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CRIMINAL PROCEDURE: Pretextual Arrests: In *United States v. Scopo* the Second Circuit Raises the Price of a Traffic Ticket (Considerably)

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PRETEXTUAL ARRESTS: IN *UNITED STATES V. SCOPO*[*] THE SECOND CIRCUIT RAISES THE PRICE OF A TRAFFIC TICKET (CONSIDERABLY)

INTRODUCTION

Over forty years ago, Justice Robert H. Jackson warned that "[w]e must remember that the extent of every privilege of search and seizure without a warrant which we sustain, . . . [police] officers interpret and apply themselves and will push to the limit."[1] Perhaps no other warrantless seizure provides a more apt illustration of this proposition than a pretextual arrest. A pretextual arrest occurs when a police officer makes an arrest for a minor infraction in order to conduct a search incident to that arrest.[2] An arrest for a violation of a minor

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[*] 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994).

[1] Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

[2] As used in this Comment, the term "pretextual arrest" refers to an instance where a police officer makes an arrest for an ostensibly proper reason "but is in fact arresting in order to conduct a search incident to arrest for which there is no independent probable cause." John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 78 n.36 (1982). As used herein, the term does not encompass "fabricated pretexts," which purportedly occur when "the government offers a justification [for the arrest] that is not the true reason for the police activity and, in fact, is legally insufficient because it is not supported by the facts." Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 6 (1991). A fabricated pretext occurs, for instance, when a police officer invents a traffic offense after the fact to justify an arrest and subsequent search. The pretext doctrine does not apply under such circumstances because the arresting officer simply lacks probable cause to make the arrest in the first place. United States v. Ferguson, 8 F.3d 385, 397-98 (6th Cir. 1993) (en banc) (Jones, J., dissenting), *cert. denied*, 115 S. Ct. 97 (1994). The lack of probable cause itself vitiates the arrest and any authority to conduct a search incident to the arrest. *See*, James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 MICH. J. L. REF. 639, 643 (1985).

This Comment also distinguishes between a pretextual stop and a pretextual arrest. In the former situation, the police officer stops a vehicle after witnessing a traffic infraction in order to observe the contents of the vehicle without searching it. The stop may lead to an arrest if the officer observes contraband or if other circumstances arise that justify an arrest. While a pretextual stop may be justified

traffic law provides a classic pretext.[3] In such a situation, the officer suspects that the driver of a vehicle is engaged in illegal activity, such as gun or drug possession, but does not have probable cause to support an arrest for that offense. The officer knows that a search of the vehicle is permissible if the driver is arrested first.[4] Thus, the officer arrests the driver for violating an infrequently enforced motor vehicle law in order to search the car.

The constitutionality of pretextual arrests recently was addressed by the Second Circuit in *United States v. Scopo*.[5] Police arrested Ralph Scopo, brother of an alleged underboss of the Colombo crime family ("Colombo Family") when he failed to signal before changing lanes in his automobile.[6] The police officers, part of an undercover team formed for the purpose of combatting a shooting war among factions of the Colombo Family, were surveilling Scopo actively on the night of his arrest.[7] After the arrest, they searched Scopo's car and recovered a pistol.[8] Accepting Scopo's argument that the officers arrested him merely as a pretext to search his car, the district court granted his motion to suppress the pistol. On appeal, the Second Circuit reversed the district court's order, reasoning that an officer's motivation for making an arrest is irrelevant to the constitutionality of the arrest and ensuing search.[9]

The issue the Second Circuit faced in *Scopo* is not novel. Over the past decade, the federal circuit courts of appeals have grappled with the problem of pretextual arrests and the proper

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on the ground that it constitutes a minimal intrusion, a pretextual arrest is far more intrusive and its reasonableness under the circumstances is therefore far less evident.

[3] *See, e.g.*, United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988) (a "classic example [of a pretextual arrest] occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal . . . activity").

[4] In Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court recognized for the first time that police may search an individual without a warrant following that person's arrest. For a discussion of the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement see *infra* part I.A.

[5] 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994).

[6] United States v. Scopo, 814 F. Supp. 292, 294-95 (E.D.N.Y. 1993), *rev'd*, 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994). The facts of *Scopo* are discussed more fully *infra*, text accompanying notes 66-75.

[7] *Id.* at 294.

[8] *Id.* at 295.

[9] *Scopo*, 19 F.3d at 784.

standard to apply in evaluating their constitutionality.[10] United States Supreme Court guidance in this area is far from clear. Numerous Supreme Court cases suggest that pretextual police activity is unconstitutional.[11] Still, the Court has held a wholly objective inquiry appropriate for determining the constitutionality of searches and seizures,[12] thus raising the question of whether subjective motivation is ever relevant to determine pretext. In *Scopo*, the Second Circuit reasoned that the "objective reasonableness" standard is the guiding principle for all fourth amendment activity, including pretextual arrests. The court found that the authority under state law to arrest for minor traffic infractions makes those arrests objectively reasonable and ends the inquiry for fourth amendment purposes. In the wake of *Scopo*, pretextual traffic offense arrests virtually are insulated from judicial review in the Second Circuit.

Although significant benefits to effective law enforcement may accrue when police officers utilize motor vehicle statutes creatively to arrest those who have committed more serious crimes,[13] this Comment argues that the state interests served

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[10] The circuit courts of appeals are divided on this issue. *See infra* notes 81-82.

[11] *See infra* note 47 and accompanying text.

[12] *See infra* part I.B.

[13] Proactive policing of this sort prevents the commission of crime. Police departments in Indianapolis, Indiana and Kansas City, Missouri recently instituted policies whereby police officers in high-crime areas routinely enforce minor infractions of the law, including traffic violations, in order to provide a legal basis to search a car or pedestrian for illegal drugs or weapons. In Kansas City, at the completion of a six-month trial period, gun-related crimes were reduced by almost 50%, and the number of homicides and drive-by shootings also fell. No similar reduction in crime was observed in areas not part of the pilot program. Additionally, the use of special gun-intercept teams proved ten times more cost-effective than regular police patrols in terms of gun-yield per hour of police patrol. Fox Butterfield, *Cities Finding A New Policy Limits Guns*, N.Y. TIMES, Nov. 20, 1994, at 22. Moreover, it is not self-evident that the aggressive investigation of crime is improper or deserves judicial or societal condemnation. Some argue that the police have not only a right, but an affirmative duty, to arrest for a minor infraction in order to conduct a search if the result is obtaining incriminating evidence that otherwise could not have been lawfully obtained. *See, e.g.*, State v. Blair, 691 S.W.2d 259, 264-5 (Mo. 1985) (en banc) ("I submit that the police had not only the right but even the positive duty to obtain the defendant's fingerprints by any lawful means. The defendant could be lawfully arrested on [a] traffic warrant, and, having been arrested, was subject to search just as any other arrestee would be.") (Blackmar, J., dissenting), *cert. granted sub nom.*, Missouri v. Blair, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 689 (1987), *overruled by* State v. Mease, 842

by enforcing traffic laws and even, in some instances, apprehending dangerous criminals in the process, are outweighed substantially by the detrimental and intrusive nature of a custodial arrest and search under such circumstances. Part I of this Comment discusses Supreme Court jurisprudence relevant to the law of pretextual traffic offense arrests. Bright-line rules fashioned by the Court have expanded the scope of a permissible search incident to an arrest greatly, particularly the search of an automobile. This expansion provides a powerful incentive for police to arrest for violations of minor traffic laws in order to conduct searches.[14] Despite indications that the Court is concerned with pretext, it has failed to define either the contours of its pretext doctrine or how that doctrine fits within the general framework of an objective analysis of fourth amendment activity. Accordingly, an inherent tension remains between the Court's pronouncements on pretext and its insistence upon this wholly objective review.

Part II examines the district and circuit court opinions in *Scopo*, focusing on how both courts interpreted and applied Supreme Court precedent to fashion diametrically opposed tests for determining the validity of pretextual arrests. Part III examines the Second Circuit's decision in *Scopo* in further detail, including the efficacy of the selective enforcement remedy proposed by the concurring opinion. Part IV explores alternatives to the Second Circuit's approach that will curb pretextual arrests more effectively. Finally, this Comment concludes that while the Second Circuit in *Scopo* rendered a principled reading of Supreme Court authority, it failed to recognize fully the implications of its holding and to explore alternative analyses that adequately address the concerns raised by pretextual police activity.

I. SUPREME COURT AUTHORITY RELEVANT TO THE LAW OF PRETEXTUAL TRAFFIC OFFENSE ARRESTS

Three areas of Supreme Court jurisprudence relate to the issue of pretextual arrests. First, during the past quarter century, the Court has expanded broadly the permissible scope of

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S.W.2d 98, 106 (Mo. 1992) (en banc).

[14] *See infra* note 127.

warrantless searches incident to arrests. Second, in a number of cases, the Court has indicated its concern that this expansion provides police with an incentive to arrest solely for the purpose of conducting a search. Lastly, the Court has fashioned a wholly objective analysis for determining whether fourth amendment activity is reasonable.[15] Under this analysis, courts must limit their review of police activity to objective factors surrounding a search or seizure and cannot consider the subjective motivations of an arresting officer. The Court appears to have both opened the door to a review of pretextual police activity with its decisions indicating that pretexts are unconstitutional, and slammed it shut with its decisions precluding a review of an officer's intent. In short, the Supreme Court has provided lower courts with inconsistent guidance in this area.

A. *The Search-Incident-to-Arrest Exception*

A touchstone of fourth amendment jurisprudence is that searches conducted without a warrant are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions."[16] One frequently invoked exception is that police contemporaneously may search both an arrestee and a certain limited area within the arrestee's control.[17] This procedure is known as a search incident to an arrest.[18] Searches

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[15] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[16] Katz v. United States, 389 U.S. 347, 357 (1967).

[17] The Supreme Court established the authority to search a person incident to a lawful arrest in Weeks v. United States, 232 U.S. 383, 392 (1914). The Court first recognized the authority to search the place where a person is arrested in dicta in Carroll v. United States, 267 U.S. 132 (1925).

[18] Besides a search incident to an arrest, the "few established and well-delineated exceptions" to the warrant requirement are: a limited post-arrest protective sweep of the places at the site of an arrest where a person could hide, *see* Maryland v. Buie, 494 U.S. 325 (1990); an inventory search of an impounded vehicle, *see* Colorado v. Bertine, 479 U.S. 367 (1987); a limited search to prevent the destruction of evidence, *see* Cupp v. Murphy, 412 U.S. 291 (1973); a seizure of evidence discovered in plain view subsequent to the arrest of a suspect, *see* Coolidge

incident to arrests serve two purposes. First, they permit arresting officers to disarm suspects. This practice ensures officers' safety while making an arrest, transporting the suspect to the station house, and during the course of any attempted escape.[19] Second, these searches prevent the suspect from destroying evidence of the crime for which he or she has been arrested.[20]

Although the Supreme Court has never questioned seriously the necessity for searches incident to arrests, it has vacillated in defining precisely the scope of the area that can be searched and the principles justifying that scope.[21] Defining the scope of post-arrest searches has proven difficult for a number of reasons. In theory, the safety rationale supports a search of an arrestee's person under most, if not all, circumstances. Whether either the safety or destruction of evidence

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v. New Hampshire, 403 U.S. 443 (1971); a stop and frisk based upon reasonable suspicion that criminal activity is afoot, *see* Terry v. Ohio, 392 U.S. 1 (1968); an entry into a home and subsequent search of the premises when police are in "hot pursuit" of a suspect, *see* Warden v. Hayden, 387 U.S. 294 (1967); and a search of an automobile upon probable cause that the vehicle contains contraband, *see* Carroll v. United States, 267 U.S. 132 (1925). At least one commentator has noted that the general requirement for a warrant has been virtually eviscerated by the frequently-invoked exceptions. Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. CT. REV. 127, 131 & n.19 (*citing* A.L.I. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 157 (Proposed Official Draft No. 1, 1972) (noting that warrantless searches have become the rule rather than the exception and that in 1966, 171,288 arrests were made by New York City police with only 3897 warrants obtained)).

