack of a warrant also brings these cases closer to the administrative and inventory search contexts, where the Court has allowed inquiries into subjective intent.²⁶⁸ For example, when approving warrantless administrative searches of commercial property, the Court recognized that if the scheme gives executive and administrative officers "unbridled discretion," a search might require a warrant.²⁶⁹ Thus, where the absence of a warrant requirement creates a heightened risk of abuse of discretion, the Court has been more receptive to using the Fourth Amendment's reasonableness requirement to forbid improper police motives.

To be sure, many of these arguments would support a broader reimagining of Fourth Amendment doctrine to prohibit any pretextual motive. Indeed, some academics argue for just that.²⁷⁰ Their position is that *Whren* is wrong because allowing pretextual enforcement expands police power at the expense of citizen liberty. Other academics have noted the sense of moral outrage that citizens feel when they believe delegated power is being abused or used for unintended purposes.²⁷¹ To them, the Fourth Amendment should prohibit all pretextual searches or seizures to prevent officers from interfering with citizens' liberty whenever they lack adequate evidence of the crime they suspect.²⁷²

²⁶⁵ See *infra* Section IV.A.2.

²⁶⁶ *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

²⁶⁷ See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2082 (2011).

²⁶⁸ See *id.* at 2081 ("The Government seeks to justify the present arrest on the basis of a properly issued judicial warrant—so that the special-needs and administrative-inspection cases cannot be the basis for a purpose inquiry here.")

²⁶⁹ *Donovan v. Dewey*, 452 U.S. 594, 599 (1981).

²⁷⁰ See, e.g., John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 100–03 (1982); Jonas, *supra* note 4, at 1825; see also Dix, *supra* note 180, at 477 (arguing that law enforcement "should be limited to those general legal theories it can prove were actually and subjectively within the analysis engaged in by the officers in deciding to take that action").

²⁷¹ See, e.g., Jonas, *supra* note 4, at 1817.

²⁷² See *id.* at 1825.

Adopting this position would require overruling *Whren*, *Atwater*, and the long line of cases holding that police can enforce one law for the purpose of investigating violations of another. That argument has no hope of gaining traction with a Court that unanimously decided *Whren* just two decades ago. In contrast, authoritarian pretext is a frame to limit *Whren* in future cases when the particular motives of power, money, or dogma are implicated. *Whren* itself acknowledged that it dealt with a “run-of-the-mine case.”²⁷³ Without overruling *Whren*, the Court could hold that it is unreasonable under the Fourth Amendment to enforce the law for reasons that are inherently wrong and undermine the Fourth Amendment’s balance of power between police and citizens (such as reasons of power, money, and dogma). That holding could nevertheless recognize that a general interest in law enforcement is not one such reason, consistent with *Whren*.

2. *How Are These Concerns Grounded in the Fourth Amendment’s Text, Purpose, and History?*

Authoritarian pretext threatens the rule of law in ways that the Fourth Amendment is designed to prevent. The Fourth Amendment prohibits “unreasonable” searches or seizures, and the text should be interpreted in light of its animating purpose. That purpose, grounded in the Framers’ rejection of general warrants and their distrust of an unrestrained King, is to prevent the government from acquiring an authoritarian character and to protect citizens from the arbitrary abuse of executive power. The Fourth Amendment’s text, purpose, and history support treating particular enforcement motives of power, money, and dogma differently than other types of pretext.

There is a wealth of commentary arguing that the Fourth Amendment, like other constitutional rights, should be interpreted to constrain abuse of power.²⁷⁴ After World War II, courts regularly drew comparisons to Nazism and the Soviet Union to justify Fourth and Fifth Amendment restrictions on police action.²⁷⁵ While still a judge on the D.C. Circuit, Warren Burger observed that this “deeply rooted national skepticism toward police and indeed all public authority” explains the continued “tendency to react to police authority in much the same way that the Colonials reacted to the Redcoats who

²⁷³ *Whren v. United States*, 517 U.S. 806, 819 (1996).

