University of Tulsa College of Law
TU Law Digital Commons

Articles, Chapters in Books and Other Contributions to Scholarly Works

2023

A Fiduciary Principle of Policing

Stephen R. Galoob
University of Tulsa College of Law

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/fac_pub

 Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation
Crim. L. & Phil. (2023).

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Articles, Chapters in Books and Other Contributions to Scholarly Works by an authorized administrator of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

A Fiduciary Principle of Policing
Stephen R. Galoob*

Consider two cases of policing. The first is *Whren v. United States*.[1] In the early 1990s, two plainclothes District of Columbia police officers, Soto and Littlejohn, were patrolling a so-called high crime area in an unmarked car when they noticed a truck that they suspected was engaged in the drug trade. However, at this point the officers lacked an independent legal basis for detaining or searching the truck. The officers made a U-turn toward the truck. The truck turned right without signaling and sped off. The officers then pulled over the truck for traffic violations. After stopping the truck, the officers saw large plastic bags containing crack cocaine in the passenger compartment. The two occupants of the truck, Whren and Brown, were arrested and charged with possessing cocaine with the intent to distribute it within 1000 feet of a school.

In *Whren*, the United States Supreme Court ruled that this seizure was legitimate, that it did not violate either defendant's constitutional rights. Whren and Brown's traffic violations were a sufficient basis for stopping their truck, so what the officers aimed to do in initiating the encounter or pulling over the truck was irrelevant. An implication of the holding in *Whren* is that pretextual stops (including those in which police officers utilize ostensible legal violations in order to seize and/or search people because they are members of minority racial or ethnic groups) can be consistent with the Fourth Amendment to the United States constitution, which *inter alia* prohibits "unreasonable searches and seizures" of "persons, houses, places and effects."[2] More broadly, *Whren* articulated a principle that the mental states of an officer—in particular, her motivations and intentions—play no role in assessing the constitutional status of her actions.[3] Instead, what matters to this assessment are "objective" considerations—specifically, considerations that (if true) would be sufficient to justify the officer's action.[4]

The second case is that of Daniel Holtzclaw. In 2015, Holtzclaw, a former police officer in Oklahoma City, was convicted of 18 crimes, including five counts of first-degree rape.[5] Holtzclaw had a modus operandi of targeting Black women, many of them middle-aged and all of whom had criminal records that could have generated reasonable suspicion for a stop or outstanding warrants that provided a sufficient basis for arrest.[6] These factors

---

* Professor of Law, University of Tulsa College of Law.
[1] 517 U.S. 806 (1996).
[2] U.S. Const, amend. IV.
[3] 517 U.S. at 813.
[4] *Id.*
[5] Dave Philipps, *Former Oklahoma City Police Officer Found Guilty of Rapes*, THE NEW YORK TIMES, December 11, 2015, https://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html (last visited Apr 7, 2022).
[6] Sarah Kaplan, *A Serial Rapist Cop's 'Mistake': Assaulting the Grandmother who Finally Reported Him*, WASHINGTON POST, December 11, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/daniel-holtzclaws-mistake-assaulting-the-grandmother-who-finally-reported-him/ (last visited Apr 7, 2022).

made the targets unlikely to seek help from the police. Several witnesses testified that Holtzclaw pulled over their vehicle, inquired about whether they were intoxicated or had any contraband, and then ran their information in a database. Holtzclaw then ordered the target to exit the vehicle in order for him to perform a pat-down search. During the pat-down, Holtzclaw ordered the target to undress and to kneel or sit down, at which time he forced the target to perform oral sex on him or otherwise raped her.[7] After the encounter, Holtzclaw informed the target that calling the police was futile because nobody would believe her. Several of the targets testified that Holtzclaw left them a $20 bill after he finished sexually assaulting them.[8] Holtzclaw had multiple encounters with several women; having obtained their information during the warrant check, he subsequently tracked down their location and reinitiated encounters.

Every plausible theory of policing would deem Holtzclaw's actions illegitimate. Some theories of policing would condemn the actions of Officers Soto and Littlejohn in *Whren*, although others would not. Regardless of a theory's verdict about the latter case, however, their actions seem different in kind than the actions of Holtzclaw.

Appreciating these examples can both illustrate and motivate a novel principle that imposes normative constraints on police—a ***fiduciary principle of policing***. According to this principle, which is elaborated in Part I, police officers are, in discharging their official duties, bound by the public equivalent of the fiduciary duties of loyalty and care. These duties, in turn, impose requirements on both the behavior and the cognition of police officers. Part II shows how the fiduciary principle of policing can account for considered judgments in the Holtzclaw and *Whren* cases. The fiduciary principle can provide a basis for criticizing the U.S. Supreme Court's decisions in *Whren* and other cases deeming an officer's intention and motivation irrelevant to assessing the constitutional status of their official actions.

I. A Fiduciary Principle of Policing

This part builds on a strain of contemporary political theory to articulate a fiduciary principle of policing. I first lay out background on fiduciary law and fiduciary political theory, then articulate a fiduciary principle that would apply to the actions of police officers and, by implication, to public officials more broadly.

In private law, fiduciary relationships include those between attorneys and clients, trustees and beneficiaries, and corporate directors and corporate shareholders. Fiduciary relationships characteristically arise when one person (the fiduciary) has discretionary power over the assets or legal interests of another (the beneficiary).[9] This discretionary power creates a special prospect of domination and predation by the fiduciary.[10] Fiduciary

---

[7] *Id.*

[8] Jessica Testa, *The 13 Women Who Accused A Cop Of Sexual Assault, In Their Own Words*, BUZZFEED NEWS (2015), https://www.buzzfeednews.com/article/jtes/daniel-holtzclaw-women-in-their-ow (last visited Apr 7, 2022).

[9] See Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L. J. 235, 262 (2011).

[10] See Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1019 (2013).

relationships are therefore characterized by special duties that the fiduciary owes to the beneficiary. In law, the paradigmatic fiduciary responsibility is the duty of loyalty, which prescribes the fiduciary's loyal behavior and prohibits betrayal when acting with regard to the interests of the beneficiary.[11] In many legal contexts, a private-law fiduciary also has a duty of care, one that requires advancing the practical interests of the beneficiary.[12]

Fiduciary norms make demands on the fiduciary's cognition and behavior. This cognitive dimension of fiduciary norms can be seen either as an entailment of the duties of loyalty and care or as independent principles applicable to fiduciaries. One aspect of the cognitive dimension of fiduciary duties concerns the fiduciary's deliberation. In exercising their authority over the beneficiary, the fiduciary must at least assign non-derivative significance to the beneficiary's interests. A violation of this deliberative requirement is sufficient to constitute a breach of the fiduciary's duty, regardless of how the fiduciary behaves or what results from her behavior.[13] In other words, breach of fiduciary duty claims have no result element.[14]