[19] Chimel v. California, 395 U.S. 752, 762-63 (1969).

[20] *Id.*

[21] *See* Marron v. United States, 275 U.S. 192, 199 (1927) (upholding seizure of item not listed in warrant on grounds that subsequent to a lawful arrest, police "had a right without a warrant contemporaneously to search the place" of the arrest); United States v. Lefkowitz, 285 U.S. 452, 465 (1932) (warrantless search of premises unlawful despite fact that search contemporaneous to lawful arrest); Harris v. United States, 331 U.S. 145, 151 (1947) (warrantless search of entire four-room apartment upheld as valid search incident to arrest), *overruled by* Chimel v. California, 395 U.S. 752 (1969); Trupiano v. United States, 334 U.S. 699, 705 (1948) (warrantless search of distillery made incident to arrest held invalid where officers had opportunity prior to making arrest to obtain warrant), *overruled by* United States v. Rabinowitz, 339 U.S. 56 (1950); United States v. Rabinowitz, 339 U.S. 56, 61-63 (1950) (warrantless search of office incident to arrest that extended for over one hour and included search of desk and file cabinets upheld despite fact that officers had opportunity to secure search warrant prior to arrest), *overruled by* Chimel v. California, 395 U.S. 752 (1969). These cases and the evolution of the search-incident-to-arrest exception are discussed fully in Chimel v. California, 395 U.S. 752, 755-62 (1969).

rationales support an area search, however, is not quite as clear; the result may differ depending on the circumstances of the arrest, including the crime involved, and the possibility that the arrestee can access a weapon.

Because of the difficulties encountered by courts when applying the search-incident-to-arrest exception to area searches involving automobiles, the Supreme Court established bright-line rules that govern such searches.[22] These rules greatly expand the police officer's latitude to conduct area searches. Moreover, they are problematic theoretically because their application does not depend on the actual existence of either the safety or evidence concerns. Because courts do not scrutinize these searches for either the probability of danger to the officer or the likelihood that evidence will be destroyed, this latitude provides a potential incentive for officers to arrest solely in order to conduct searches.

1. "Bright Lines" and the Scope of a Search Incident to an Arrest

In 1969, in *Chimel v. California*,[23] the Court appeared to settle the issue of the proper scope of a search incident to a lawful arrest. Relying on the safety and evidence rationales, the *Chimel* Court permitted a post-arrest search of the arrestee and the area within the arrestee's immediate control.[24] In *Chimel*, the Court established two principles regarding the scope of a search incident to arrest: first, that specific purposes

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[22] *See infra* part I.A.1.

[23] 395 U.S. 752 (1969).

[24] *Id.* at 762-63. In *Chimel*, police officers acting pursuant to an arrest warrant arrested the defendant in his home for the burglary of a coin shop. Although they did not have a search warrant, they conducted a post-arrest search of Chimel's entire three-bedroom home, including the insides of closed drawers. They seized a number of coins which were later introduced as evidence at his trial. *Id.* at 753-54. The Supreme Court reversed Chimel's burglary conviction. It found that the safety and evidence concerns underlying the search incident to arrest exception justify a search of the arrestee's person and the area within his immediate control, or "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 762-63. The Court found that no similar justification exists for conducting a routine search of any room other than the one in which the suspect is arrested or for searching closed drawers outside the reach of the arrestee because there is no attendant danger to the officer and no possibility that the suspect could destroy evidence. *Id.*

are served in permitting such searches; and second, those purposes define and limit the proper scope of such searches.

In subsequent decisions involving searches of automobiles, however, the Court did not adhere to those principles. In two post-*Chimel* decisions the Supreme Court replaced the rationale of *Chimel*, and its mandate of a case-by-case assessment of the circumstances surrounding a search, with bright-line rules governing the search of a person arrested in an automobile and the search of an automobile incident to the arrest of its occupant. These rules permit police to search fully both the arrestee's person and the interior of the automobile.

In *United States v. Robinson*[25] the Court held that a full search of an arrestee's person is per se reasonable and that the scope of such a search is not restricted by the likelihood of discovering either a weapon or evidence of the crime for which the person was arrested.[26] At issue in *Robinson* was a search of the inside of a crumpled cigarette package discovered on Robinson's person after police arrested him for driving without a license.[27] The Court of Appeals for the District of Columbia held that the search was unconstitutional. That court reasoned that because the officer could not have discovered evidence of the traffic infraction in the cigarette package, he was limited to conducting a protective search of Robinson to uncover weapons.[28] The Supreme Court reversed.

The *Robinson* Court recognized that the need to disarm a suspect in order to take him into custody justifies a search incident to arrest as much as the need to preserve evidence.[29] It rejected the assumption that persons arrested for traffic violations are less likely to possess dangerous weapons than those arrested for other crimes.[30] It therefore declined to qualify the breadth of the authority to search in traffic infraction cases.[31] Instead, the *Robinson* Court held that all custodial arrests are equivalent for purposes of search justification because the danger posed by extended contact with the arrestee

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[25] 414 U.S. 218 (1973).
[26] *Id.* at 234-35.
[27] *Id.* at 223.
[28] *Id.* at 227.
[29] *Id.* at 234-35.
[30] *Id.* at 234.
[31] *Robinson*, 414 U.S. at 234.

both on the scene and in transporting the arrestee to the police station exists in all arrest situations.[32] Because the arrest independently justifies the search, the validity of the search does not depend on a case-by-case assessment of the likelihood that weapons or evidence would be found on the arrestee.[33] According to the *Robinson* Court, this bright-line rule accommodates the needs of the arresting officer who must make a "quick ad hoc judgment" of how and where to search the person of an arrestee.[34]

Although *Chimel* appeared to resolve the question of the proper scope of a search of the *place* of arrest—as opposed to the *person* of the arrestee—the Court revisited that issue in 1981 in the context of an automobile occupant's arrest. In *New York v. Belton*,[35] the Court declined to impose the limitations established by *Chimel* to automobile searches.

In *Belton*, a state trooper stopped a vehicle for excessive speeding. The officer detected the odor of marijuana and saw a suspicious envelope on the floor of the car. He ordered the four occupants out of the car and placed them under arrest for possession of narcotics. After conducting pat-down searches of all four men, the trooper placed them in separate areas of the New York State Thruway, returned to the vehicle, and searched four jackets lying on the back seat of the car. He discovered cocaine in the zippered pocket of Belton's jacket. The cocaine was admitted into evidence at Belton's trial and he was convicted of possession of a controlled substance.[36]

The New York Court of Appeals, applying *Chimel*, reversed the conviction. It found that the warrantless search of the jackets could not be justified as a search incident to an arrest because at the time of the search, none of the occupants could have gained access to the jackets or their contents.[37] The Supreme Court, in turn, reversed the court of appeals, holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger com-

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[32] *Id.* at 234-35.
[33] *Id.* at 235.
[34] *Id.*
[35] 453 U.S. 454 (1981).
[36] *Id.* at 455-56.
[37] *Id.*

partment of that automobile."[38] The scope of this search includes the glove compartment and any other closed containers or clothing within the automobile, whether or not such containers are capable of holding either a weapon or evidence of the crime for which the person was arrested.[39]

Underlying the Court's opinion in *Belton* was its concern that the principles enunciated in *Chimel* are difficult to apply in the context of automobile stops. The Court asserted that a standard capable of ready application was essential to guide police officers in their day-to-day activities.[40] The dissent, on the other hand, characterized the Court's bright-line rule as incorporating the "fiction . . . that the interior of a car is always within the immediate control of an arrestee who has recently been in the car."[41]

The *Belton* bright-line strictly limits review of the scope of a post-arrest search of an automobile. If an arrest is lawful and the search does not extend beyond the interior of the car, a court will not review its scope. This rule raises a serious concern that police officers might use the power to arrest for the purpose of conducting a search and not for the purpose of enforcing law.[42] Without a requirement that police articulate

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[38] *Id.* at 460 & n.4.

[39] *Id.*

[40] *Id.* at 458.

[41] *Belton*, 453 U.S. at 466 (Brennan, J., dissenting).

[42] One commentator described the likely effect of *Belton* as follows:

> After *Belton*, an officer who makes a lawful custodial arrest for a traffic offense not only may remove and search any purse, wallet or crumpled cigarette package that the arrestee is carrying; he also may search the arrestee's car and luggage or other containers within it. The officer may make this search simply to satisfy his curiosity, to pursue vague suspicions, or even to harass. *Belton* gives anyone who drives an automobile and cares about his privacy a new and powerful incentive to obey the rules of the road.

Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 281 (1984).

Commenting on the pros and cons of the bright-line trend of Supreme Court decisions in the area of search and seizure, Professor Alschuler notes that:

> [Bright-line] [r]ules tend to limit the importance of subjective judgment, to promote equality, to control corruption, to simplify administration and to provide a basis for planning before and after controversies arise. Nevertheless, the limitations of language and the variety and unpredictability of human behavior make extremely difficult the articulation of general principles that will yield justice in almost every situation that they address. When the best rules that our powers can devise produce injustice

the basis for their suspicions, the arrest power can be used arbitrarily, to confirm a hunch or an unsubstantiated suspicion.[43]

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often enough, we do well to abandon them even at the price of lawlessness.

Id. at 227.

[43] The Supreme Court consistently has recognized that a primary purpose of the Fourth Amendment is to combat arbitrarily exercised police discretion. The history surrounding the Fourth Amendment is replete with references to the unbridled discretion conferred on those operating under the authority of general warrants and writs of assistance. *See generally*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). These devices permitted the police to decide whom, where and for what to search, without requiring a showing of individualized suspicion that evidence would be found on a particular person or in a particular place. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 254 (1989). For discussions of the history of general warrants and writs of assistance, and their influence on the drafting of the Fourth Amendment, *see* Salken, *supra*, at 254-57, and authorities cited therein, and Amsterdam, *supra* at 410-12.

The Fourth Amendment protects against indiscriminate and arbitrary police action in two ways. First, police must conduct searches pursuant to a warrant issued by a neutral judicial officer. The warrant must specifically limit the scope of the ensuing search in order to provide a protective wedge between a citizen and a police officer. Second, the Fourth Amendment imposes a standard of reasonableness "upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'" Delaware v. Prouse, 440 U.S. 648, 654 (1979) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (footnote omitted)).