²⁷⁴ See, e.g., Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 343–44, 356, 364 (1993) (“Within our constitutional practice, concerns about the way the powers of government must be limited to prevent possible abuse furnish a common foundation for rights.”); Sundby, *supra* note 18, at 1780–82 (“[R]ights’ become enclaves from government interference . . .”).

²⁷⁵ See Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1203–20, 1245 (1998) (“Totalitarian comparisons reflected a redefinition of ‘tyranny’ in light of current perceptions.”).

harassed them”: with a “democratic temper,” characterized as “a sort of briny irreverence toward officials.”²⁷⁶

This idea underlies early conceptions of the Fourth Amendment. The Framers doubted that ruling governments are or remain benevolent,²⁷⁷ and their rejection of general warrants and writs of assistance stemmed from that distrust.²⁷⁸ In eighteenth century England, police executed broad warrants often for the purpose of harassing political opponents.²⁷⁹ The 1763 English case of *Wilkes v. Wood*²⁸⁰ is understood to have motivated the Fourth Amendment.²⁸¹ Wilkes was a member of Parliament who published an anonymous scathing attack against the King, and in response, an executive official issued a sweeping warrant to search the offending publishers and printers.²⁸² The colonies were outraged by the search as a symbol of government oppression.²⁸³ What they considered unreasonable under the Fourth Amendment was thus tied up with politically motivated executive action and abuse of power.²⁸⁴

Admittedly, the Framers objected to the unrestricted scope of the search as well, and they included a particularity requirement in the Fourth Amendment to target the “principal evil of the general warrant.”²⁸⁵ If scope were the only problem, however, the particularity requirement would solve it, and there would be no need for a general mandate of “reasonableness” as well. There was something else “unreasonable” about that search, and it is easy to doubt that the Founders would have been as outraged had the police simply been looking for a body in Wilkes’s attic. If we can say anything about the original intent behind the Fourth Amendment, it is that the Framers were “notorious[ly] suspicio[us] of centralized power in every form,” and the reasonableness requirement was a “fundamental principle[]” meant to constrain abuse of that power.²⁸⁶

²⁷⁶ Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 4 (1964) (quoting EDMOND CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 24 (1961)).

²⁷⁷ See Bressman, *supra* note 235, at 497 (“[A] pivotal aim of the constitutional design was the prevention of tyranny. One means for achieving that end was to create a government representative of and responsive to the people—a government ‘by the people.’ A dictator, however benevolent, could not satisfy this condition.”).

²⁷⁸ Cf. David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1785 (2000) (explaining that the Fourth Amendment began as a rejection of the general warrants of England and the writs of assistance of the colonies).

²⁷⁹ See Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 361–63 (1921).

²⁸⁰ (1763) 98 Eng. Rep. 489 (K.B.).

²⁸¹ See Amar, *supra* note 235, at 772; see also *Boyd v. United States*, 116 U.S. 616, 626 (1886), *overruled in part on other grounds*, *Warden v. Hayden*, 387 U.S. 294, 318 (1967).

²⁸² See *Wilkes*, 98 Eng. Rep. at 490; Amar, *supra* note 235, at 772 n.54.

²⁸³ See sources cited *supra* note 282.

²⁸⁴ The search in *Wilkes* was for certain publications that “had been very bold in denunciation of the government, and were esteemed heinously libelous.” *Boyd*, 116 U.S. at 626.

²⁸⁵ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). The Fourth Amendment approves of only warrants “particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

²⁸⁶ See Sklansky, *supra* note 278, at 1786–90.