A second aspect of the cognitive dimension of fiduciary duties concerns motivation. Fiduciary duties are not satisfied when a fiduciary's deliberation is inappropriately connected to their actions on behalf of the beneficiary. Put differently, a fiduciary who acts for the wrong kinds of reasons can run afoul of their responsibilities, regardless of how they otherwise deliberate and behave.[15] However, loyalty does not require devotion. A wide range of motivations are compatible with discharging one's fiduciary responsibilities.[16]

Third, the cognitive demands imposed by fiduciary principles are robust.[17] In the deliberative context, robustness requires that the fiduciary's deliberation and behavior update based on changes to the interests of the beneficiary. The fiduciary must both monitor and alter their deliberation and behavior based on these changes. Fiduciary norms are therefore capable of purely counterfactual violation—someone can violate a fiduciary responsibility solely in virtue of a disposition, regardless of whether that disposition is ever realized. Therefore, inchoate or planned betrayals can violate fiduciary duties.[18]

---

[11] *Id.*, at 971-2; Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1 (1975)
[12] See, e.g., Paul Miller, *Principles of Public Fiduciary Administration*, *in* BOUNDARIES OF RIGHTS (Anat Scolnicov & Tsvi Kahana eds., 2016), at 25.
[13] Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 95 (2018).
[14] *Id.*, at 92.
[15] Stephen R. Galoob & Ethan J. Leib, *Motives and Fiduciary Loyalty*, 65 AM J JURIS. 41, 54 (2020).
[16] *Id.*
[17] Ethan J. Leib & Stephen Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1839-44 (2016).
[18] Galoob and Leib, *Fiduciary Loyalty, Inside and Out,* at 100-104.

There is a long tradition of applying the fiduciary principle to politics.[19] The basic idea of fiduciary political theory is that fiduciary principles at least serve as a regulative ideal for the design of political institutions and the conduct of public officials.[20] On this view, fiduciary-type responsibilities operate as conceptual constraints on authority, such that one is automatically subject to these responsibilities any time that one utilizes power on behalf of another.[21] In the political realm, such responsibilities have been claimed to be necessary to avoid the fiduciary dominating or violating the independence of the beneficiary.[22] Likewise, many theories of political legitimacy appraise whether officials satisfy their fiduciary responsibilities as relevant to assessing the state's right to rule.[23]

As Malcolm Thorburn has argued, the relationship between police and the public realizes all the hallmarks of fiduciary relationships.[24] The exercise of coercive power by a police officer is a commitment of public power that implicates the practical interests of the public. Given the open-textured nature of criminal law, coercive exercises inevitably involve officer discretion.[25] These exercises necessarily draw from the state's monopoly on the use of coercive force, which is a central practical interest of any legitimate polity.[26] On this logic, when police engage in coercive exercises within their official roles, their actions either are or should be seen as constrained by a series of responsibilities akin to those that apply to private-law fiduciaries. These responsibilities are a conceptual entailment of substantive principles of political morality. They exist regardless of whether they have been specified or announced in advance, although the precise contours of these responsibilities sometimes require elaboration.[27] Moreover, fiduciary principles apply to the design of policing institutions as well as to the acts of officials. The setup of policing institutions should, at a

---

[19] For discussion, see Daniel Lee, *"The State Is a Minor": Fiduciary Concepts of Government and the Roman Law of Guardianship*, *in* FIDUCIARY GOVERNMENT 119-45 (Evan J. Criddle et al. eds., 2018); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2018).

[20] Some theorists, for example Evan Fox-Decent, go further and contend that political relationships are instantiations of fiduciary relationships, such that fiduciary norms just are the norms applicable to public officials and political institutions. See Evan Fox-Decent, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2011).

[21] *Id.*, at 22.

[22] See Evan J. Criddle & Evan Fox-Decent, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 3 (2016).

[23] Fiduciary political theory is compatible with a wide variety of accounts of political normativity, as discussed in Stephen R. Galoob & Ethan J. Leib, *Fiduciary Political Theory and Legitimacy*, *in* FIDUCIARY GOVERNMENT 163-82 (Evan Criddle et al. eds., 2018).

[24] Malcolm Thorburn, *Justifications, Powers and Authority*, 117 YALE L. J. 1070, 1121 (2008).

[25] *See* Monaghan (forthcoming) on the inevitability of police discretion.

[26] *See, e.g.,* Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1026-7 (2014); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1154 (1998).

[27] See generally Fox-Decent, *supra* n. 20. One need not adopt Fox-Decent's core substantive argument for the fiduciary principle to see fiduciary responsibilities as a conceptual entailment of authority relations.

minimum, allow police to live up to their fiduciary responsibilities regarding the exercise of coercive power.[28]

If police officers have fiduciary-type responsibilities towards the public that they serve, then by necessity there is a cognitive component to legitimate policing. The clearest deliberative requirement concerns public purposes. An officer acts illegitimately by exercising the state's coercive power for a private purpose or to contravene the public purpose.[29] The fiduciary principle identifies patterns of deliberation, motivation, and commitment that are inconsistent with an officer's living up to their responsibility, although it does not fully specify the contours of the these expectations as they apply to police.[30] Furthermore, the fiduciary principle provides a subsumptive explanation of mixed motive cases.[31] An officer's mixed motivations for acting are not problematic per se, and no particular motive is required in order for an officer's action to be legitimate. However, some motivations for an officer's action (for example, those that conflict with the fiduciary standards under which officers operate) can undermine the legitimacy of that action.

The Holtzclaw case discussed above illustrates each of these cognitive components of fiduciary duties of the policing office. In pulling over his targets, Holtzclaw was enacting a plan to commit sexual assault, rather than acting on a public purpose. Holtzclaw violated the norms of his office well before he sexually assaulted each target. To be sure, a conscientious officer might have behaved identically to Holtczclaw in some respects. For example, a

---

[28] *See* Fox-Decent and Criddle, supra n. 22; Stephen R. Galoob & Ethan J. Leib, *The Core of Fiduciary Political Theory*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 401-17 (D. Gordon Smith & Andrew S. Gold eds., 2018). This point about the necessity to embed normative principles within the structure of policing resembles arguments raised by Tracy Meares and Nirej Sekhon, among others. *See* Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65 (2017); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015). However, the fiduciary principle defended below posits that the same principles regulate institutional design and specific actions by officers, even though the implications of that principle are different when applied to these different questions. By contrast, both Meares and Sekhon seem to accept (a la Rawlian "institutionalism," *see, e.g.*, Brian Berkey, *Double Counting, Moral Rigorism, and Cohen's Critique of Rawls: A Response to Alan Thomas*, 124 MIND 849 (2015)) that different principles should regulate the design of policing institutions than regulate the token actions of specific police officers.

[29] *See* Fox-Decent and Criddle, *supra* n. 22.

[30] This way of identifying the contours of the fiduciary principle resembles the Strawsonian method of utilizing "reactive attitudes" to identify the contours of moral principles. See Stephen R. Galoob and Ethan J. Leib, *Intentions, Compliance and Fiduciary Obligations*, 20 LEGAL THEORY 106, 109 (2014). On a modular understanding of the fiduciary principle, the precise details of these requirements derive from substantive principles of political morality. For example, a republican principle such as Pettit's might impose different cognitive requirements depending on whether one adopts a "modal" or "anti-deference" interpretation of freedom as nondomination. See Vincent Chiao, *Discretion and Domination in Criminal Procedure: Reflections on Pettit*, 15 POL. PHIL. & ECON. 92 (2016).