While most commentators agree that the history surrounding the enactment of the Fourth Amendment indicates that the Framers were concerned with the indiscriminate nature of general warrants and writs of assistance, Professor Telford Taylor has argued that the Framers were not concerned with warrantless searches at all, but simply with overreaching warrants. Amsterdam, *supra*, at 410 (discussing Professor Taylor's view of the warrant and reasonableness clauses of the Fourth Amendment). According to the latter view, the reasonableness requirement of the Fourth Amendment addresses warrantless searches and, contrary to the Supreme Court's interpretation, the amendment does not embody an overriding preference for warrants. Accordingly, the Fourth Amendment permits a broad range of reasonable warrantless searches. *Id.* Professor Amsterdam, on the other hand, believes that the Court's analysis of warrantless searches correctly permits the Court to impart meaning to the characteristics of unreasonable warrantless searches. According to this view, the Court should inquire into what the condemnation of general warrants and writs of assistance implies about the nature of unreasonable searches. *Id.* at 410-11. Thus, warrantless searches that exhibit the same characteristics as general warrants or writs of assistance must be deemed unreasonable if nothing else distinguishes them from those types of searches. *Id.* at 411. Because the Framers accepted specific warrants as reasonable, the feature of the general warrants and writs of assistance that the Framers found objectionable must have been their indiscriminate or arbitrary character. *Id.*

Police exercise broad discretion with respect to arrest decisions, particularly when the offense is minor and usually ignored. According to one commentator, when police utilize the power to arrest and search in such a selective manner

> whether you and I get arrested and subjected to a full-scale . . . search or are sent upon our respective ways with a pink multi-form and a disapproving cluck when we happen to go for a drive . . . depends upon the state of digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.[44]

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[44] Amsterdam, *supra* note 42 at 416. Professor Amsterdam is not alone in recognizing the implications of police discretion in this area. Mark Baker interviewed over one hundred police officers anonymously throughout the country. Drawing on these interviews, he posited the following situation as illustrative of some of the elements that may influence a police officer exercising discretion to arrest for a minor traffic violation:

> As you are driving down the highway, suddenly there are flashing lights in the rear-view mirror and the whoop of a siren in your ears. A small dose of adrenaline surges into your blood stream. Your heart beats faster; your palms sweat. You feel guilty whether you've consciously done something wrong or not. Everyone is afraid of the police.
>
> There is really little to fear, especially if you are white and middle-class. The police officer will be civil and efficient. He will finish his business and have you back on the road in a matter of minutes. If he gives you a ticket, you can probably afford to pay the fine. No real damage is done, just a slight inconvenience and perhaps some minor bruises on your ego from being told you were wrong.
>
> However, the police officer who stops you does have some extraordinary powers. . . .
>
> A police officer is well trained to deal calmly and coolly with the public. Even when he is confronted with abusive language and disrespectful behavior, he must suppress his personal prejudices and wield his authority with fairness. He is taught to hold his temper and to act in a detached, professional manner. And he does—most of the time.
>
> But a cop is only human. Every police officer has had a bad day—a hangover, a fight with the wife, a screw-up with the bosses—and has taken it out on the citizenry. He is rude, insulting, intimidating. Many a cop has given in to temptation and has misused his discretionary powers to gratify his own ego. . . .

MARK BAKER, COPS: THEIR LIVES IN THEIR OWN WORDS 205-06 (1985). *See also* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 167 (1969) (noting that "administrative choices to enforce or not to enforce are often made by a single officer, usually unsupervised, usually unchecked, almost always without a systematic statement of findings, almost always without a reasoned opinion, usually without any reporting to anyone of pressures or extraneous influences, and almost always without opportunity for the public to observe what is done or undone or with what motivations").

Both the pervasiveness of traffic infractions and the ease of detecting them illustrate the potential for abuse of discretion in such situations.[45]

B. *Pretext and the "Objective Reasonableness" Standard for Determining Probable Cause*

The Supreme Court has never excluded evidence solely because it was obtained as a result of a pretextual arrest.[46] Yet, in a number of cases, including cases involving arrests for minor traffic violations, members of the Court have indicated

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[45] *See* WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 1.4(e) at 95 (2d ed. 1987).

[46] The Court bypassed the opportunity to decide the pretext issue squarely when it dismissed its writ of certiorari as improvidently granted in State v. Blair, 691 S.W.2d 259 (Mo. 1985) (en banc), *cert. granted sub nom.*, Missouri v. Blair, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 689 (1987), *overruled by* State v. Mease, 842 S.W.2d 98, 106 (Mo. 1992) (en *banc*). In *Blair*, police were informed that Zola Blair was involved in a murder, but did not have probable cause to arrest her. The only physical evidence found at the crime scene was a palm print. *Id.* at 260. Blair's fingerprints were not on file at the police station, so no comparison could be made. *Id.* Prior to taking Blair into custody for the murder, police discovered that she was the subject of an outstanding warrant for a traffic violation. They arrested Blair, brought her involuntarily to the homicide unit and took her palm prints and fingerprints. She was detained overnight. Fifteen minutes after her release she was booked on the traffic warrant. *Id.* After police discovered that her palm print matched the one taken at the crime scene, Blair was arrested for murder. She was confronted with the evidence of the matching prints and made inculpatory statements. *Id.* The trial court found that Blair was never in legal custody because the arrest on the traffic warrant was a pretext to obtain her palm print. It granted her motion to suppress the palm print as the product of an illegal detention and the statements as the fruit of the illegally obtained palm print. *Id.* at 261. The Supreme Court of Missouri affirmed the trial court's decision, *id.* at 264, and the Supreme Court of the United States granted the State's petition for certiorari. Missouri v. Blair, 474 U.S. 1049 (1986). In her brief to the Supreme Court, Blair argued that the finding of pretext clearly was supported by the record and additionally requested that the Court rule that the subjective intent of an arresting officer is relevant to assessing the existence of pretext. John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363, 393 & nn.134-136 (1989) (citing Brief for Respondent at 22-41, Missouri v. Blair, 474 U.S. 1049 (1986) (No. 85-303), *cert. dismissed*, 480 U.S. 689 (1987)).

This term the Court denied certiorari in three pretextual arrest cases. *See* United States v. Scopo, 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994); United States v. Harvey, 24 F.3d 795 (6th Cir.), *cert. denied*, 115 S. Ct. 258 (1994); United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 97 (1994).

that they consider pretextual behavior to be of constitutional significance and that, if presented squarely with the issue, they would find such conduct unconstitutional.[47] Consider-

[47] *See, e.g.*, Horton v. California, 496 U.S. 128, 148 (1990) (Brennan, J., dissenting) (stating that there is "no doubt that [pretextual] searches violate the Fourth Amendment" but conceding that the case did not involve a question of pretext); United States v. Robinson, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting) (noting that because the officer has discretion to arrest or to issue a citation "[t]here is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search"); United States v. Robinson, 414 U.S. 218, 238 n.2 (1973) (Powell, J., concurring) (the case "would have presented a different question if petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives"); Chimel v. California, 395 U.S. 752, 767 (1969) (in restricting the scope of a search of petitioner's home incident to his arrest, Court notes that "petitioner correctly points out that one result of [the Court's prior scope] decisions . . . is to give law enforcement officials the opportunity . . . of arranging to arrest suspects at home rather than elsewhere [in order to search the home]"); Abel v. United States, 362 U.S. 217, 226 (1960) (although finding no pretext, Court generally condemns the practice of using an administrative warrant to gather evidence in a criminal case, noting that "[w]ere this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers [because] [t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must be met with stern resistance by the courts"); United States v. Lefkowitz, 285 U.S. 452, 466 (1932) (holding that arrest does not confer the authority to conduct a general exploratory search of premises and noting that "[a]n arrest may not be used as a pretext to search for evidence.").

Commentators differ sharply over how the Supreme Court cases in this area should be construed. Professor Burkoff maintains that the cases cited above and others that he points to, especially in the areas of inventory and administrative searches, indicate that the Supreme Court examines the question of pretext on a case-by-case basis and that the Court finds the arresting officer's intent dispositive in pretext cases. John J. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 MICH. J. L. REF. 523, 544-50 (1984); *see also* Burkoff, *supra* note 2, at 75-83. Professor Haddad, on the other hand, criticizes this approach. He argues that the Court has adopted what he calls the "hard choices" approach to pretextual police activity. According to Professor Haddad, the Court examines whether the authority of the police in a given situation is susceptible to abuse by means of its use as a pretext and then limits that authority accordingly. Haddad, *supra* note 2, at 654-55. Professor Butterfoss, in turn, argues that the Burkoff and Haddad approaches are overinclusive. He reconciles them by arguing that the Court only utilizes a case-by-case approach if it finds that the police have resorted to a fabricated pretext (*see, supra* note 2), but where the pretext is not fabricated, the Court utilizes the "hard choices" approach. Butterfoss, *supra* note 2, at 6. Although a full discussion of these approaches is beyond the scope of this Comment, it should be noted that under Butterfoss's approach the Court would find the arrest in *Scopo* constitutional because Scopo contended that the traffic infraction he committed was used as a pretext to conduct a warrantless search and not that the infraction was fabricated post-arrest. Under Haddad's approach, the Court would consider restricting the underlying authority of the police in such situations

ation of the issue of pretext is premature, if not irrelevant, however, without a threshold determination that the minor traffic violation itself establishes probable cause to make the arrest.

Prior to making an arrest, police must establish that they have probable cause to do so. Probable cause is the minimum quantum of knowledge that an officer must have in order to effect a search or a seizure. It exists where "the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information are sufficient in and of themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed" and that the person to be arrested committed the offense.[48]

The Court's pronouncements concerning the proper standard for determining probable cause have proved troublesome to federal courts reviewing pretextual arrests because the objective standard of reasonableness adopted by the Court appears to preclude consideration of the subjective motivations of an arresting officer. This notion, in turn, appears to conflict with the Court's concern over pretextual police activity. Thus, courts attempting to give content to the concept of pretext must reconcile two apparently contradictory lines of Supreme Court authority.

1. The *Scott* Trilogy

The Court first enunciated an entirely objective approach to search and seizure issues in *Scott v. United States*.[49] The

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because of its susceptibility to being used as a pretext. This result could be accomplished by limiting the scope of the search incident to a traffic offense arrest or limiting the authority of police to make such arrests. *See* discussion *infra* part IV.

[48] Draper v. United States, 358 U.S. 307, 313 (1959) (citation omitted).

[49] 436 U.S. 128 (1978). In Maryland v. Macon, 472 U.S. 463 (1985), and United States v. Villamonte-Marquez, 462 U.S. 579 (1983), the Court reaffirmed this standard. These cases are hereinafter referred to as "the *Scott* trilogy." All of the circuit courts passing on the question of pretext recognize this trilogy. *See* United States v. Scopo, 19 F.3d 777, 782-83 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 207 (1994); United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994), *reh'g and reh'g en banc denied* (Aug. 8, 1994); United States v. Ferguson, 8 F.3d 385, 391-92 (6th Cir. 1993) (*en banc*), *cert. denied*, 115 S. Ct. 97 (1994); United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994); United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 428

question presented to the Court in *Scott* was whether federal agents violated the Fourth Amendment when they intercepted telephone conversations pursuant to an authorized wiretap without attempting to minimize the interception of calls unrelated to their investigation.[50] In addressing this question, the Court stated that for purposes of evaluating alleged violations of the Fourth Amendment, the applicable standard is one of "objective reasonableness without regard to the underlying intent or motivation of the officers involved."[51] Consequently, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."[52] Although in *Scott* the agents had intercepted virtually all of the calls made or received on the tapped telephone, the Court found that their actions were objectively

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(1991); United States v. Trigg, 878 F.2d 1037, 1040 (7th Cir. 1989), *cert. denied*, 112 S. Ct. 428 (1991); United States v. Guzman, 864 F.2d 1512, 1516 n.3 (10th Cir. 1988); United States v. Causey, 834 F.2d 1179, 1182-83 (5th Cir. 1987) (en banc); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).

A fourth case that cites *Scott* as setting the standard for the proper scope of a fourth amendment inquiry is Graham v. Connor, 490 U.S. 386 (1989). *Graham* did not present the Court with a pretext question; rather the central issue in *Graham* was the proper standard for evaluating excessive-force claims that had arisen in the context of an arrest or other seizure. *Id.* at 388. In determining that the Fourth Amendment's "objective reasonableness" standard applies to such claims, the Court noted that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397.