The need to prevent arbitrariness likewise permeated the Fourth Amendment's origins. As John Adams described, the Fourth Amendment grew out of "the first act of opposition to the arbitrary claims of Great Britain" embodied in the writs of assistance.²⁸⁷ In *Entick v. Carrington*²⁸⁸ and *Money v. Leach*,²⁸⁹ the English courts invalidated general warrants for opening up citizens to the unfettered and arbitrary exercise of government power. In *Entick*, the court recognized that "if a man is punishable for having a libel in his private custody," then "half the kingdom would be guilty" if "libels may be searched for and seized by whomever and wheresoever the Secretary of State thinks fit."²⁹⁰ The core problem with the writs of assistance was that in giving police such broad search powers, they did nothing to constrain police discretion or offer a modicum of predictability.²⁹¹

The Court has repeatedly confirmed that concern about arbitrary power is a constitutional norm at the heart of the Fourth Amendment.²⁹² As the Court has recognized, the Fourth Amendment's "basic purpose" is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."²⁹³ That protection against arbitrary searches and seizures, no less than protection against unjustified ones, is a "paramount purpose" of the Fourth Amendment.²⁹⁴

Concern about arbitrariness is fundamentally about the potential for abuse of discretion.²⁹⁵ Unrestricted discretion is what allows police to act arbitrarily, "upon suspicion or whim, or worse."²⁹⁶ It was discretion that made the writs of assistance "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book," because they "placed the liberty of every man in the hands of every petty officer."²⁹⁷ Of course, some discretion is necessary and desirable in modern society.²⁹⁸ The key is to prevent its abuse by placing meaningful limits on how the government exercises discretion. As Justice William Douglas recognized, "[a]bsolute discretion, like corruption, marks the beginning of the end of liberty."²⁹⁹

²⁸⁷ Fraenkel, *supra* note 279, at 365 (quoting Letter from John Adams to William Tudor (Mar. 29, 1817), reprinted in OLD SOUTH LEAFLETS, NO. 179 60 (vol. VIII)).

²⁸⁸ (1765) 95 Eng. Rep. 807 (P.C.).

²⁸⁹ (1765) 96 Eng. Rep. 320 (K.B.).

²⁹⁰ *Entick*, 95 Eng. Rep. at 818.

²⁹¹ See Maclin, *supra* note 13, at 227–29.

²⁹² See WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e) (5th ed. 2014).

²⁹³ *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

²⁹⁴ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974).

²⁹⁵ See Burkoff, *supra* note 270, at 102–03.

²⁹⁶ *Id.* at 102.

²⁹⁷ *Boyd v. United States*, 116 U.S. 616, 625 (1886), overruled in part on other grounds, *Warden v. Hayden*, 387 U.S. 294, 318 (1967).

²⁹⁸ See Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960).

²⁹⁹ *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting).

Ignoring all subjective motives in the Fourth Amendment opens citizens to greater risk of arbitrary enforcement. A fully objective theory of the Fourth Amendment requires a benevolent executive if it is to be compatible with democratic governance. As seen by the experiences of modern authoritarian leaders, selective enforcement allows them to enforce unwritten rules, typically those regarding their own supremacy of power, in much the same way as general warrants were tools for harassing political opponents. To be sure, much of the general public may no longer feel as skeptical of governmental authority as the Framers felt, nor be as wary of totalitarian government as were those who lived through Nazi and Soviet rule.³⁰⁰ But these dangers are prevalent in much of the world, and they are not that different from the abuses of King George. When Putin enforces the fire code against election monitors, everyone understands the implicit threat. Permitting authoritarian pretext to go unchecked is what truly endangers democracy in Russia and elsewhere.

These risks are particularly relevant after *Heien*, when the full range of reasonable legal interpretations will provide reasonable suspicion for traffic stops. To illustrate, consider a case that arose in the Seventh Circuit before *Heien*.³⁰¹ A city law both required the proper use of turn signals and prohibited the improper use of turn signals. This meant that failing to signal when required could result in a traffic stop, and signaling when unwarranted could also result in a traffic stop. There was a ninety-degree turn in the road, but the road retained the same name. Another ambiguous city law could be read either to *require* a turn signal at that juncture or to *prohibit* it—no matter what the driver did at that turn, signal or not, it was objectively reasonable to believe the driver violated the law and he could be pulled over.³⁰² This is the kind of result that creates opportunities for arbitrary government, because the law does not constrain police discretion at that juncture.³⁰³ If a court cannot ask what motivated police to make a traffic stop at that ninety-degree turn, and police can stop a driver *no matter what he does*, the risk of arbitrary enforcement undermines the rule of law. Although the Seventh Circuit thought that the officer's mistaken belief about the law could not support a traffic stop at that ninety-degree turn,³⁰⁴ after *Heien* such a stop would be altogether reasonable under the Fourth Amendment.