[31] *See* Galoob and Leib, *supra* n. 15, at 53-4.

conscientious officer might have stopped some of these targets for moving vehicle violations and run warrant checks. However, Holtzclaw's motivation alone is sufficient to deem his actions illegitimate from the outset. If, in carrying out his sexual assault scheme, Holtzclaw had searched a target's vehicle and found contraband during an episode, then that search would be illegitimate because it was not incident to a lawful arrest. The point is not that Holtzclaw was merely in breach of his official responsibilities. Rather, despite appearances to the contrary, Holtzclaw was not policing at all.

The same conclusions do not necessarily apply to the *Whren* case. To be sure, Officers Soto and Littlejohn broke departmental policy by effectuating an arrest from an unmarked vehicle. There was likely a powerful reason for this policy. In so-called "high crime" neighborhoods like the ones that Officers Soto and Littlejohn were patrolling, the prospect of unmarked vehicles aggressively pursuing suspects is likely to result in unnecessary risk to officers, suspects, and bystanders. At a preliminary hearing before trial, Officer Soto testified that (as a vice investigator) he did not intend to issue the driver a ticket. Rather, Officer Soto testified, he intended to "pull [the driver] over and talk to him."[32] If one credits this testimony, it seems plausible to conclude that the officers were engaged in legitimate policing.

There is reason to doubt Officer Soto's testimony and to assess the stop differently. For example, Officer Littlejohn justified the initial attempt to stop the vehicle based on having good reason to believe that the occupants had drugs in the vehicle.[33] At the time of the stop in *Whren*, police in D.C. and elsewhere were trained to draw inferences about reasonable suspicion in order to effectuate more invasive traffic stops. Beginning in the early 1990s, the D.C. police department initiated a program called Operation Ceasefire, under which trained DCPD units would patrol certain predominantly Black neighborhoods and areas of the city, utilizing minor traffic offenses to escalate encounters and search for weapons inside of vehicles.[34] Based on the conflicting testimony from the officers and the policing context, it is also possible to conclude that Officers Soto and Littlejohn engaged in racial or statistical profiling when they stopped the vehicle—that if the vehicle's occupants had not been Black or driving in a predominantly Black area of town, then the officers would not have approached them initially, pursued them, or pulled them over.

Therefore, the cognition of Officers Soto and Littlejohn in approaching the vehicle of Whren and Brown could be characterized in at least three possible ways.

> **Whren1:** Officer Soto's testimony is accurate and the approach of Whren and Brown's vehicle was an effort by the officers to seek or impart information.
>
> **Whren2:** Officer Littlejohn's testimony is accurate and the approach was a token of statistical discrimination—that is, an inference about the likelihood

[32] Brief for Petitioners, at 6, in *United States v. Whren*, 517 U.S. 806 (1996) (95-5841).
[33] *Id.,* at 7.
[34] JAMES FORMAN, LOCKING UP OUR OWN 194-7 (2017).

of criminal activity in the vehicle based on data about the location from which the vehicle had recently departed.

Whren3: Neither Officer Soto nor Officer Littlejohn's testimony is accurate and the approach was a token of racial discrimination because the officers approached Brown and Whren's vehicle due to their race and/or the racial composition of the neighborhood in which they were located.

For each of these scenarios, the behavior is identical. In each scenario, the officers violated then-applicable DCPD policy. However, the token action in Whren1 seems more legitimate than the token action in Whren2, while the token action in Whren3 seems least legitimate of all.

If these judgments are well-taken, then they can be explained by reference to the fiduciary duty of loyalty. Suppose, as in Scenario 1, that the initial approach was prompted by informational concerns. If so, then the pattern of cognition by Officers Soto and Littlejohn is entirely consistent with the cognitive aspects of the fiduciary duty of loyalty. The officers' deliberation and motivation were consistent with public purposes related to community caretaking. Their course of action could demonstrate the kind of robust commitment to public purposes that we expect of fiduciaries.

On the other hand, if (as in Whren2) the officers were engaging in an act of statistical discrimination based on suspected drug activity, then their cognition might be seen as deficient in a way that compromises the legitimacy of their actions. To be sure, a fiduciary's motivation need not be pure in order to be compatible with the duty of loyalty. However, it seems debatable whether the motivation of interdicting on drug activity actually constitutes a public purpose. (I examine some arguments for this position more thoroughly in the discussion of the Irrelevance Principle below.)

Furthermore, fiduciary concepts can explain why the actions in Whren3 are comparatively less legitimate than those in Whren2. The pattern of deliberation in Whren3 is even more difficult to construe as a public purpose than the pattern of deliberation in Whren2.

If the foregoing is correct, then a fiduciary notion of public offices can both capture considered judgments about the legitimacy of token police actions and explain the analytic significance of aspects of police behavior and cognition that might otherwise go unexplained. The following principle captures these insights.

Fiduciary Principle of Policing (FPP): In a legitimate exercise of coercive power, a police officer acts loyally and carefully in relation to public purposes. Legitimate policing institutions create conditions under which these responsibilities can be realized.

FPP is not a comprehensive principle of policing. It does not fully specify the normative constraints that apply to officers or the design of policing institutions. Nor does it delineate which public purposes should animate policing institutions. Rather, FPP is best understood as an element of a broader normative theory of policing. Some theoretical investigations of

policing presuppose something like FPP. For other theories, FPP increases the theory's capacity to explain important normative considerations. Indeed, substantive theories of policing can fill in the gaps of the fiduciary principle by explaining the nature of the authority that police wield and the identity of the beneficiary on whose behalf police wield that authority.

II. The Implications of FPP for Officer Intentions and Criminal Procedure

Appreciating FPP can improve the coherence and explanatory capacity of a variety of normative theories of policing. FPP can be utilized to make broader conclusions in ongoing debates about policing and criminal procedure. For example, FPP attributes an ineliminable significance to the intentions and motivations of police officers. As such, FPP calls for revising a relatively settled (albeit highly controversial) tenet of criminal procedure jurisprudence in the United States and elsewhere.

A. The "Irrelevance Principle"

Over the past four decades, the United States Supreme Court has repeatedly held that the "subjective intentions" and "motivations" of a police officer do not bear on the legitimacy of that officer's actions under the Fourth Amendment.[35] Courts in other jurisdictions have embraced similar conclusions.[36] Call this notion the ***Irrelevance Principle***.[37] Despite its entrenchment in United States criminal procedure jurisprudence, the Irrelevance Principle has been subjected to sustained scholarly criticism.[38] Yet many of the criticisms of the Irrelevance Principle are contingent, based on the tendency of this principle to

---

[35] *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the] action.") (internal quotations omitted); *Ashcroft v. Al-Kidd*, 563 U.S. 731, 737 (2011) (noting that, outside the limited contexts of special needs and administrative searches, Court has "almost uniformly rejected invitations to probe subjective intent" of officers under the Fourth Amendment).