[50] *Scott*, 436 U.S. at 135. In *Scott*, government officials applied for authorization to wiretap a telephone that they had probable cause to believe was being used in furtherance of a conspiracy to distribute narcotics. *Id.* at 131. A magistrate authorized the wiretap pursuant to a federal law permitting certain types of electronic surveillance. The statute, however, requires that such surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [the statute]." *Id.* at 130 (quoting 18 U.S.C. § 2518(5)). Because the agents admitted their awareness of the minimization requirement, but made no attempt to comply with it, the district court granted a motion to suppress all of the intercepted conversations. *Id.* at 133-34 & n.7. The Court of Appeals for the District of Columbia reversed, finding that the proper standard for determining the reasonableness of the interceptions did not rest on "whether the agents subjectively intended to minimize their interceptions." *Id.* at 134.

[51] *Id.* at 138.

[52] *Id.*

reasonable under the circumstances because the case involved a wide-ranging conspiracy and the relevancy of the calls could not be determined without listening to them.[53] Thus, the Court declined to suppress the incriminating conversations.[54]

If applied broadly to all areas of fourth amendment activity, *Scott* sounds the death knell for judicial inquiries into the subjective motivations of an arresting officer for purposes of determining fourth amendment violations.[55] In fact, the second case in the *Scott* trilogy, *United States v. Villamonte-Marquez*,[56] appears to expand the scope of the objective reasonableness inquiry to pretextual arrests.

Villamonte-Marquez was convicted of possession of marijuana with intent to distribute after a customs agent, who had ostensibly boarded Villamonte-Marquez's boat to check its documentation, spotted a large amount of marijuana.[57] Although the central issue was the validity of a federal statute permitting the warrantless boarding of vessels for purposes of checking documentation,[58] Villamonte-Marquez also argued that because the customs agent was accompanied by a state policeman and was acting pursuant to a tip that a vessel in the vicinity was carrying marijuana, he was precluded from relying

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[53] *Id.* at 142.

[54] *Id.* at 141.

[55] The *Scott* language can be read narrowly for a number of reasons. First, *Scott* is not a pretext case; no allegation was made that the officers applied for and used the wiretap for the purpose of intercepting calls that they otherwise would not have been able to intercept, with the hope of gathering evidence of another crime not under investigation. Second, the Court did not squarely address the question of the agents' intent. In *Scott*, although only about 40% of the calls intercepted by the agents were narcotics related, virtually all of the calls were intercepted. *Id.* at 132. These facts indicate that the agents intended to disregard the minimization requirement of the statute. The Court used these facts, however, to determine the sufficiency of the minimization that took place rather than to examine the intent of the agents.

[56] 462 U.S. 579 (1983).

[57] *Id.* at 582-83.

[58] The customs agent made the entry pursuant to a federal statute providing that "[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers . . . and to this end may hail and stop such vessel . . . and use all necessary force to compel reliance." 19 U.S.C. § 1581(a) (1976 & Supp. 1994). Villamonte-Marquez argued that the statute violated the Fourth Amendment's prohibition against unreasonable searches and seizures by permitting entry in the absence of reasonable suspicion of criminal activity. *Villamonte-Marquez*, 462 U.S. at 584-85.

on the statute.[59] The Court disposed of this argument in a single footnote, pointing out that "[t]his line of reasoning was rejected in a similar situation in *Scott* . . . , and we again reject it. . . . We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers."[60] Thus, *Villamonte-Marquez* appears to dismiss the notion that the otherwise valid actions of an arresting officer are unconstitutional solely because the officer used the arrest in order to search for evidence related to another offense.[61]

The Court reiterated the objective reasonableness standard in *Maryland v. Macon*.[62] In *Macon*, plainclothes detectives purchased magazines from an adult bookstore using a marked fifty-dollar bill. After confirming the fact that the magazines were obscene, the detectives returned to the store, arrested Macon and retrieved the fifty-dollar bill from the cash register without returning the change they received when the purchase was made.[63] Macon subsequently moved to suppress the magazines as the product of an illegal seizure, arguing that the subjective intent of the detectives to retrieve the marked bill without returning the change converted what would otherwise

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[59] *Villamonte-Marquez*, 462 U.S. at 584 n.3.

[60] *Id.* (citations omitted).

[61] The facts of *Villamonte-Marquez* do not necessarily lend themselves to an analysis of a typical pretextual traffic stop situation. First, the *Villamonte-Marquez* Court placed significance on the pedigree of the federal statute in question, noting that it was passed by the same Congress that had promulgated the Bill of Rights and that the type of seizure it permitted was thus not considered unconstitutional by the Framers. *Id.* at 585-86. Arguably, the same degree of deference might not be given to state laws permitting arrests for minor traffic violations. Additionally, the Court distinguished the type of seizure conducted in *Villamonte-Marquez* from discretionary stops of automobiles. In so doing it noted that the intrusive nature of roving patrol stops of automobiles militated in favor of curbing the discretion of the police to make such stops, especially where a less intrusive method such as fixed checkpoint stops was available and would serve the same underlying governmental interest in permitting the stop. *Id.* at 588-89. The Court found that no such alternative was available in the case of seafaring vessels. *Id.* at 589. Lastly, in noting these differences, the Court stated that had the customs agent in *Villamonte-Marquez* stopped an automobile without articulable suspicion, the stop would have run afoul of the Fourth Amendment. *Id.* at 588. This final point is inapposite with respect to pretextual traffic offense stops because probable cause to make the stop always exists in such situations.

[62] 472 U.S. 463 (1985).

[63] *Id.* at 465.

have been a bona fide purchase into a warrantless seizure.[64] The Court rejected the argument that the subjective intent of the officers was dispositive or even relevant to determining whether a seizure had taken place. Citing *Scott*, the Court noted that "[o]bjectively viewed, the transaction was a sale in the ordinary course of business . . . [and] is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence."[65] Thus, the true reason for the detectives' purchase of the magazines—to conduct a criminal investigation and not to make a bona fide purchase—was irrelevant for purposes of determining whether a fourth amendment violation had taken place.

The *Scott* trilogy laid the groundwork for the district court's decision suppressing Scopo's gun. Ironically, it also provided the foundation for the Second Circuit's reversal of that decision.

II. THE *SCOPO* DECISION

A. *Factual Background*

In November of 1991, a shooting war commenced between feuding factions of the Colombo Family.[66] At least six murders were committed and a dozen attempted in connection with the shooting war. The shootings were carried out by "hit teams" comprised of shooters who would travel "caravan style" in automobiles.[67] In an effort to respond to the violence, the Federal Bureau of Investigation and the New York City Police Department formed the Colombo Strike Force ("Strike Force").[68]

On the night of January 17, 1992, New York City police

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[64] *Id.* at 470.

[65] *Id.* at 471.

[66] United States v. Scopo, 814 F. Supp. 292, 294 (E.D.N.Y. 1993), *rev'd*, 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994).

[67] "Caravan style" refers to vehicles travelling "in a line, following one another, turning with one another, staying in a group." Transcript of Hearing Before the Honorable I. Leo Glasser at 29, July 2, 1992, United States v. Scopo, 814 F. Supp. 292 (E.D.N.Y. 1993) (No. 92-184), *rev'd*, 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S.Ct. 207 (1994) [hereinafter "Transcript of Suppression Hearing"].

[68] *Scopo*, 814 F. Supp. at 294.

detectives assigned to the Strike Force were conducting surveillance of the Mill Basin Social Club in Brooklyn, New York, a known meeting place of one of the warring factions of the Colombo Family. The detectives observed four men leave the club and identified two as members of the Colombo Family. The men entered four cars and drove away in caravan style. The detectives followed the cars to Joseph Scopo's residence. A short time later, the detectives located two of the four vehicles double-parked on the wrong side of the street in front of the residence of Salvatore Micciotta.[69]

Although the detectives had summons books with them, and the cars were parked in violation of New York City traffic regulations, they did not issue any summons at that time.[70] The officers next saw two men, Anthony Mesi and Joseph Scopo, leave the residence and enter the two cars. Mesi was carrying a rifle case. That information was relayed to the entire surveillance team. The detectives followed the two cars, which again were travelling caravan style. They saw the drivers of both cars twice fail to signal when changing lanes, but did not pull them over.[71]

The detectives continued following the cars for approximately two miles, until they stopped at a red light. They boxed-in the cars by positioning police vehicles in front, at the side and behind the caravan.[72] Three detectives, at least two of whom had guns drawn, approached Scopo's car. One of the detectives saw Scopo throw an object, later identified as a cellular phone, into the back of the car. Scopo was removed from the car and frisked for weapons.[73] At the same time, another of the detectives looked in the car and observed the butt of a gun in "plain view"[74] protruding from a pouch behind the

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 294-95.

[73] *Id.* at 295.

[74] The plain view doctrine entitles police to seize evidence without a warrant when that evidence is visible to them during the course of a legal search or seizure. Horton v. California, 496 U.S. 128, 134 (1990) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971) and Chimel v. California, 395 U.S. 752 (1969)). A plain view seizure is valid only when the incriminating nature of the item seized is immediately apparent and the item is discovered during the course of an arrest authorized by law. Illinois v. Andreas, 463 U.S. 765, 771 (1983) (citing Texas v.

passenger seat. The gun was fully loaded and the serial number had been obliterated. Scopo was arrested and later indicted for possessing a handgun with the serial number removed in violation of federal law.[75]

B. *The District Court Decision*

Scopo moved pretrial to suppress the gun. He contended that the traffic stop made by the detectives was a pretext to enable them to search his car for weapons and that the gun was, therefore, the "fruit"[76] of an illegal search.[77] The govern-

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Brown, 460 U.S. 730, 738 and n.4, 741-42 (1983) (plurality opinion)). Thus, the plain view doctrine legitimizes the seizure of objects which are otherwise outside the permissible scope of a search. Arizona v. Hicks 480 U.S. 321, 325-26 (1986).

[75] *Scopo*, 814 F. Supp. at 295.

[76] Evidence discovered as the direct result of unconstitutional police activity is generally inadmissible at trial because it is considered the "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 485-88 (1963).

[77] Scopo also claimed that because he was arrested pursuant to state law, the federal court determining the legality of the arrest was obligated to refer to state law to determine whether it should suppress the evidence seized as a result of the arrest. *Scopo*, 814 F. Supp at 295 n.6.