³⁰⁰ See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 296 (1993); Amsterdam, *supra* note 294, at 400; Raymond, *supra* note 275, at 1235 & n.148 (“The power of the American ‘state’ as an entity may be viewed by a substantial sector of the public as largely benevolent, making it more difficult to argue convincingly for the need to limit police authority.”).

³⁰¹ *United States v. McDonald*, 453 F.3d 958 (7th Cir. 2006).

³⁰² *Id.* at 959–60.

³⁰³ This type of situation also violates another principle of the rule of law that Lon Fuller identifies as “laws requiring the impossible.” See FULLER, *supra* note 203, at 70; see also *id.* at 71 (“[I]ts brutal pointlessness may let the subject know that there is nothing that may not be demanded of him and that he should keep himself ready to jump in any direction.”).

³⁰⁴ *McDonald*, 453 F.3d at 959.

B. Implementation

If courts were open to considering the role of authoritarian pretext in the Fourth Amendment, how would it work? Is there a practical way to take authoritarian pretext into account while respecting the considerations that drove the Court to focus on objectivity? Of course, some have questioned whether the Court is right to worry that general inquiries into pretext would be unmanageable; the criminal justice system has proven able to evaluate the culpable mental states of offenders, state courts have administered subjective standards successfully, and the Court itself has inquired at times into officer motives.³⁰⁵ But these arguments have not carried the day, and any standard will have to satisfy the Court's central concerns about administrability, uniformity, and costs. This Section is not meant to be an exhaustive exploration of every implication that would arise were courts to introduce authoritarian pretext into Fourth Amendment doctrine. Instead, it sketches the main outlines for a workable doctrine going forward in the suppression context, while leaving related issues for another day.³⁰⁶

1. Rebuttable Presumption of Regularity

The starting place is a rebuttable presumption of regularity. The prohibition on authoritarian pretext is not meant to be a license for criminal defendants to launch fishing expeditions into the hidden motives of law enforcement officers in the hopes of suppressing evidence. The presumption in every case is that police operate without authoritarian pretext, and only where a defendant can make a difficult *prima facie* showing of irregularity will the court permit him to pursue that claim. The burden of persuasion remains at all times with the person asserting that authoritarian pretext colored the search or seizure.³⁰⁷ In the ordinary case, there will not be any evidence of authoritarian pretext (much less sufficient evidence to overcome the presumption of regularity), and the Fourth Amendment inquiry will remain wholly objective.

Selective prosecution offers a helpful roadmap for how an authoritarian pretext claim could work under the Fourth Amendment. When a prosecutor charges a defendant with violating a law that is enforced rarely, or fails to

³⁰⁵ See Dix, *supra* note 180, at 478–79.

³⁰⁶ In particular, I do not explore procedural questions related to habeas actions or civil liability under 42 U.S.C. § 1983 (2012).

³⁰⁷ See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (“It is important to note, however, that . . . ‘the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.’” (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981))); *cf.* FED. R. EVID. 301 (“In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.”).

enforce the law against other known violators as well, the prosecutor's exercise of discretion is open to challenge.³⁰⁸ There is, however, a presumption of regularity that supports the government's "prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" ³⁰⁹ To prevail on a claim of selective prosecution, the defendant must show that the government prosecuted him "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights."³¹⁰ As the Second Circuit explained in a widely followed formulation:³¹¹

To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.³¹²

Mirroring the selective prosecution standard addresses the Court's concerns about evidentiary difficulties and costs for judicial administration and law enforcement. As the Court has recognized, "the showing necessary to obtain discovery [for a selective prosecution defense] should itself be a significant barrier to the litigation of insubstantial claims."³¹³ In the suppression context,³¹⁴ placing the initial burden on the criminal defendant to show authoritarian pretext likewise would limit speculative inquiries that have lit-

³⁰⁸ See Reiss, *supra* note 257, at 1368–69.