[36] *See, e.g.*, *Brown v. Durham Police Force* (1998) 131 CCC3d 1 (Ont CA); *Regina v. Humphrey*, 30111 ONSC 3024 (CanLII), [2011] OJ 2412 (Ont. Sup. Ct.).

[37] *See* Eric F. Citron, *Note: Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1086, 1100 (2007) (terming "irrelevance principle" as proposition that "subjective motivations" of police officers are "wholly beside the point" to determining "whether or how much a [Fourth Amendment] right or interest has been invaded").

[38] Among many examples, some of the finest include David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 582 (1997); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. LJ 1005 (2010); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882 (2014); Eric J. Miller, *Challenging Police Discretion*, 58 HOWARD L.J. 521 (2014); Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543 (2018).

exacerbate or legitimate racial disparities in policing. Fewer criticisms of the Irrelevance Principle provide a basis for establishing how, exactly, an officer's intentions and motivations should matter to the constitutional legitimacy of their official actions.

Before explaining how FPP both justifies the rejection of and provides an alternative to the Irrelevance Principle, let's examine the cases and arguments that gave rise to the Irrelevance Principle in the first place. The Irrelevance Principle is the view that a police officer or law enforcement official's intentions and motivations do not bear on the legal status of their action. U.S. Courts often use the terms "subjective intentions" or "subjective intent" to indicate the variable of interest,[39] by which they mean the intention or motivation of a specific, identifiable officer or officers. For our purposes, an intention should be conceived as an executive attitude toward a plan, which constitutes the representational content of the intention.[40] A motivation should be understood as an appraisal of how an intention connects with action. To be motivated by an intention "is for it to be the case that the causal sequence initiated by the intention would culminate in the world coming to match the intention, were obstacles removed and were the agent not to change his mind."[41] Although intentions and motivations can come apart, most of the cases driving the Court's criminal procedure jurisprudence involve overlap between intention and motivation. In *Whren*, for example, one might analyze both the officers' intention (that is, whether they planned to provoke a traffic violation by Whren and Brown by making a U-turn, then take advantage of that traffic violation to pull over the truck) and their motives (that is, the specific considerations that prompted the officers to form and execute that plan, such as the protocols of Operation Ceasefire). The Court's criminal procedure jurisprudence treats intentions and motivations as equivalent,[42] although (for reasons explained below) the FPP calls for differentiating these two cognitive phenomena.

The United States Supreme Court embraced the Irrelevance Principle most prominently in *Whren*. The *Whren* Court asserted that the "constitutional reasonableness" of a traffic stop does not "depend[] on the actual motivations of the individual officers involved."[43] Rather, the "Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances whatever the subjective intent."[44] The *Whren*

---

[39] *E.g.*, *Whren*, at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Kentucky v. King*, 563 U.S. 452, 464 (2011) ("The reasons for looking to objective factors, rather than subjective intent, are clear.").

[40] *See, e.g.*, Alfred R. Mele, *Persisting Intentions*, 41 NOÛS 735, 741 (2007).

[41] Gideon Yaffe, *Criminal Attempts*, 124 YALE L.J. 92, 116 (2014).

[42] To be sure, some commentators attribute normative significance to motivations but not to intentions. For example, Daniel Yeager adopts a different definition of motivation and intention, according to which motivations describe someone's mental states and intentions explain a person's actions and thereby make them intelligible to others. *See, e.g.,* Daniel B. Yeager, *The Stubbornness of Pretexts*, 40 SAN DIEGO L.R. 611, 615-16, 628-31 (2003). Based on these definitions, Yeager concludes that an officer's intentions might be relevant to the constitutional status of her actions, but denies that an officer's motivations ever could be. *Id.*, at 623.

[43] *Whren*, 517 U.S. at 813.

[44] *Id.*, at 814.

Court did not address the conflicting testimony about what the officers hoped to accomplish by approaching Brown and Whren's vehicle because these considerations had no bearing on the legitimacy of the seizure and search.[45] Under the *Whren* Court's logic, the Irrelevance Principle renders legitimate any pretextual stops for which there is a sufficient justification for seizure, regardless of whether that justification prompted the behavior of (or even was available to) the officer. In addition, the Court has invoked the Irrelevance Principle to resolve a number of other doctrinal questions.[46] The Court describes its jurisprudence as having "repeatedly rejected"[47] the relevance of officer intentions or motivations. Moreover, the Irrelevance Principle enjoys clear support from both conservatives and liberals on the Court.[48] The Irrelevance Principle therefore is a relatively settled principle in contemporary U.S. criminal procedure jurisprudence.

Despite this importance, the Court has not to date provided a fundamental defense of the Irrelevance Principle. Rather, the Court has offered mostly instrumental rationales for the principle—for example, that the principle conserves judicial resources[49] and better realizes the conduct-guiding benefits associated with bright-line rules.[50] The closest thing to a non-instrumental argument for the Irrelevance Principle is the Court's contention that it promotes "evenhanded"[51] and non-arbitrary[52] law enforcement actions. Yet this rationale lacks even facial plausibility, since the application of the Irrelevance Principle countenances

---

[45] Indeed, the petitioners in *Whren* did not "allege that they had actually been racially profiled. Instead, their claim was that stops should be regulated based on the *possibility* of such profiling." Chin and Vernon, *supra* n. 38, at 894.

[46] Sekhon, *supra* n. 28, at 79-82 (noting the irrelevance of officer intentions and motivation in doctrinal rules concerning warrantless searches and seizures under exigency, plain view, and third-party consent doctrines).

[47] *Brigham City*, 547 U.S. at 404.

[48] This consensus was recently noted and questioned by Justice Ginsburg's concurring opinion in *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring) ("A number of commentators have criticized the path we charged in *Whren v. United States*… and follow-on opinions, holding that 'an arresting officer's state of mind… is irrelevant to the existence of probable cause.' I would leave open, for reexamination in a future case, whether a police officer's reason for acting in at least some circumstances, should factor into the Fourth Amendment Inquiry.").

[49] *U.S. v. Leon*, 468 U.S. 897, 922-3, n. 23 (1984).

[50] *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988).

[51] *See Horton v. California*, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.") This "evenhanded law enforcement" rationale starts from the premise officers cannot generate probable cause solely from their licit or laudable intentions. If so, then the rationale is a non sequitur: from the notion that officer intention is insufficient to legitimize an action, it does not follow that an officer's intention is irrelevant to appraising the legitimacy of an action.

[52] *Devenpeck v. Alford*, 543 U.S. 146, 155-6 (2004); see also Chin and Vernon, *supra* n. 38, at 906 (contending that adoption of objective standards was initially concerned with protecting defendants from "arbitrary police conduct" by underscoring that "subjective good faith of… officers" was "not sufficient to validate a search").

paradigmatically discriminatory and arbitrary law enforcement actions—for example, the ones evinced in Holtzclaw's case.