Scopo's argument on this point is more clearly set forth in his brief before the Second Circuit. Scopo argued that because the propriety of the search in question was wholly dependent on state law, the federal court should look to both state statutes and caselaw to determine the validity of the arrest. Brief for Defendant-Appellee at 40, United States v. Scopo, 19 F.3d 777 (2d Cir.) (No. 93-1201), *cert. denied*, 115 S. Ct. 207 (1994) [hereinafter "Opening Brief"]. In essence, he asked the federal court to look beyond the plain words of the statute that authorized an arrest for a traffic infraction and consider state caselaw, which he argued did not permit an arrest under these circumstances despite the plain words of the statute. The district court rejected the argument that state suppression law applied. *Scopo*, 814 F. Supp. at 295-96 n.6 (quoting Elkins v. United States, 364 U.S. 206, 223-24 (1960) ("In determining whether there has been an unreasonable search and seizure by state officers [in a federal criminal trial], a federal court must make an independent inquiry. . . . The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed")). It found that New York traffic law provided grounds for an arrest, but that federal pretext doctrine should be applied to determine the constitutionality, as opposed to the legality, of that arrest. *Id.*

Application of state law to the seizure would have been beneficial to Scopo for a number of reasons. First, under New York law, pretextual arrests are impermissible seizures. *See, e.g.*, People v. Llopis, 125 A.D.2d 416, 417, 509 N.Y.S.2d 135, 136 (2d Dep't 1986). Moreover, the subjective intent of the arresting officer is relevant to the determination of pretext in New York. *See, e.g.*, People v. Smith, 181 A.D.2d 802, 803, 581 N.Y.S.2d 240, 241 (2d Dep't 1992). Second, although the statutory language itself clearly permits an arrest for a traffic infraction (*see infra* note 98), as Scopo pointed out in his brief, New York courts appear to have

ment contended that the detectives had probable cause to arrest Scopo for violating a traffic law and that the gun should therefore be admissible.[78]

The district court granted the motion to suppress. It first noted that while the Supreme Court has recognized the existence of pretext doctrine, it has never defined the contours of the doctrine.[79] It then noted that all of the circuit courts of appeals that had passed on the pretext question were in agreement that, in accord with the *Scott* trilogy, a wholly objective inquiry is appropriate for purposes of determining pretext.[80] The district court observed that the circuit courts predominantly use two tests to define the parameters of an objective review in the context of pretextual arrests. Some circuits have adopted the "usual police practices" test—referred to herein as the "*would have* test"—which focuses not on "whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose."[81] Other circuits have

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placed a gloss over the statutory language that limits arrests to situations where the traffic violation poses a threat to public safety or where the motorist is unable to produce identification. Opening Brief *supra*, at 43-44. In all other instances, police should issue traffic citations in lieu of making an arrest. *Id.*

[78] *Scopo*, 814 F. Supp. at 295. The government argued alternatively that the detectives had reasonable suspicion to believe that "criminal activity was afoot," therefore justifying an investigative stop as provided by Terry v. Ohio, 392 U.S. 1, 21 (1968). *Id.* The Court rejected this argument, noting that when the detectives surrounded and boxed-in the two cars, drew their weapons and removed the occupants from the vehicle, the stop was converted into a full-blown arrest requiring probable cause. *Id.* at 297-98 (citing United States v. Marin, 669 F.2d 73, 81 (2d Cir. 1982) ("probable cause is necessary when police restrain an individual in a manner that, although not technically an arrest, is nonetheless so intrusive as to be 'tantamount' to an arrest. . . . The reasonableness of a particular stop depends in turn on the extent of the intrusion on the rights of the individual, and on the reason for the restraint")).

[79] *Scopo*, 814 F. Supp. at 299.

[80] *Id.* at 300.

[81] *Id.* (citing United States v. Rivera, 867 F.2d 1261, 1263 (10th Cir. 1989) (quoting United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988)). In addition to the Tenth Circuit, the Sixth and Eleventh Circuits have adopted the *would have* test. *Scopo*, 814 F. Supp. at 300. The Eleventh Circuit adopted the test first and continues to apply it in determining whether a pretextual arrest has occurred. *See* United States v. Smith, 799 F.2d 704, 710 (11th Cir. 1986) (instituting *would have* test) and United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987) (reaffirming validity of *would have* test). Subsequent to the district court's opinion in *Scopo*, however, the Sixth Circuit abandoned the *would have* test in favor of an approach that validates an arrest "so long as the officer has probable cause to

adopted the "authorization" test—referred to herein as the "*could have* test"—which rejects any inquiry into the usual police practices and instead focuses on whether the officer in question would be "legally permitted and objectively authorized [to make] an arrest."[82]

In finding that "the pretext doctrine retains vitality in [the Second C]ircuit[,]"[83] the district court relied primarily on the Second Circuit's decision in *United States v. Caming*.[84] In that case, Stanley Caming was convicted of structuring currency transactions to avoid reporting requirements and causing financial institutions to fail to file currency transaction reports.[85] Internal Revenue agents had arrested Caming, pursuant to a warrant, as he was exiting the parking lot of an athletic club in his car. Earlier on the morning of his arrest, they had watched his apartment for over three hours until discovering that his car was not in the garage of the apartment building. They then proceeded to the athletic club where they had previously observed Caming on numerous occasions. When they saw his car in the parking lot of the athletic club, the agents parked on the street and waited for Caming to exit the club. They then blocked Caming's automobile with their own cars, arrested him and searched his automobile, discovering various financial records which were later used to convict him

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believe that a traffic violation has occurred or was occurring." United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994). Additionally, since the district court's opinion in *Scopo*, the Ninth Circuit appears to have adopted the *would have* test. United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994) (finding that traffic stop was reasonable under the circumstances, but stating that "we treat our previous cases as consistent with the Tenth and Eleventh Circuits' objective 'would have' standard").

[82] *Scopo*, 814 F. Supp at 300. As the *Scopo* Court noted, the Fifth, Seventh and Eighth Circuits have adopted the *could have* test. *See* United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990), *cert. denied*, 502 U.S. 962 (1991); United States v. Trigg, 878 F.2d 1037, 1042 (7th Cir. 1989), *cert. denied*, 502 U.S. 962 (1991); United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc). Subsequent to the district court's decision in *Scopo*, the Fourth Circuit also adopted the *could have* test, United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994), and, as mentioned in note 82 *supra*, the Sixth Circuit abandoned its adherence to the *would have* test in favor of the *could have* test. *Ferguson*, 8 F.3d at 391.

[83] *Scopo*, 814 F. Supp. at 303.

[84] 968 F.2d 232 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 416 (1992).

[85] *Id.* at 233.

at trial.[86]

In his appeal before the Second Circuit, Caming contended that the district court erred when it denied his motion to suppress the financial records recovered from the car because the agents purposefully delayed arresting him until he was in his car in order to search it.[87] The Second Circuit first noted the legal standard articulated and applied by the lower court:

> When a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the vehicle. . . . Where, however, it appears that the search and not the arrest was the real purpose in effecting a warrantless search of the premises, "and that the arrest was a pretext for or at most an incident of the search," the search is unreasonable under the Fourth Amendment.[88]

It then affirmed Caming's conviction, accepting the lower court's finding that the detectives had no such pretextual motivations.

The *Scopo* court distinguished *Caming*, by pointing to two factors relied upon by the Second Circuit in concluding that the agents' arrest of Caming in his automobile was not pretextual, factors that were absent in Scopo's case. First, the officers who arrested Caming used reasonable precaution to preserve their own safety and to avoid arousing the suspicions of others still under investigation. Second, if the officers were conducting a pretextual arrest, they probably would have arrested Caming in his apartment, where they would be more likely to find evidence.[89] In addition to construing *Caming* as affirming the *would have* test, the district court found that the test has the advantage of preserving the requisite objective standard while providing a "meaningful review of discretionary police action."[90]

Applying the *would have* test, the court concluded that Scopo's arrest was pretextual and granted his motion to sup-

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[86] *Id.* at 235.

[87] *Id.*

[88] *Id.* (quoting United States v. Caming, 756 F. Supp. 121, 123-24 (S.D.N.Y. 1991) (citation omitted).

[89] *Scopo*, 814 F. Supp. at 303 (citing *Caming*, 968 F.2d at 236).

[90] *Id.* at 304 (citing United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988)).

press the gun.[91] The court pointed to several factors supporting its conclusion that absent an invalid purpose, a reasonable officer would not have arrested Scopo for failing to signal.[92] First, the violation occurred at night, when no other vehicles were present on the street and the vehicle had not been speeding. It therefore posed no danger to public safety. Second, although one of the detectives testified that it was common practice to pull over a vehicle immediately upon witnessing a violation, the detectives did not stop Scopo until he proceeded approximately two miles after failing to signal. Third, the detectives failed to issue a summons for the earlier violation they had witnessed.[93] Finally, the court noted both that the Strike Force's purpose was to stop the shooting war by means of aggressive law enforcement, and that the members of the Strike Force were aware that traffic stops previously had been used with success against other Colombo Family members in order to seize illegal weapons.[94]

C. *The Second Circuit Decision*

The Court of Appeals for the Second Circuit reversed the district court's order granting Scopo's motion to suppress.[95] The court began by recognizing that "a traffic stop constitutes a limited seizure within the meaning of the Fourth . . . Amendment"[96] and thus "must be justified by probable cause or reasonable suspicion, based on specific and articulable facts, of unlawful conduct."[97] Applying this rule, the court found that the traffic violation witnessed by the Strike Force members provided the requisite probable cause to make an arrest. The

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[91] *Id.* at 305.

[92] *Id.* at 304-05.

[93] *Id.*

[94] *Id.*

[95] United States v. Scopo, 19 F.3d 777, 780 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 207 (1994). The Second Circuit's decision in *Scopo* clarified Second Circuit pretextual arrest law. After the district court's decision in *Scopo*, but prior to the Second Circuit's decision, another court in the Second Circuit applied the *could have* test in *United States v. Barber*, 839 F. Supp. 193, 199 (W.D.N.Y. 1993).

[96] *Scopo*, 19 F.3d at 781 (citing United States v. Hassan El, 5 F.3d 726, 729 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979)).

[97] *Id.* (citing *Hassan El*, 5 F.3d at 729 (citing Terry v. Ohio, 392 U.S. 1 (1968)).

court asserted that, although the violation was minor, the detectives acted within their authority when they stopped Scopo's car because New York law permits a police officer to stop a car and arrest its driver for such a violation.[98] Furthermore, the Second Circuit found that the factors relied upon by the district court to support a finding of pretext were irrelevant because they did not "negate the fact that [the Strike Force members] had directly observed Scopo violate the traffic laws and thus had probable cause to arrest him."[99] The court further asserted that, because the police had probable cause to stop and arrest Scopo, they were entitled to search both Scopo and the "grab space"[100] in his car, particularly when one of the detectives had observed Scopo throwing an object into the back seat of the car.[101] Finally, because both the officers'

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[98] *Id.* The Court cited to both New York statutory authority and caselaw that permits an arrest for a traffic violation witnessed by the arresting officer. *See* N.Y. VEH. & TRAF. LAW § 155 (McKinney 1986 and Supp. 1994) ("For purposes of arrest without a warrant, pursuant to article one hundred forty of the criminal procedure law, a traffic infraction shall be deemed an offense."); N.Y. CRIM. PROC. LAW § 140.10(1)(a) (McKinney 1992) ("an officer may arrest a person for [a]ny offense when [he] has reasonable cause to believe that such person has committed such crime in [his] presence"). *See also* People v. Cortes, 86 Misc.2d 155, 158, 382 N.Y.S.2d 445, 447 (Sup. Ct. N.Y. County 1976) ("a police officer [is empowered to] arrest a person for [any traffic infraction] committed in the officer's presence"). Whether New York State courts still permit such an arrest is unclear. *See supra* note 77.

[99] *Scopo*, 19 F.3d at 782.

[100] *Id.* The term "grab space" denotes the area that may be searched incident to an arrest and encompasses "the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]." New York v. Belton, 453 U.S. 454, 460 (1981) (citation omitted). The grab space of an automobile includes the entire passenger compartment, as well as the contents of any containers found therein. *Id.* at 460, 461 & n.4.

[101] *Scopo*, 19 F.3d at 782 (citing New York v. Belton, 453 U.S. 454, 460 (1981) ("when a police officer has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile") (footnotes omitted) and United States v. Paulino, 850 F.2d 93, 98 (2d Cir. 1988) (furtive movements provide a legal basis for a protective search), *cert. denied*, 490 U.S. 1052 (1989)). At the time police frisked Scopo and searched his car, he had not yet been placed under arrest. Transcript of Suppression Hearing *supra* note 67, at 35-36. Technically, neither Scopo nor his car could, at that point, have been subject to a search incident to arrest. *But see* Sibron v. New York, 392 U.S. 40, 70-79 (1968) (Harlan, J., concurring in result) (so long as probable cause to arrest exists, in the interest of the officer's safety, the search may slightly precede the formal arrest). Presuming that the initial stop of the car was permissible, the court found that a protective frisk of both Scopo and his vehicle was also permissible under the circumstances be-

presence at the scene and a protective search of the car were legally justified, the detectives were entitled to seize any incriminating objects discovered in plain view during the course of the search.