³⁰⁹ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

³¹⁰ *Wayte v. United States*, 470 U.S. 598, 608 (1985) (citations omitted) (internal quotation marks omitted).

³¹¹ See Reiss, *supra* note 257, at 1370–71.

³¹² *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (emphasis omitted).

³¹³ *Armstrong*, 517 U.S. at 464.

³¹⁴ The rights question is, of course, separate from the remedy question, and this Article argues that authoritarian pretext establishes a Fourth Amendment violation. While suppression does not automatically follow from a violation, authoritarian pretext speaks directly to culpable behavior on the part of individual officers, and thereby satisfies the deterrence rationale that underlies the exclusionary rule. See *Davis v. United States*, 131 S. Ct. 2419, 2426–27 (2011). As with most Fourth Amendment violations, it should be expected that authoritarian pretext will come up in court most often in the context of suppression hearings. See *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting) ("Because the strongest advocates of Fourth Amendment rights are frequently criminals, it is easy to forget that our interpretations of such rights apply to the innocent and the guilty alike."); CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 215 (2007) ("The exclusionary remedy, designed to suppress evidence of crime, ensures that the only Fourth Amendment claims most judges see are brought by guilty people seeking to elude conviction.").

tle chance of success. The Court has warned that “sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”³¹⁵ A rebuttable presumption of regularity in this context, as for selective prosecution claims, mitigates this problem by creating an initial evidentiary hurdle for defendants to clear.

Section 1983³¹⁶ claims also provide a window into how courts can inquire into law enforcement motives in a workable way when determining a constitutional violation. Proving an official’s improper motive is a necessary element of section 1983 claims based on a variety of federal constitutional provisions,³¹⁷ including violations of the First Amendment,³¹⁸ the Eighth Amendment,³¹⁹ and the Equal Protection Clause of the Fourteenth Amendment.³²⁰ In these cases, the Court has encouraged trial courts to exercise their discretion to ensure officials are “not subjected to unnecessary and burdensome discovery or trial proceedings.”³²¹ Foremost among their available options is to “insist that the plaintiff ‘put forward specific, nonconclusory factual allegations’ that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.”³²² The Court reiterated in *Bell Atlantic Corp. v. Twombly*³²³ and *Ashcroft v. Iqbal*³²⁴ that requiring this type of initial showing is a reasonable way to prevent frivolous claims and shield government officers from expensive discovery obligations.³²⁵

Allowing claims for authoritarian pretext in the Fourth Amendment context is unlikely to create heavy new burdens for courts or police departments, any more than selective prosecution claims or section 1983 suits have created. In selective prosecution cases, limited access to evidence and difficulty proving intent are often insurmountable barriers to show targeting on the basis of membership in a protected class.³²⁶ The same is true in sec-

³¹⁵ *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984) (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)) (internal quotation marks omitted).

³¹⁶ 42 U.S.C. § 1983; *see also id.* (authorizing suits against police acting “under color of” state law and “depriv[ing]” the plaintiff “of any rights, privileges, or immunities secured by the Constitution and laws”).

³¹⁷ *See Crawford-El v. Britton*, 523 U.S. 574, 585 (1998).

³¹⁸ *Branti v. Finkel*, 445 U.S. 507, 513–17 (1980); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968); *see also* Fallon, *supra* note 274, at 359 (recognizing that government motive is a familiar element of First Amendment claims).

³¹⁹ *Farmer v. Brennan*, 511 U.S. 825, 834–40 (1994) (“To violate the Cruel and Unusual Punishments Clause, a prison official must have a ‘sufficiently culpable state of mind.’” (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991))).

³²⁰ *Washington v. Davis*, 426 U.S. 229, 239–48 (1976) (race); *Pers. Adm’r. v. Feeney*, 442 U.S. 256, 274 (1979) (gender).

³²¹ *Crawford-El*, 523 U.S. at 597 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

³²² *Id.* at 597–98.