Despite the Court's repeated embrace of the Irrelevance Principle, the principle is actually inconsistent with a number of areas of criminal procedure jurisprudence in the U.S. As a doctrinal matter, many rules of criminal procedure make essential reference to the intentions and/or motivations of specific officers to resolve questions about the legal status of police actions.[53] These inconsistencies in the application of the Irrelevance Principle are not only a doctrinal anomaly, but also raise a deeper worry that the Court's invocation of the Irrelevance Principle is unprincipled.[54] In other words, if the Irrelevance Principle stands for the proposition that an officer's laudable intentions or benign motivations can legitimate police action but an officer's malign intentions have no bearing on the assessment of the legitimacy of police action, then it would be difficult to dispute that the Irrelevance Principle provides a license to police domination.

Similarly, the Court's articulation of the Irrelevance Principle rests on a number of important distinctions that are both undefended and difficult to defend. One such distinction is between an officer's beliefs and her intentions. The Court has conceded that an officer's beliefs have direct significance for assessing the status of that officer's actions. For example, what an officer believes is relevant to determining whether she had legal

---

[53] For example, the Court has held that officer intention bears on the legitimacy of administrative stops and searches. An officer's "deliberate elicitation" of statements or their functional equivalent from a defendant outside the presence of counsel is prohibited, absent a waiver of the presence of counsel by the defendant. *Massiah v. United States,* 377 U.S. 201 (1964). Further, officer intention matters to the showing of intentional misconduct necessary to establish that a pre-trial identification procedure violates a suspect's Due Process right. *Perry v. New Hampshire*, 565 U.S. 228 (2012). Officer intention also matters to several doctrines related to the Fourth Amendment's exclusionary rule, including the "good faith", attenuation, and independent source exceptions to the fruit of the poisonous tree doctrine. *See Herring v. United States*, 555 U.S. 135 (2009) (finding that only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" by police is sufficient to trigger the exclusionary rule); *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (application of the attenuation exception to the exclusionary rule turns, in part, on whether police conduct is "purposeful or flagrant"); and *Murray v. United States*, 487 U.S. 533, 542 (1988) (when police enacted illegal search then applied for a warrant to search the same premises, whether "independent source" exception to the exclusionary rule applies to the warranted search depends on whether the "decision to seek the warrant was prompted by what they had seen during the initial [unlawful] entry").

[54] Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 74-5 (2007) (concluding that the Supreme Court has "shifted between objective and subjective standards and between the perspective of the defendant and that of the officer" and advocating that "the Court should adopt a principled, consistent approach to the question of perspective, based on the interests a particular constitutional protection is designed to further").

authorization to effectuate a search or seizure.[55] On the other hand, the Irrelevance Principle contends that what an officer intends does not bear on the constitutional status of an officer's actions. This asymmetry is strange in many ways, not least because of the considerable overlap between what an officer believes and what an officer intends to do.

Similarly, the Court has held that the purpose behind a police program (such as a roadside checkpoint) is relevant for determining the constitutional status of that program under the Fourth Amendment.[56] Yet the Court's definition of "programmatic purpose" is, most plausibly, the joint intentions of the officers in a police department. This rule is also in tension with the Irrelevance Principle. Under the Irrelevance Principle, an individual officer's intention cannot affect the constitutional status of her action. Yet the joint intentions of police officers in authorizing an action-type can affect the constitutional status of any token action by a police officer. Such an asymmetry is puzzling in cases where multiple officers are involved in the effectuation of a seizure or search. The oddity is that, under *Indianapolis v. Edmond*, a department's joint intention for effectuating a program is relevant to constitutional legitimacy, while under *Whren* the joint intention of two officers in effectuating a specific stop or seizure is irrelevant, as are the joint intentions grounding the creation of Operation Ceasefire.

Finally, the Court often embraces what has been called the "indirect" significance of officer intention in its Fourth Amendment jurisprudence. For example, T.M. Scanlon has contended that, while an agent's intentions never bear directly on the permissibility of an action, an agent's intention can bear on the meaning of her action. For Scanlon, an action's meaning can sometimes indirectly determine whether it is permissible.[57] The Court has invoked something like this indirect sense of the relevance of intention as part of its Fourth Amendment jurisprudence. For example, in *Brower v. County of Inyo*, the Court noted that its definition of a "seizure" (which triggers Fourth Amendment scrutiny) does not encompass all cases in which "there is a governmentally caused termination of an individual's freedom of movement… nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement, but only when there is a governmental termination of freedom of movement through means intentionally applied."[58] The *Brower* Court noted that an officer's intentionality (in the sense of her "willful" detention

---

[55] *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (probable cause exists where the "known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found"). This standard references subjective considerations in assessing what an officer knew at the time of acting, while invoking an objective test for determining whether the officer's inference regarding reasonable suspicion or probable cause was justified. The beliefs of specific officers are also salient in "collective knowledge" or "constructive knowledge" cases, in which probable cause is agglomerated from the knowledge of separate officers. *See, e.g.,* Michael L. Rich, *Machine Learning, Automated Suspicion Algorithms, and the Fourth Amendment*, 164 U. PA. L. REV. 871, 894 (2015); Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085 (2006).

[56] *Indianapolis v. Edmond*, 531 U.S. 32, 40-1 (2000).

[57] T.M. Scanlon, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME 40 (2009).

[58] 489 U.S. 593, 596-7 (1989).

or taking) is "implicit in the word 'seizure,' which can hardly be applied to an unknowing act."[59] In *Brower*, then, an officer's intention does not directly determine the legitimacy of their action, but it has indirect relevance by helping to fix the appropriate description of that action—namely, as a seizure (which is regulated by the Fourth Amendment) or a non-seizure (which is unregulated). It is difficult to square the conclusion that an officer's intention is directly relevant to describing an action as a seizure but is categorically irrelevant to the assessment of whether that action is reasonable, since the description of an action often bears on its assessment.

The Irrelevance Principle is also inconsistent with a variety of legal principles outside the domain of criminal procedure. Many U.S. constitutional legal standards (including rules for determining whether free speech has been impermissibly infringed, whether a policy discriminates based on religion, and whether an action is a token of racial discrimination) attribute direct significance to the intentions of officials.[60] Likewise, a prosecutor's reasons for bringing charges against a defendant bear on whether their actions violated the Due Process and Equal Protection clauses, regardless of whether those charges are objectively reasonable.[61] A defender of the Irrelevance Principle might explain these variations based on differences between the roles of prosecutors and police, or perhaps based on substantive differences between Fourth Amendment rights against unreasonable search and seizure and the rights to due process, free speech, free exercise of religion, and against racial discrimination.[62] If so, then it might make sense that the standards for assessing whether official action violates these other constitutional provisions would differ from those for

---

[59] *Id.*, at 596. To adapt the *Brower* Court's example, say that two separate officers, O and O*, pin a suspect against a wall with their car. O's car pinned the suspect because it slipped its brake, while O* executed a plan to drive his car into the suspect in order to prevent him from fleeing. Although the same force is exerted on the suspect in both cases, under the *Brower* standard O's action is not a seizure (and thus not subject to Fourth Amendment scrutiny) while O*'s action is a seizure. In neither case does the officer's intention bear directly on the permissibility of the action. Rather the officer's intention determines what kind of action it is, and that classification, in turn, bears on assessing the action's constitutional status.