The Second Circuit rejected the district court's application of the *would have* test. It found that such an approach was inconsistent with a completely objective review of alleged fourth amendment violations because the test requires a reviewing court to look into the motivations and hopes of the arresting officer.[102] The Second Circuit cited a number of Supreme Court cases, including the *Scott* trilogy, which it interpreted as prohibiting any such inquiry where the arresting officer has probable cause to make a valid arrest.[103] The *could have* test, however, requires no such inquiry, and therefore better facilitates the objective assessment required in fourth amendment cases.[104]

The Second Circuit also articulated several policies underlying its conclusion that the authorization approach—the *could have* test—is preferable to its alternative. First, the test ensures that the validity of traffic stops and arrests are not "subject to the vagaries of police departments' policies and procedures."[105] Second, it prevents persons involved in criminal activity from being insulated from liability simply because a judge later determines that the arresting officer would not have stopped the vehicle for an offense that the driver concededly committed. Third, this approach gives law enforcement officers the freedom to enforce violations of the law that they have witnessed. Fourth, it maintains legislative control over the task of authorizing which traffic violations police officers can enforce.[106]

In addition to these policy concerns, the Second Circuit

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cause of the furtive movement the detectives had witnessed.

[102] *Scopo*, 19 F.3d at 782.

[103] *Id.* at 782-83 (citing, *inter alia*, Horton v. California, 496 U.S. 128 (1990); Maryland v. Macon, 472 U.S. 463 (1985); United States v. Villamonte-Marquez, 462 U.S. 579 (1983); Scott v. United States, 436 U.S. 128 (1978); United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973)).

[104] *Id.* at 784.

[105] *Id.* (quoting United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994)).

[106] *Id.* at 785 (citing United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994)).

determined that the authorization approach is consistent with its pretext doctrine as articulated in prior cases. It took issue with the district court's broad reading of *Caming*, pointing out that in that case

> [w]e simply agreed with the district court's determination that the defendant [had not shown that his arrest was pretextual]. We never reached the question of whether the arrest would have been constitutional if the defendant had demonstrated that his arrest was pretextual. *Caming* does not provide a basis for concluding that the "usual police practices" approach has been adopted in this Circuit.[107]

In closing, the court briefly addressed the concern raised by Scopo that the authorization approach fails to prevent and in fact encourages arbitrary police action.[108] The court disagreed, noting that whichever test is applied, "a reviewing court must always consider the reasonableness of the officer's conduct in light of the circumstances following the initial stop."[109]

In his concurring opinion, Chief Judge Newman agreed that current fourth amendment jurisprudence requires courts to adopt the *could have* test.[110] Chief Judge Newman also addressed the danger that courts are unable to detect arbitrary and harassing arrest tactics when applying the test.[111] He emphasized that the court's opinion did not support or encourage selective enforcement of the law against particular groups and suggested that officers who so abused their arrest power could be subject to civil suits for discriminatory enforcement of the law.[112] In closing, Chief Judge Newman stated explicitly what was left unsaid by the majority opinion: the Fourth Amendment does not preclude pretextual arrests.[113]

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[107] *Id.* at 784-85 (citation omitted).

[108] Opening Brief, *supra* note 77, at 30-31.

[109] *Scopo*, 19 F.3d. at 785 (citation omitted).

[110] *Id.* at 785 (Newman, C. J., concurring).

[111] *Id.* at 785.

[112] *Id.* at 786. For a discussion of Judge Newman's concurring opinion and the effectiveness of a selective enforcement remedy in general see *infra* part III.D.

[113] *Id.*

III. ANALYSIS

The guiding principle of the Second Circuit's decision is that the *Scott* trilogy applies to the specific type of activity at issue in *Scopo*.[114] Assuming the validity of that presumption raises certain questions. First, does the *Scott* trilogy require institution of the *could have* test? Second, if so, are there any remaining judicial restraints against pretextual arrests? Third, how effectively does the test address the policy issues raised by the Second Circuit? Finally, presuming that subjective intent is beyond the scope of permissible judicial review, how effective is a selective enforcement remedy in combatting arbitrary police arrest practices? This section addresses those questions.

A. *Applying the* Scott *Trilogy to Pretextual Arrests*

Stripped of pretense, the *could have* test is not a test at all. Because it presumes that *any* legally cognizable arrest, even one for the most minor of violations, is a sufficient basis for a search, it is impossible for a reviewing court to find that such arrests are unconstitutional pretexts. The district court in *Scopo* recognized as much, finding that the test inevitably "immunizes from judicial scrutiny any arbitrary and unreasonable use by police officers of minor violations."[115] In its stead, the district court instituted the *would have* test, a test that permits such scrutiny, but carries with it the inherent drawback of only superficially preserving a wholly objective inquiry. And while the district court assumed that "courts are capable of engaging in [the] type of inquiry"[116] necessary to determine the subjective motivations of an arresting officer, it discussed neither the feasibility nor the wisdom of a court making such a determination.

As the government noted in its Second Circuit brief, the *would have* test "requires an initial determination as to the arresting officer's purpose in making the arrest."[117] This in-

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[114] For a discussion of the validity of this assumption see *infra* part IV.C.

[115] *Scopo*, 814 F. Supp. at 304.

[116] *Id.*

[117] Brief for the United States at 22, United States v. Scopo, 19 F.3d 777 (2d Cir) (No. 93-1201), *cert. denied*, 115 S. Ct. 207 [hereinafter "Government Brief"].

quiry is necessary because courts applying the test must determine why the officer chose to make the arrest in the first instance, and not whether the arrest was objectively reasonable based on probable cause to arrest for a traffic infraction. The Second Circuit recognized that couching a subjective review in objective language does not change the nature of the inquiry. The *would have* test inevitably "requires a reviewing court to look into the motivations and hopes of an arresting officer,"[118] if only as an incidental effect of the type of review conducted.[119]

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[118] *Scopo*, 19 F.3d 777 at 782.

[119] Professor Wayne R. LaFave proposes an approach to pretext that strikes a balance between the *would have* and *could have* tests. He argues that the *Scott* approach—disregarding the underlying intent or motivation of the arresting officer—is correct only if there are more reliable and feasible means for determining whether or not the challenged arrest was arbitrary. LAFAVE, SEARCH AND SEIZURE, *supra* note 45, at 94. He suggests better results can be reached by requiring that "Fourth Amendment activity [be] carried out in accordance with standard procedures in the local police department." *Id.* The standard-police-practice approach provides an objective yardstick to measure police conduct in individual cases. Moreover, it avoids the subjective intent issue by not requiring a court to determine why the officer deviated from standard practice, but simply whether such a deviation occurred.

Although Professor LaFave has not fleshed out the particulars of his approach, its application presents difficulties. First, definitional problems abound. What is standard police department practice and who defines it? Must such a practice be in writing or would a practice that conforms with normal everyday policing suffice? In *Scopo*, the detectives were members of a special Strike Force whose function was to "engage in active, aggressive law enforcement in order to quell the violence of the Colombo shooting war." *Scopo*, 814 F. Supp at 304 (citations omitted). Is such a mandate tantamount to a standard policy of the Strike Force members, and, if so, does that conclusion insulate entire areas of police conduct from review simply because they are considered standard practices by a group or by individual officers? Moreover, with respect to the many types of traffic infractions that occur, will a court look at the standard practice of enforcement with respect to each type of infraction? In the case of speeding violations, must a department have a standard practice of enforcement that differs with respect to each additional mile that a driver exceeds the speed limit? In *Scopo*, it was determined that the standard practice of detectives assigned to organized crime units was to utilize minor traffic offenses as a means of seizing illegal weapons. *Id.* at 305 (citation omitted). Could an informal policy designed to combat a specific and identifiable crime problem be considered a standard practice? Additionally, what are the geographical and job-related boundaries that define a standard practice? Is the practice determined with respect to each police department or with respect to the normal functions of each individual police officer? *See* Haddad, *supra* note 2, at 651.

Institutional problems also abound. What happens when community needs dictate that standard practices must change? For example, a community may decide to enforce stringently all traffic laws because of an increase in accident-related deaths. How, and at what cost, are officers to be apprised of such changes in

Aside from the question of whether the *would have* test could ever logically be deemed a wholly objective inquiry as required by the *Scott* trilogy, application of the *could have* test avoids the many practical problems that can arise if a court must determine the motivations of an arresting officer. Triers of fact commonly are called upon to determine subjective intent in certain contexts. For example, when assessing punitive damages, juries may be required to make a finding that the defendant acted maliciously or with an evil motivation.[120] Additionally, state of mind is crucial to a finding of culpability for almost all criminal offenses. In cases of pretextual arrests, however, unlike most other situations requiring a determination of intent, courts will always be faced with a facially valid and legally cognizable justification for the arrest. As one commentator notes, this distinction is important for purposes of determining motivation because

> [a] subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.[121]

Instituting a test that encourages fabricated police testi-

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standard practice? What if, under these circumstances, an officer inadvertently failed to adhere to the newly-instituted standard practice, but with a good-faith belief that the old standard was still in effect? Could a court under those circumstances look at the subjective motivations of the officer to validate the arrest on the theory that there is no reason to deter this kind of good-faith conduct? If so, is there any distinction between the LaFave approach and the *would have* test?

Applying the LaFave approach, the Second Circuit in *Scopo* could have validated the actions of the Strike Force members on the ground that standard practice dictated that they make arrests for minor traffic violations in order to search for illegal weapons. On the other hand, this approach punishes inadvertent deviations from standard practice even if an officer has no illicit motivations.

Finally, the standard-police-practices approach permits local police departments to legislate in the area of search and seizure. As a result, police practice will be constitutional in one jurisdiction, as standard practice there, while unconstitutional in another that has not adopted the relevant standard. The effect may well be to undermine the Supreme Court's preference for bright-line rules in the area of search and seizure law.

[120] W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 9-10 (5th ed. 1984).

[121] Amsterdam, *supra* note 43, at 436-37.

mony is troubling from a policy standpoint, but the possibility of perjury always exists. Situations where officers act with dual motivations are of greater concern from a judicial perspective. The *would have* test rests on the premise that an arrest is pretextual and therefore unreasonable if "under the same circumstances a reasonable officer would [not] have made the stop in the absence of the invalid purpose."[122] This test is essentially a "but for" test. It requires a court to sift through the ingredients comprising the officer's motivation and to determine whether in the absence of one or more of those motivating factors the officer would not have made the arrest. Although primary motivation may be easier to glean from certain facts than from others, judicial consistency remains an issue.[123]

Lastly, for courts to instruct police officers not to do what they are otherwise legally justified in doing merely because of their state of mind is somewhat anomalous.[124] An officer confronted with a situation where two drivers commit precisely the same traffic infraction can freely arrest and search only the driver about whom he or she has no underlying suspicions. The second driver is immunized from a search or, at a minimum, immunized from prosecution based on any evidence found as a result of the search primarily because of the officer's suspicions (which are later confirmed).[125]

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[122] *Scopo*, 814 F. Supp. at 304 (citation omitted).

[123] As Professor Haddad points out, police officers choose to conduct searches for many illegitimate reasons, some of which are more easily detectable by a reviewing court than others. Haddad, *supra* note 2, at 642 (pointing out that an officer may wish to conduct a search because "[t]he officer might be uncommonly nosy . . . or might wish to harass the individual because of intense personal dislike . . . [or] might harbor a bias against persons [of a certain] age, race, or sex . . . [or] in the hope of discovering evidence of a crime.")