³²³ 550 U.S. 544 (2007).

³²⁴ 556 U.S. 662 (2009).

³²⁵ *See id.* at 685–86; *Twombly*, 550 U.S. at 559.

³²⁶ *See* Frase, *supra* note 5, at 333; Reiss, *supra* note 257, at 1373–74.

tion 1983 suits, and authoritarian pretext claims pose similar evidentiary challenges. But where there *is* evidence of invidious discrimination or other forms of authoritarian pretext, the fact that many plaintiffs will not prevail should not preclude success by those who can.³²⁷

2. *Improper Motives as a But-For Cause*

Adding another limitation further would mitigate the Court's evidentiary concerns: requiring that improper motives be a but-for cause of the search or seizure to demonstrate a Fourth Amendment violation.³²⁸ Human action is often driven by mixed and difficult-to-parse motives, and police decisionmaking is no different. Suppose, for example, an opposition politician is driving under the influence and a police officer pulls him over, in part to harass him for his criticism of the local police chief and in part because he is a danger to society. In that case, the driver's political activities would not be a but-for cause of the seizure, and there would not be a Fourth Amendment violation.

This requirement also addresses the Court's concerns about administrability. Police must be able to know what is demanded of them in the field, and that requires Fourth Amendment rules to be simple, clear, and uniform. A prohibition on authoritarian pretext offers a straightforward rule. Indeed, police are already precluded by other constitutional amendments from doing much of what constitutes authoritarian pretext.³²⁹ Eliminating the specter of mixed motives makes the rule clearer still. Police simply would be forbidden from effectuating a search or seizure when they would not otherwise do it, but for a political, monetary, or dogmatic purpose.

This strict causation requirement likewise addresses the Court's other concerns about litigation costs and the burdens that such claims might place on courts and police departments. As the Court recognized in establishing a but-for causation requirement for Title VII retaliation claims, that standard is of "central importance to the fair and responsible allocation of resources in

³²⁷ While precisely what evidence will be sufficient to show authoritarian pretext will naturally depend on the circumstances, note that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

³²⁸ This is consistent with the standards urged by others in similar contexts. When arguing in support of a broader role for motive in the Fourth Amendment, it has been suggested that a but-for cause is a theoretically and practically desirable standard. The same suggestion is applicable when considering only authoritarian pretext as a narrow subset of subjective motives that are most problematic under the Fourth Amendment. See Burkoff, *supra* note 270, at 109 ("[W]e cannot constitutionally tolerate those searches that 'would not have been undertaken but for the improper 'underlying intent or motivation' of the searching officers which, standing alone, could not supply a lawful basis for the police conduct.'" (quoting 1 W. LAFAVE, SEARCH AND SEIZURE § 1.2, at 15 (Supp. 1981))); Citron, *supra* note 4, at 1081-86.

³²⁹ See, e.g., U.S. CONST. amend. I (prohibiting political targeting); U.S. CONST. amend. XIV (prohibiting racial targeting).

the judicial and litigation systems.”³³⁰ In contrast, a lesser causation standard can “contribute to the filing of frivolous claims” and “siphon resources” from employers, agencies, and courts.³³¹

Requiring but-for causation is consistent with how the Court has treated other types of improper motive claims. In the First Amendment context, for example, when a public employee demonstrates that his protected speech was a “motivating factor” for his being fired, the employer “still prevails by showing that it would have reached the same decision in the absence of the protected conduct.”³³² The Court likewise has required that to establish a *Bivens* violation,³³³ the plaintiff must “plead sufficient factual matter to show” that the challenged government action was implemented “not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”³³⁴

In these cases, the Court does not consider there to be a profound challenge of non-uniformity, even though an employment termination decision in city X might violate the First Amendment while the same objective circumstances in city Y—absent the but-for improper motive—would not. The reasons are that the constitutional violation is tied to the government’s assumption of an improper role in society, and that the threat to free speech is rooted in allowing insidious motives that damage the proper relationship between citizens and the government.³³⁵ The same is true in cases of invidious discrimination, where the “purposeful discrimination is ‘the condition that offends the Constitution.’”³³⁶ So, too, with authoritarian pretext. A traffic stop for speeding in city X might violate the Fourth Amendment, while a stop in city Y for the same speeding violation would not. But where authoritarian pretext is what renders the stop unconstitutional, it uniformly has the same effect wherever it arises.