[60] *See, e.g.*, Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* NOMOS LXI: POLITICAL LEGITIMACY 201 (Jack Knight & Schwartzberg eds., 2018).

[61] *See United States v. Goodwin*, 457 U.S. 368, 384 (1982) (proof that "prosecutor's charging decision was motivated by a desire to punish [the defendant] for doing something that the law plainly allowed him to do" bears on whether prosecutor's charging decision was vindictive and violated defendant's Due Process rights); *Wayte v. United States*, 470 U.S. 598 (1985) (prevailing on discriminatory prosecution claim requires establishing that prosecutorial policy had discriminatory effect and was "motivated by a discriminatory purpose") (citations omitted).

[62] *See*, *e.g.*, Richard Fallon, *Constitutionally Forbidden Legislative Intent*, 130 HARVARD LAW REVIEW 523, 531-2 (2016). ("[W]hether motivations should determine the reasonableness and thus the validity of searches under the Fourth Amendment is a different question from whether forbidden intent should matter in a case alleging that a statute violates the Equal Protection Clause. The two provisions have different languages and purposes. The costs and benefits of motive-based inquiries may vary from one case to the other.")

assessing which official or which right is implicated. Yet no such argument has been offered by the Court or articulated by any proponent of the Irrelevance Principle. An adequate account of the significance of the intentions of police officers, therefore, will at least be compatible with an account of the normative significance of intentions and motivations of other criminal justice actors (and, perhaps, provide a plausible general explanation regarding the significance of intentions by public officials).

Criticisms of the Irrelevance Principle are legion. Many of these criticisms focus on the incoherence of the principle or its tendency to facilitate racial discrimination in policing.[63] Yet the critics of the Irrelevance Principle face a daunting explanatory challenge of their own. If officer intention is relevant, then how, exactly, should intention matter? It seems implausible (and strange) to expect purity of motivation or intention, akin to what Kant called the "motive of duty." Absent a principled basis for evaluating officer intention, criticisms of the Irrelevance Principle risk ad hocness.

What, exactly, would constitute an adequate account of the normative significance of officer intention? The criticisms of the Irrelevance Principle above suggest several desiderata of an account of how officer intention bears on the legitimacy of an official action. First, such an account should be internally consistent, avoiding attributing different kinds of normative significance to subjective considerations that are interrelated (e.g., beliefs, motivations, and intentions). Second, an adequate account should be explanatorily adequate within the domain of criminal law and procedure. It would be strange if a prosecutor's intentions in deciding to bring charges in a specific case affected the legitimacy of their actions, but a police officer's intentions in deciding whether to arrest someone in the same case did not. Likewise, it would be strange if substantive criminal law attributed direct normative significance to a defendant's intentions or motivations but criminal procedure rules denied that there could be any direct significance to officer intention, especially since some important questions of criminal law and criminal procedure are interrelated.[64] A third desideratum concerns comprehensiveness: an account of police officer intention and legitimacy should at least be congruent or reconcilable with accounts of how the intentions of other types of public officials who exercise similar types of powers bear on the legitimacy of their actions.

It is difficult for criticisms of the Irrelevance Principle to satisfy these three desiderata. Consider one prominent recent account of the significance of police officer intention by Orin Kerr. Kerr offers a consequentialist theory of the significance of officer intention in criminal procedure law. For Kerr, the Fourth Amendment aims to force police to "internalize the civil liberties harms" of their investigations,[65] requiring officers to refrain

[63] This is the position taken by each of the articles cited *supra*, n. 38.
[64] For example, whether a killing perpetuated by an officer in the line of duty is justifiable can turn on whether the officer was adhering to the Fourth Amendment. It would therefore be strange if an officer's mental state were relevant for determining whether they committed murder but not for whether they were complying with the Fourth Amendment, since the same facts about the officer's mental state would be relevant to both questions.
[65] Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 469 (2021) (citations omitted).

from taking actions whose "civil liberties costs can be expected to outweigh the public benefits to the enforcement of law."[66] Subjective considerations allow for the crafting of narrower *ex ante* rules, which have the benefit of generating fewer civil liberties violations in application.[67] Kerr reasons that what an officer intends to bring about "likely correlates" with the effects of that officer's action.[68] However, the main drawback to such analysis is that the subjective considerations of officers are difficult to measure *ex post*,[69] owing to mixed motivations, the routine nature of many police activities, and officers' lack of privileged introspective access to their own mental states.[70] Therefore, Kerr proposes that an officer's intentions and motivations be relevant to criminal procedure doctrine when (a) they can be reliably assessed ex post and (b) incorporated into rules that protect civil rights *ex ante*.[71]

Let's grant, for the sake of analysis, that Kerr's theory satisfies the desiderata of internal consistency.[72] Nonetheless, Kerr's theory would not satisfy the desiderata of explanatory adequacy. As noted above, Kerr's view assigns instrumental significance to officer intentions and motivations: intentions and motivations in a token case matter if they would produce benefits if incorporated into *ex ante* rules. Yet intentions and motivations have a non-derivative significance in criminal law (for example as elements of a criminal offense or defense). It is strange that an officer's intentions and motivations would have merely instrumental significance for questions of criminal procedure but have a more fundamental significance in criminal law, especially since the line between these two areas is often fluid.

Nor does Kerr's theory satisfy the desiderata of comprehensiveness. Kerr's instrumental explanation of the significance of police officer intention and motivation would not graft easily onto other kinds of officials. For example, school officials, prosecutors, and legislators all have significant discretionary authority that empowers them to advance the public good but raises risks of violating the civil rights of people. Furthermore, the measurement difficulties regarding the intentions and motivations of police officers apply just as much to these other kinds of officials. Yet the balancing schema that Kerr proposes for police officers would be difficult to accept regarding, say, a teacher's decision to assign a

---

[66] *Id.*, at 470.
[67] *Id.*, at 471.
[68] *Id.*, at 474.
[69] *Id.*, at 475.
[70] *Id.*, at 476.
[71] *Id.*, at 467, 479.
[72] There are reasons to question this assumption. For example, although Kerr notes the difficulty of determining an author's intention or motivation as a potential cost to abandoning "objective" standards, it unclear that he acknowledges similar difficulties with determining what an officer believes. If the epistemic difficulties of determining an officer's belief are not acknowledged, then Kerr's view would assign different normative significance to interrelated mental phenomena (since intentions and motivations are constituted, at least in part, by beliefs). If the epistemic difficulties of determining an officer's beliefs are the same as determining their intentions or motivations, then Kerr's theory would be far more revisionist than he concedes, since (for example) it would call for significant changes to the way that probable cause is determined.

lower grade to a student of color, or a prosecutorial decision that discriminates against women based on gender stereotypes,[73] or a legislator (or legislature) that enacts policies in order to burden specific religious minorities. In these scenarios, the wrongfulness of the official action does not depend on contingent calculations of costs and benefits of the intentional or motivational set being incorporated into *ex ante* rules. Rather, the discrimination is wrong in itself. It is unclear why the same is not true of the actions of police officers that discriminate based on race, gender, or religion.