[124] Professor Haddad explained his dissatisfaction with the individual motivation approach by describing his unease in lecturing police officers on fourth amendment law:

> As best I could, I would outline the prerequisites for a valid warrantless search under one or another of the exceptions to the warrant requirement. . . . But I would then warn the officers not to be too "cute" by using the particular exception for the wrong reason. The wrong reason, of course, was the quest for incriminating evidence. Eventually, my schizophrenic exhortations began to echo in my ears like some mock Spenserian refrain: "Be wise, be wise, be wise. But be not too wise."

Haddad, *supra* note 2, at 691 (citation omitted).

[125] Moreover, as the government noted, permitting the introduction of evidence

B. *Review of Pretextual Post-Arrest Searches in the Wake of* Scopo

The essential holding of *Scopo*, recognized by Chief Judge Newman's concurring opinion, is that "the Fourth Amendment permits a pretext arrest."[126] Because *Scopo* restricts review of such arrests to determinations of whether a traffic offense occurred, pretexts can be employed to insulate arbitrary arrests from review.[127] Moreover, the Second Circuit's opinion potentially curtails the protection against pretextual police conduct that New York state law affords.

In light of the bright-line rule laid down in *Belton*,[128] it is difficult to discern what, if any, import can be attributed to the Second Circuit's assertion that the *could have* test does not have the secondary effect of insulating arbitrary police arrest practice because "a reviewing court must always consider the reasonableness of the officers' conduct in light of the circumstances following the initial stop."[129] Perhaps the court was addressing the government's contention that "[t]here is a wealth of judicially and legislatively created standards that define police officers' authority to make arrests and conduct post-arrest searches. . . . Officers must always be able to satisfy a reviewing court that they have adhered to those stan-

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discovered during a stop made purely to enforce a traffic law, but suppressing the same evidence under identical circumstances except that the officer has suspicions about the driver, is tantamount to creating an inadvertence requirement in the context of traffic stops. The Supreme Court has squarely rejected this requirement for plain view searches. Government Brief, *supra*, note 117, at 23 (citing Horton v. California, 496 U.S. 128 (1990)).

[126] *Scopo*, 19 F.3d at 786 (Newman, C. J., concurring).

[127] Empirical studies document that police make arrests to conduct searches that otherwise could not lawfully be made. *See* LaFave, *supra note* 18, at 153 & n.116 (citing WAYNE R. LAFAVE, ARREST 151 (1965) and LAWRENCE P. TIFFANY, ET AL., DETECTION OF CRIME, 136 (1967)). *See also Scopo*, 814 F. Supp. at 305 (discussing F.B.I. strategy of massive enforcement of minor traffic violations as a means of conducting searches for weapons); United States v. Millio, 588 F. Supp. 45, 46 (W.D.N.Y. 1984) (stipulation that traffic stop employed as pretext to search for weapons). Additionally, recent informal studies of videotapes of highway stops have concluded that stops often are made to search automobiles and seize the instrumentalities of crime pursuant to civil forfeiture laws. David Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, § 6 (Magazine) at 73.

[128] *See supra* notes 35-42 and accompanying text.

[129] *Scopo*, 19 F.3d at 785 (citation omitted).

dards."[130] A byproduct of the Second Circuit's opinion, however, is that even stringent application of the standards governing arrests and searches will not affect pretextual arrest practice.

First, New York law governing arrests for traffic law violations requires only that the arresting officer witness the violation.[131] Scopo, however, did not contest the violation, but raised the point that the standard governing such arrests affords no meaningful protection against arbitrary arrests because the standard itself is so easily met.[132]

Second, as previously discussed, federal law stringently limits review of post-arrest searches of vehicles.[133] Again, Scopo did not contest the scope of the search conducted by the Strike Force members; he contested the initial arrest giving rise to the authority to search. As the government noted, once the arrest and search meets these minimal standards, "the defendant cannot show that his rights have been violated, and there is no basis [for excluding the evidence obtained from the search]."[134]

Scopo's motion to suppress failed because he was charged with a federal offense to which the Second Circuit applied federal law. Had the Second Circuit applied New York State law to the seizure,[135] as Scopo argued it should have, it might have reached a different result. Under New York State law "police may not use a mere pretext to investigate the defendant on an unrelated matter."[136] In contrast to the Second Circuit,

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[130] Government Brief, *supra* note 117, at 26. Included in this "wealth of standards" perhaps is the manner in which an arrest is carried out. That was not at issue in *Scopo*.

[131] *See* N.Y. VEH. & TRAF. LAW § 155 and N.Y. CRIM. PROC. LAW § 140.10(1)(a), *supra* note 98. *But see supra* note 77, discussing Scopo's argument that New York state courts have effectively limited the circumstances under which arrests may be made for violations of the New York Vehicle & Traffic Law.

[132] Defendant Appellant's Petition for Rehearing with Suggestion for Rehearing In Banc at 11, United States v. Scopo, 19 F.3d 777 (2d Cir.) (No. 93-1201), *cert. denied*, 115 S. Ct. 207 (1994) ("[t]he existence of probable cause for a minor traffic violation . . . does not sufficiently answer the concerns of unbridled police arbitrariness.") [hereinafter "Petition for Rehearing"].

[133] *See supra* notes 35-42 and accompanying text.

[134] Government Brief, *supra* note 117, at 26.

[135] See *supra* note 77 for a discussion of the applicability of federal as opposed to state suppression law.

[136] People v. Smith, 181 A.D.2d 802, 803, 581 N.Y.S.2d 240, 241 (2d Dep't 1992) (citations omitted).

when the issue of pretext is raised New York State courts examine all of the circumstances surrounding an arrest and determine whether the arrest was made because of the traffic violation or because the police were interested in investigating other criminal activity.[137] In Scopo's case, the district court found that the facts and circumstances established a pretextual arrest, and this finding was not disputed by the Second Circuit.

These differences between state and federal law lead to significantly different results for New York defendants depending on whether their case is tried in state or federal court. One of the effects of the *Scopo* decision is that prosecutors in New York State have every incentive to avoid bringing charges in state court, opting instead, where possible, to bring those charges in federal court—where the issue of pretext will inevitably be resolved in their favor.[138] Thus, the effectiveness of New York State pretext law, and the protection it was designed to provide against capricious search practices, is undermined in favor of the far less stringent federal pretext law.

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[137] *Id.* (court finds that illegal U-turn was clearly a pretext to stop vehicle where officer testified that he followed vehicle because he thought defendant was in possession of drugs, and failed to issue summons or to ask driver for license and registration); *see also*, People v. Letts, 180 A.D.2d 931, 934, 580 N.Y.S.2d 525, 527-28 (3d Dep't 1992) (court finds that failure to come to complete stop was "mere pretext" to search car for narcotics where officers had been surveilling defendant based on anonymous tip and had waited until defendant proceeded six miles after infraction to make stop); People v. Vasquez, 173 A.D.2d 580, 581, 570 N.Y.S.2d 164, 165 (2d Dep't 1991) (court finds double-parking violation "mere pretext" to approach vehicle and order occupants out where officer testified that he was not interested in issuing summons but was interested in investigating suspicious vehicle); People v. Flanagan, 56 A.D.2d 658, 660, 391 N.Y.S.2d 907, 909 (2d Dep't 1977) (court finds stop of vehicle for previously observed double-parking violation "mere pretext" to search vehicle where officers were members of anti-crime unit, were not assigned to traffic duty and were patrolling in high crime area).

[138] As Scopo pointed out, "New York City detectives are now encouraged to disregard the rules and standards of the New York State Courts concerning vehicle stops, since they may now bring the fruits of any arbitrary pretextual searches to the district courts of this Circuit. In effect, the district courts of this circuit may now become the local traffic courts of choice for the police officers of New York City." Petition for Rehearing, *supra* note 132, at 14.

C. *Policy Concerns Underlying the Second Circuit's Decision*

The Second Circuit based its opinion, in part, on extra-constitutional policy concerns.[139] Unfortunately, the *Scopo* court failed to explain why only the *could have* test adequately addresses these concerns. In fact, although at first glance these policy justifications exhibit a certain symmetry and common-sense appeal, and illustrate the neatness and efficiency of the *could have* test, on further examination they prove largely to be either without merit or unrelated to the concerns addressed by pretext doctrine.

The *Scopo* court expressed concern that application of the *would have* test subjects the validity of a traffic stop or arrest to "the vagaries of police departments' policies and procedures."[140] This argument assumes that the only element courts consider when examining a pretext claim is whether the initial stop constituted a deviation from standard policy and procedure. Most courts that apply the *would have* test, however, consider additional elements.[141] For instance, while the district court in *Scopo* found significance in the Strike Force members' failure to stop Scopo immediately after they witnessed the first traffic infraction—despite the fact that this is standard practice[142]—it did not limit its review to that single finding.[143]

The court's rationale fails to recognize that the *would have* test does not begin and end with a finding of a deviation from standard practice. While it may be impractical to require police

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[139] The Sixth Circuit previously articulated these same policy concerns in United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994).

[140] *Scopo*, 19 F.3d at 784 (citing *Ferguson*, 8 F.3d at 392).

[141] *See, e.g.*, *Scopo*, 814 F. Supp. at 304-05 (factors pointing to pretext include prior surveillance of suspect, failure to issue a citation for infraction witnessed earlier by same officer and knowledge on part of arresting officers that traffic infractions used in past to justify gun searches); *Ferguson*, 989 F.2d at 205 (factors pointing to pretext include prior surveillance of suspect and pursuit of suspect prior to witnessing traffic infraction); United States v. Smith, 799 F.2d 704, 705, 707 (11th Cir. 1986) (factors pointing to pretext include presence of DEA agent in police car and reliance on drug courier profile).

[142] *Scopo*, 814 F. Supp. at 304.

[143] For a discussion of other factors considered by the district court see *supra* notes 91-94 and accompanying text.

officers to know the standard policy for every traffic infraction, and burdensome to require courts to make searching inquiries regarding those policies, the *would have* test does not implicate such concerns to the degree suggested by the Second Circuit. Departmental policies are merely one element in the factual mix considered by courts applying the test.[144]

The *Scopo* court next noted its concern that the *would have* test insulates "persons involved in criminal activities from 'criminal liability for those activities simply because a judge determines that the police officer who executed the traffic stop . . . would not have stopped them for the traffic offense that they in fact committed.'"[145] The *would have* test, like any other review resulting in exclusion of evidence, insulates a certain amount of criminal activity, because an unconstitutional seizure precludes use at trial of direct evidence obtained as a result of that seizure. The Second Circuit's observation is not novel. It has long been recognized that an unfortunate consequence of affording fourth amendment protections to both guilty and innocent alike is that the guilty will at times be insulated from liability for their criminal activity.[146] Adoption of the *would have* test ensures that the innocent will be afforded the same protections.

In this respect, the Second Circuit appears to criticize exclusionary practice in general. But this approach fails to answer the threshold question in pretextual arrest cases—whether the initial seizure is constitutional. If it is not, then the incriminating evidence discovered as a result of the fourth amendment violation cannot bootstrap the illegal seizure.

The third benefit of the *could have* test as enumerated by the court is that "law enforcement officials [have] the freedom to enforce violations of the law—even minor ones—when they

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[144] The Second Circuit's argument is more accurately a general criticism of Professor LaFave's "standard police practices" approach rather than a criticism of the *would have* test. For a discussion of Professor LaFave's approach see *supra* note 119.

[145] *Scopo*, 19 F.3d at 784 (citing United States v. Ferguson, 8 F.3d 385, 392) (6th Cir. 1993), *cert. denied*, 115 S. Ct. 97 (1994).