³³⁰ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2531, 2533 (2013).

³³¹ *Id.* at 2531.

³³² *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998); *see also id.* (“Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself.”). This causation requirement is also consistent with the but-for causation requirement for retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012), although Title VII claims require only that the “motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives that were causative in the employer’s decision,” *Nassar*, 133 S. Ct. at 2522–23, 2533.

³³³ *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389–90, 397 (1971) (holding that the Constitution authorizes a damages suit against federal officers who commit an unlawful search under the Fourth Amendment).

³³⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2010).

³³⁵ These reasons also apply to religious exercise claims. As the Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), “[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt,” *id.* at 534.

³³⁶ *Pers. Adm’r v. Feeney*, 442 U.S. 256, 274 (1979).

3. *Burden of Proof*

What is the right standard to overcome the presumption of regularity? The person raising the possibility of authoritarian pretext should be required to show by a preponderance of the evidence that the improper motive was a but-for cause of the search or seizure.³³⁷ This standard respects the government's interests, including the need to manage discovery costs that would attend the government's obligation to respond to a prima facie case of authoritarian pretext, that were identified in selective prosecution cases.³³⁸ But a preponderance of the evidence standard also protects a defendant's ability to raise authoritarian pretext when he reasonably can show that the officer acted improperly.

This standard is also consistent with the burden of proof that the Court has imposed in other cases where improper motive is a necessary element of showing a constitutional violation.³³⁹ Notably, the Court has refused to impose a higher requirement of "clear and convincing evidence" in such cases brought under section 1983.³⁴⁰ Additionally, the preponderance standard mirrors that used in Title VII cases to show employment discrimination.³⁴¹ Where but-for causation already imposes a demanding proof requirement, a preponderance of the evidence standard would strike the proper balance between protection of constitutional rights and other interests as the Court has found proper in other contexts.

4. *Whose Intent Matters?*

The final question is one of the most difficult. Should authoritarian pretext be limited to the individual officer's motives, or should it include departmental policies and instructions? There are two main issues. The first is evidentiary: Can evidence of improper motives at the department level be imputed to the individual officer who effectuates the search or seizure? The second is conceptual: If the department has an improper purpose but the individual officer does not, is it a case of authoritarian pretext?

Consider the first situation. Suppose an officer is patrolling for speeding violations, and he sees a driver who is going two miles over the limit. It is a small town, and he recognizes the driver as a local town councilman

³³⁷ Cf. Citron, *supra* note 4, at 1082 (proposing a preponderance of the evidence standard to demonstrate pretext in a broader sense).

³³⁸ See *United States v. Armstrong*, 517 U.S. 456, 468 (1996).

³³⁹ See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (refusing to impose a "clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself" when unconstitutional motive was necessary element of claims).

³⁴⁰ *Id.* at 593. But see *Armstrong*, 517 U.S. at 465 ("In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926))).

³⁴¹ See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 509 (1993).

who is campaigning to have the police chief replaced. Just that morning, the officer ran into the chief in the break room, and the chief told him that if he happened to see this town councilman, he should make sure to inconvenience him. The chief even sent a department-wide email reminding officers to pay special attention to the councilman whenever the opportunity arose. The officer remembers this, and he resents the councilman for interfering with the department, and so he turns on his blue lights and cites the councilman for speeding. There is no evidence about the officer's subjective motives (he was patrolling alone, and there was no partner to hear him remark that they better go after that meddling town councilman), but the councilman's friend in the department tips him off to the chief's email. Should that email of departmental motives be evidence of authoritarian pretext?