Kerr's argument is laudable (and rare) in its attempt to provide a principled alternative to the Irrelevance Principle. My aim is not to single it out for criticism, so much as to sketch how difficult it is for a theory that attributes significance to police officer intentions and motivations to satisfy the innocuous-seeming desiderata of internal consistency, explanatory adequacy, and comprehensiveness.

To summarize, the Irrelevance Principle is relatively entrenched in the criminal procedure law of the United States. However, the Irrelevance Principle is doctrinally inconsistent and normatively undefended (and, for some, unappealing). Yet it is not enough to criticize the Irrelevance Principle. What's needed is an alternative account of how officer intention should matter to the legitimacy of police action. Such an account should be internally consistent, explanatorily adequate, and relatively comprehensive. Few critics of the Irrelevance Principle have offered such alternative accounts of the significance of officer intention, and it is challenging for any such account to satisfy these desiderata.

B. Fiduciary Principle of Policing and the Relevance of Officer Intentions and Motivations

Conceiving of police as public fiduciaries can not only show why the Irrelevance Principle is indefensible, but also provide a basis for establishing how and why officer intention should matter to evaluating the legitimacy of police conduct and institutions. In general, fiduciary duties generally have both objective and subjective components, and the cognitive dimension of fiduciary duties places demands on the deliberation, motivation, and commitment of fiduciaries. Examining these components of fiduciary responsibilities show how FPP provides an alternative to the Irrelevance Principle that is moderate, plausible, and explanatorily adequate.

The deliberative and motivational constraints imposed by fiduciary responsibilities are broad. Because fiduciary relationships are characterized by discretion and the prospect of domination, there are inevitably a variety of deliberative patterns that are consistent with acting loyally toward one's beneficiary. However, at least some patterns of deliberation are inconsistent with the fiduciary duty of loyalty. One plausible construal of the deliberative demands on fiduciaries is that the fiduciary's practical deliberation must attribute non-

[73] For example, seeking a longer sentence for a mother who enables or "fails to protect" a child from child abuse than for a father who commits such abuse. *See, e.g.*, Michelle Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIM. 579 (1998).

derivative significance to the practical interests of the beneficiary.[74] In other words, whether a particular course of action would affect the beneficiary's interests or ends must matter to the fiduciary's deliberation. Fiduciary duties do not necessarily impose any specific weight to the beneficiary's interests. Rather, the beneficiary's interests shape the fiduciary's deliberation only if the fiduciary is disposed to revise her deliberation in accordance with changes to the beneficiary's interests.[75] Likewise, fiduciary duties impose standards of correctness on the motivational structure of fiduciaries. However, the loyalty demanded of fiduciaries is not true devotion. Any motivation that is compatible with the fiduciary's attributing non-derivative significance to the beneficiary's practical interests will suffice.[76]

The deliberative and motivational standards applicable to fiduciaries generally can be straightforwardly applied to police officers. The beneficiary of police officers is the public as a whole. Different substantive theories of policing offer different ways of specifying the contours of the public and the interests of the public that ground the duties of police officers. However, across any of these specifications, a police officer violates the deliberative component of their official duties if their practical deliberation assigns no significance (or only derivative significance) to the interests of the public. Likewise, the officer violates the motivational constraints on where her actual reasons for action are incompatible with assigning non-derivative significance to the public interest.

The Holtzclaw case demonstrates how a police officer might fail to satisfy these deliberative and motivational constraints. Holtzclaw decided whether to seize or search people based on non-public considerations. To the extent that Holtzclaw considered the public interest, it was to exploit rather than to promote them. Indeed, the deficiency of Holtzclaw's deliberation and motivation affected the appropriate description of his action. Based on his deliberation and motivation, Holtzclaw's pulling over vehicles was not policing at all, but rather a substantial step towards committing sexual assault.[77] Such failures to act within one's role (appearances to the contrary) might be characterized as defalcations of office, which contrast with more ordinary breaches of role-based responsibilities.[78]

By contrast, the deliberation of Officers Soto and Littlejohn in *Whren* might have been consistent with satisfying their fiduciary responsibilities. Recall that Soto and Littlejohn gave conflicting accounts of their plans of action in approaching Whren and Brown's vehicle. Soto testified that the officers' initial approach was geared toward asking for and providing information. Above, this construal was termed Whren1. The pattern of deliberation in Whren1 would be consistent with attributing non-derivative significance to the public interest if the information that Soto sought to gain or impart was itself consistent with the public interest.

Suppose, as in Whren2, that the officers' plan in stopping the vehicle was to investigate suspicions that the occupants were engaged in unlawful drug-related activity.

---

[74] Galoob and Leib, *supra* n. 30, at 115-17.
[75] *Id.*, at 116.
[76] Galoob and Leib, *supra* n. 15, at 54-8.
[77] Yeager, *supra* n. 41, at 595-6.
[78] Galoob and Leib, *supra* n. 15, at 62-3.

Whether this pattern of deliberation and motivation is consistent with the public interest turns on one's substantive theory of policing. On the one hand, consider Seamus Miller's contention that "the most important end or purpose of policing is the protection of rights," most fundamentally the "moral right to freedom" (which includes both human rights and institutional rights).[79] Miller's normative theory of policing suggests that the deliberation of Officers Soto and Littlejohn as deficient to the extent that the pursuit of drug-related activity is inconsistent with the goal of protecting and promoting moral rights. On the other hand, consider Luke Hunt's contention that policing institutions are oriented around liberal conceptions of personhood that construe those policed as "free and equal reciprocators" who are "voluntary partners in [a] cooperative scheme and moral agents" who are "responsible because free."[80] If the public interest is construed in this way, then it is possible to characterize the deliberation of Soto and Littlejohn in Whren2 as attributing non-derivative significance to the public interest. On this characterization, Brown and Whren might bear ultimate responsibility for their decision to engage in any drug activity, which would mark them as deficient reciprocators. Indeed, failing to investigate and, if founded, to punish Brown and Whren for their violation of (arguendo) legitimate drug laws might fail to respect their agency.[81] Whether the patterns of cognition in Whren2 are consistent with their fiduciary responsibilities therefore turns on broader theoretical questions about the public interest and the point of policing.

Finally, suppose that the officers' patterns of deliberation were as described in Whren3—the officers approached Brown and Whren's vehicle because of their race or because of the racial composition of the location in which they were located. This pattern of deliberation would constitute racial discrimination inconsistent with the Equal Protection Clause of the Fourteenth Amendment. However, under the Supreme Court's current jurisprudence, it would not violate the Fourth Amendment's prohibition on unreasonable searches and seizures. Whren3 *would* constitute a violation of the officers' fiduciary responsibilities. Enacting racial discrimination is not a public purpose under any plausible normative theory of policing. Therefore, plans aiming to enact such a pattern would not satisfy the deliberative component of the officers' fiduciary responsibility.

Furthermore, the officers in Whren3 would fail to exhibit the kind of robust commitment to the beneficiary's purposes or interests that is demanded of fiduciaries. Suppose that Officers Soto and Littlejohn would not have approached a vehicle that was in a predominantly white area with statistically high levels of drug possession and distribution. If not, then there is reason to doubt the robustness of the officers' commitment to drug interdiction. Fiduciary principles admit of purely counterfactual violations—a fiduciary can violate the duty of loyalty solely based on characterizations of close possible worlds. Whren3 supports the inference that there are many close possible worlds in which Officers Soto and Littlejohn would not have intervened in the way that they did in the events of *Whren*. This failure of robustness indicates a violation of the duty of office in Whren3 that does not arise in Whren1 nor (arguably) in Whren2.

---

[79] Seamus Miller, "Political Theory, Institutional Purpose, and Policing," in THE SAGE HANDBOOK OF POLICING 13, 16 (Ben Bradford, et al., eds. 2016).
[80] Luke Hunt, THE RETRIEVAL OF LIBERALISM IN POLICING 105-6 (2019).
[81] *Id.*, at 125.

FPP's charge to conceive of police officers as public fiduciaries therefore challenges the Irrelevance Principle while at the same time establishing plausible standards for evaluating the cognition of police officers. FPP posits that police, like others who wield authority on behalf of others, face standards of behavior and cognition for fulfilling their official duties. A variety of deliberative patterns and motivational structures are consistent with upholding one's official responsibilities. However, at least some patterns of deliberation and motivation are inconsistent with acting loyally toward the public. (As noted above, determinations of how to construe the public and the public interest will vary significantly across normative theories of policing.) Likewise, the contingency of a police officer's commitment to the public interest can constitute a violation of their fiduciary responsibilities, even if this contingency does not ever come to fruition. Some patterns of cognition (e.g., arguably Whren2) will constitute breaches of an officer's fiduciary responsibilities. Other patterns of cognition (e.g., Holtzclaw's case) will constitute defalcations, which negate whether actions taken by a police officer are really policing at all.

FPP does not prescribe any particular institutional arrangement about how to deal with breaches or defalcations by police officers. Whether a legal system should apply remedies such as the exclusion of unlawfully obtained evidence to all breaches of fiduciary responsibility, or merely a subset of them, implicates broader questions about political legitimacy, justice, and the rule of law.

FPP avoids the logical problems and doctrinal inconsistencies implicated by the Irrelevance Principle. First, FPP does not draw implausible distinctions between different kinds of subjective considerations (e.g., what an officer believes vs. what an officer intends) in the way that the Irrelevance Principle does. Rather, all aspects of an officer's practical deliberation (motives, intentions, and beliefs) can bear on whether they satisfy their fiduciary responsibilities. Official action is illegitimate if it does not follow the proper deliberative channels or if there is a deviant connection between deliberation and action, although the standards for assessing deliberation and motivation should be construed widely. Nor does FPP attribute different normative significance to the intentions of a specific officer and the joint intentions of a police department. Both types of intentions can compromise the legitimacy of a token officer's action if they are outside the broad range of acceptability licensed by the fiduciary principle.

Second, FPP does not draw a sharp incongruity between the relevance of subjective considerations in criminal law and criminal procedure. In criminal law, a defendant's liability turns, in part, on whether their mens rea satisfies the legal standard specified in a criminal offense. Under FPP, the legitimacy of an officer's action turns on whether the officer's motivations and intentions are consistent with the generic requirements of officeholding and the specific responsibilities that apply to the police, whatever those are. In other words, FPP does not treat the cognition of those subject to the law as categorically different than the cognition of those who enforce the law.

Third, FPP allows for the possibility that the same standards might be used to evaluate the legitimacy of police officers and other kinds of public officials, such as school officials, prosecutors, or legislators. These types of officials also wield discretionary power on behalf of others, and so their actions would seem to be generically constrained by

fiduciary-type principles. Therefore, FPP does not draw a divide between questions regarding unreasonable search and seizure (protected by 4th Amendment) and questions about free speech and equal protection (protected, respectively, by the 1st and 14th Amendments).

Conclusion

One aim of this paper is to resolve a specific but important legal question regarding the defensibility of the doctrine that officer intentions are irrelevant to assessing the legitimacy of token actions of police. The Irrelevance Principle is regularly invoked in U.S. law, yet it is rarely defended and draws distinctions that are doctrinally inconsistent and normatively untenable. At the same time, any plausible account of the relevance of officer intention to criminal procedure should explain when and why an officer's intentions and motivations might bear on the legitimacy of their action.

The Fiduciary Principle of Policing articulated here provides a legal and moral basis for rejecting the Irrelevance Principle. An officer's intentions affect whether they have breached a fiduciary duty to the public. They also determine whether the officer's action is a role-action at all. The insights provided by the fiduciary principle can satisfy several doctrinal and logical desiderata of a plausible account of why and how officer intentions matter. Although the fiduciary principle does not fully resolve all important questions of policing, it is compatible with many prominent normative theories of policing. On the fiduciary principle, officer intentions have an undeniable (albeit limited) relevance to assessing the legitimacy of the actions by police.

In this sense, police do not seem different from other public officials. All public officials exercise public power. This exercise of public power creates possibilities for domination and abuse of discretion. The types of abuse of office involved in the Holtzclaw's case are, unfortunately, not committed only by police officers. Therefore, fiduciary principles can inform assessments of the actions of public officials, regardless of what other substantive principles of political morality should also apply to such assessments. A fiduciary principle would impose standards for the deliberation and commitment of fiduciaries, not just their behavior. For a wide range of actions by public officials, legitimacy turns on how and why someone acts, not merely what they do.

Acknowledgments

Previous versions of this paper were presented at the Philosophical Perspectives on Criminal Procedure workshop at Osgoode Hall Law School, the Criminal Law Theory Workshop at Northwestern University, and a Policing and Political Philosophy workshop convened by the Institute for Humane Studies. I owe debts to Russell Christopher, Brandon del Pozo, Donald Dripps, Raff Donelson, Kim Ferzan, Chad Flanders, Daniel Fryer, Bill Glod, Rachel Harmon, Luke Hunt, Aziz Huq, Josh Kleinfeld, Youngjae Lee, Ethan Leib, Chris Lewis, Matt Matravers, Deric McClellan, Jake Monaghan, Tony O'Rourke, Gabe Mendlow, Eric Miller, Jake Monaghan, Sylvia Rich, Alice Ristroph, Francois Tanguay-Renaud, Malcolm Thorburn, Daniel Viehoff, and Ekow Yankah.