Now consider a second case. The situation is the same, except now the officer's subjective motives are entirely innocent. The police chief advised his officers to pull over the local councilman, but the patrolling officer forgets what the councilman looks like, and all he sees is a driver going over the speed limit. The officer believes in strictly holding everyone to the letter of the law. He pulls over the councilman because he was driving two miles too fast, and it is his job to enforce the speed limit no matter how petty the violation. Suppose the dashboard camera even shows him say to his partner, "I don't know who that guy is, but everyone should follow the law." The councilman later complains that he was targeted for his political activities, and he has the police chief's letter as proof of discriminatory departmental policy. Can he make out a claim for authoritarian pretext, even though the individual officer's motives were proper?

On the one hand, the Court has been careful to tie improper motives to the person accused of a constitutional violation. In the liability context, a subordinate's improper motives are insufficient to establish an invidious discrimination claim against a superior. There is no "supervisory liability" in a section 1983 suit or a *Bivens* action, and "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for [sic] his or her own misconduct."³⁴² On the other hand, however, the Court's programmatic purposes cases focus on departmental policy to evaluate general schemes of searches conducted without individualized suspicion. In *Edmond*, for example, although there was no evidence about the officer's individual motives, the Court's language focused on the department's subjective motives, not those of individual officers.³⁴³ Moreover, the Court looked to department-level evidence to discern the primary purpose of the road-

³⁴² *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2010).

³⁴³ See *City of Indianapolis v. Edmond*, 531 U.S. 32, 46 (2000) ("[S]ubjective intent was irrelevant in *Bond* because the inquiry that our precedents required focused on the objective effects of the actions of an individual officer. By contrast, our cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level.").

block,³⁴⁴ and it later clarified that the inquiry has “nothing to do with discerning what is in the mind of the individual officer conducting the search.”³⁴⁵

A finding of authoritarian pretext should be tied to the individual officer. There is no authoritarian pretext when the officer’s motivations are innocuous. Conceptually, if the unconstitutional motive must be a but-for cause of the search or seizure, a traffic stop motivated in fact by a proper purpose would not be a case of authoritarian pretext. The officer would have made the stop for a legitimate reason regardless of the departmental policy. Unlike other constitutional provisions, which may be violated by a departmental policy itself,³⁴⁶ the Fourth Amendment is not violated until a search or seizure is actually carried out *because of* the improper purpose. In the case of an officer who does not remember his police chief’s improper directions, the actual seizure would not be motivated by authoritarian pretext.

The evidentiary question, however, is a different matter. When the burden of proof is preponderance of the evidence, a smoking-gun email directing officers to pull over the local town councilman is powerful evidence that would make out a *prima facie* case for authoritarian pretext. A reasonable person could infer that an officer who receives an email directing him to punish the chief’s political opponent, and who then pulls over that opponent for a two-mile-an-hour speeding violation, was acting pursuant to that policy and the stop would not have happened but for the improper motive. Of course, the officer still could rebut the showing of authoritarian pretext by presenting evidence that the police chief’s email did not in fact motivate the stop. But in the ordinary case, department-wide evidence of authoritarian pretext likely would carry the day.

CONCLUSION

It is important to remember why law enforcement officers make pretextual searches and seizures: The law does not give them the power to search or seize for the reason they desire. In the usual case, the reason is that the circumstances do not provide reasonable suspicion or probable cause to believe that the suspected crime is being committed. In more dangerous cases, the reason is that no legitimate law has as its purpose the targeting of political opponents, the seizure of private property without compensation or guilt, or the harassment of certain groups based on their status or policy preferences. Leaving aside broader questions of general pretext, the Fourth

³⁴⁴ See *id.* at 41.

³⁴⁵ *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006).

³⁴⁶ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (“The Equal Protection Clause of the Fourteenth Amendment . . . prohibits intentional discrimination based on race. Intentional discrimination can be proved [by showing] . . . that a law or policy expressly classifies persons on the basis of race, and that the classification does not survive strict scrutiny.”).

Amendment should be understood to prevent these dangerous cases, which are tied to authoritarian pretext. If confronted with police motives that threaten the balance of power between government and citizens, courts should conclude that the resulting search or seizure is unreasonable.