[146] *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.") (Jackson, J., dissenting).

actually view violations."[147] Certainly, any approach that substantially limits enforcement of traffic safety laws arouses concern. This argument, however, is flawed in that it assumes that any other approach, including the *would have* test, precludes enforcement. This simply is not the case. Functionally, the *would have* test operates to exclude evidence of a more serious crime that police discover as a result of a pretextual arrest. It does not straitjacket police officers in their efforts to enforce traffic laws.[148] The concern expressed by courts that adopt a would have test relates not to issuance of the traffic citation, but to the ensuing search and the officer's reasons for conducting it. Practically speaking, police officers might not expend the effort to enforce minor traffic violations absent the prospect of conducting a search. Nonetheless, under either test, they are still free to do so. Eliminating the search incentive is not tantamount to barring the issuance of traffic tickets.

Lastly, the Second Circuit suggested that the *would have* test permits courts to usurp the legislative law-making function. Conversely, the *could have* test, according to the court, has the benefit of ensuring that "'courts leave to the legislatures the job of determining what traffic laws police officers are authorized to enforce and when they are authorized to enforce them.'"[149]

The legislature has a paramount interest in fashioning the most efficient and effective means to implement its laws. Courts lack sufficient resources and expertise to assume this role.[150] Lawmakers may find sound reasons to permit custodi-

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[147] *Scopo*, 19 F.3d at 784.

[148] *See, e.g.*, *Ferguson*, 8 F.3d at 397 ("Even in the most egregious case of pretext, . . . the citizen can be issued the citation for [the] traffic violation.") (Jones, J., dissenting); United States v. Guzman, 864 F.2d 1512, 1518 (10th Cir. 1988) ("Contrary to the Government's argument, [a reasonable officer] approach will not severely curtail the ability of the [p]olice to enforce traffic laws. No prosecution for violation of a traffic [safety] regulation will be affected. Police officers may always issue appropriate citations to drivers who violate traffic regulations.") (citation omitted). *But see Ferguson*, 8 F.3d at 395 ("Of course, not every minor violation of traffic regulations justifies a stop. . . . The appropriate inquiry . . . is whether the traffic violation is one that is so minor . . . that the reasonable officer would not have stopped an unsuspicious car, or whether the stop was for a reason that would have let a reasonable officer to make the stop under any circumstances.") (Keith, J., dissenting).

[149] *Scopo*, 19 F.3d at 784 (quoting *Ferguson*, 8 F.3d at 392).

[150] The Supreme Court has noted that the decision of how best to enforce traffic

al arrests for all traffic violations. For example, arrest policies incrementally tied to the "seriousness" of every conceivable type of violation pose institutional and definitional difficulties. Whether a traffic offense warrants an arrest may vary according to how many miles a driver exceeds the speed limit, whether the traffic violation occurs in a populous area, and other innumerable factors. A coherent policy based on these variables, that can be applied with any degree of certainty by police officers in the field, may be impossible to develop.

The court's concern, however, again appears to be based on the erroneous assumption that the *would have* test prevents enforcement of laws that the legislature has decided should be enforced. But the *would have* test does not presume that arrests for traffic violations are per se unconstitutional. Ultimately, the court's reliance on this rationale simply begs the question of the constitutionality of pretextual arrests. While legislatures are empowered to decide the most appropriate means for enforcing laws, courts are "entrusted with [duties] as guardians of the Bill of Rights to apply limitations upon the legislature's power."[151] Legislative mandates cannot insulate police conduct from constitutional review. Unfortunately, the type of judicial restraint espoused by the Second Circuit in *Scopo* undermines the basic judicial function of reviewing constitutionally infirm conduct.

Simply put, the concerns expressed by the court do not support institution of the *could have* test. Nor do Chief Judge Newman's assurances that the test will not be abused because police will be deterred by the prospect of liability for selective enforcement withstand close scrutiny.

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laws should be left to politically accountable branches of government. *See, e.g.*, Michigan State Dep't of Police v. Sitz, 490 U.S. 444, 453-54 (1990) (prior fourth amendment precedent "not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed. . . . [T]he choice among . . . reasonable alternatives remains with the government officials who have a unique understanding of, and responsibility for, limited public resources").

[151] United States v. Ferguson, 8 F.3d 385, 398 (6th Cir. 1993) (en banc) (Jones, J., dissenting), *cert. denied*, 115 S. Ct. 97 (1994)

D. *The Effectiveness of a Selective-Enforcement Remedy: The* Scopo *Concurrence*

Chief Judge Newman wrote separately to address the risk posed in permitting pretextual arrests. He stated the concern that

> some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that police officers do not like, such as young men with long hair, heavy jewelry or flashy clothing.[152]

Chief Judge Newman proposed that such abuses could be adequately curbed by civil selective-enforcement lawsuits awarding monetary damages to the victims of such practices.[153]

A selective-enforcement remedy is appealing because it permits introduction of incriminating evidence at a criminal trial while providing a remedy for violation of the defendant's constitutional rights. Yet, because of the stringent legal standards for establishing a claim and the practical improbability of prevailing on the merits, the effectiveness of this remedy is questionable.

1. The Legal Standards for Establishing a Prima Facie Claim of Selective Enforcement

A selective-enforcement claim does not attack the merits of a case. Rather, it challenges the fact that police have enforced a law against one person and have not enforced that same law against others "who appear to be equally culpable and apprehensible."[154] Selective-enforcement and selective-prosecution claims[155] arise under the equal protection clause of the Four-

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[152] *Scopo*, 19 F.3d at 785-86 (Newman, C.J., concurring).

[153] *Id.* at 786. Chief Judge Newman conceded that some discriminatory treatment would likely escape detection, but he concluded that "the Equal Protection Clause has sufficient viability to curb most of the abuses [that may occur]." *Id.*

[154] Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1369 (1987).

[155] Courts use the terms "selective enforcement" and "selective prosecution" interchangeably to refer to the generic practice of unequal application of the laws

teenth Amendment[156] because discriminatory application of the law amounts to a denial of equal justice.[157] A claim of selective enforcement may be raised as an affirmative defense to a criminal charge[158] and may form the basis for a civil suit for monetary damages or injunctive relief under 42 U.S.C. section 1983.[159]

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by police, prosecutors and other public officials charged with enforcement of criminal and civil laws. *See e.g.*, United States v. Lichenstein, 610 F.2d 1272, 1281 (5th Cir. 1980) ("[t]hough selective prosecution, if based on improper motives, can violate constitutional guarantees of equal protection, selective enforcement in and of itself is not a constitutional violation") (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)); United States v. Diggs, 613 F.2d 988, 1003 (D.C. Cir. 1979) ("assuming that the defendant's evidence of selective enforcement somehow was sufficient,. . . . [a]ll that the defendant could point to in support of his claim was the general danger [of] selective prosecution"); Lennon v. Immigration and Naturalization Serv., 527 F.2d 187, 195 (2d Cir. 1975) ("[a]lthough the Board rejected [defendant's] selective enforcement defense. . . . [i]t would be premature for us to be more specific, since the facts underlying [defendant's] claim of selective prosecution have not been developed sufficiently for appellate review"); Perrotta v. Irizarry, 430 F. Supp. 1274, 1279 (S.D.N.Y. 1977) ("[p]laintiff alleges that the charges made against him . . . constituted selective prosecution. . . . [h]owever, selective enforcement does not in and of itself amount to a constitutional violation") (citing *Oyler*, 368 U.S. at 456). As used in this Comment, "selective enforcement" refers to a police officer's decision to enforce a particular law and not to the prosecutorial decision to bring charges.

[156] The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV.

[157] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[158] *See, e.g.*, United States v. Fares, 978 F.2d 52, 54 (2d Cir. 1992) (motion to dismiss conviction for unlawful reentry into United States predicated on claim of selective prosecution). In the Second Circuit, if the defense is not raised prior to trial, it is waived. United States v. Moon, 718 F.2d 1210, 1229 (2d Cir. 1983).

[159] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). Chief Judge Newman did not discuss the use of a selective enforcement claim as a defense in a criminal action. That aspect of selective enforcement is relevant for present purposes because it is possible that a criminal defendant such as Scopo may be collaterally estopped from bringing a post-conviction § 1983 cause of action for selective prosecution if he or she fails to raise it as an affirmative defense at the trial level. *See* Green v. City of New York Medical Examiner's Office, 723 F. Supp. 973, 975-76 (S.D.N.Y. 1989); *see also supra* note 178.

In *Wayte v. United States*,[160] the Supreme Court held that a selective-enforcement claim is judged according to "ordinary equal protection standards" and requires a showing that the practice of selective enforcement "[has] a discriminatory effect and that it [is] motivated by a discriminatory purpose."[161] In *United States v. Berrios*,[162] the Second Circuit developed a two-pronged test for selective enforcement that requires a defendant to establish prima facie:

> (1) that, while others similarly situated have not generally been proceeded against because of the 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 a constitutional right.[163]

Mere failure to prosecute other offenders does not suffice to establish a federal constitutional violation.[164] Moreover, a plaintiff must present sufficient proof to meet both prongs of the *Berrios* test. A failure to prove one prong will defeat the claim.[165]

A claimant meets the first prong of the test by showing

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[160] 470 U.S. 598 (1985).

[161] *Id.* at 608.

[162] 501 F.2d 1207 (2d Cir. 1974).

[163] *Id.* at 1211. Although in *Berrios* the selective enforcement claim was raised as a defense to a criminal charge, the Second Circuit has applied the same two-pronged test to civil claims arising under 42 U.S.C. § 1983. *See, e.g.*, LeClair v. Saunders, 627 F.2d 606, 609 (2d Cir. 1980) (liability for selective enforcement claim brought pursuant to § 1983 for monetary damages depends on proof that plaintiff was treated selectively compared with others similarly situated and that selective treatment was based on impermissible considerations such as race, religion, or intent to punish or inhibit exercise of constitutional right); Contractors Against Unfair Taxation Instituted on New Yorkers v. City of New York, No. 93 CIV. 4718, 1994 WL 455553, at *6 (S.D.N.Y. Aug. 19, 1994) (same).

[164] Oyler v. Boles, 368 U.S. 448, 456 (1962). Because it is likely that proof that others have violated a particular law and have not been prosecuted could be offered with respect to virtually every type of offense, permitting that fact alone to sustain a claim of selective enforcement would seriously hinder the administration of criminal justice. *See, e.g.*, Moss v. Hornig, 314 F.2d 89, 93 (2d Cir. 1963) ("[i]f such facts alone were sufficient to make out a [selective enforcement claim] almost every state prosecution would be subject to interference on the claim of discrimination and the offer of such proof").

[165] *See Saunders*, 627 F.2d at 610 ("we need not decide whether appellees satisfied the first part of the test, since even assuming arguendo that they did, they nevertheless failed to proffer sufficient evidence supporting the second").

that the discriminatory treatment was purposeful and systematic. This showing is made "by specifying instances in which the plaintiff was singled out for unlawful oppression in contrast to others similarly situated."[166] Conclusory allegations of selective treatment are insufficient to meet the first prong,[167] as are allegations that enforcement is not routine.[168]

Even if a claimant successfully shows that the selective-enforcement practice had a discriminatory effect or result, thus satisfying the first prong of *Berrios*, he or she must also show that a discriminatory purpose motivated the decisionmaker and that the decisionmaker intended the discriminatory result.[169] Establishing discriminatory purpose requires proof that the police officer made the decision, at least in part, because of its adverse effect on an identifiable group.[170] Whether the impermissible motivation must be the sole or dominant factor in the decision to enforce, a lesser "but for" cause, or only one of a number of reasons for the decision is unclear.[171]

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[166] *Contractors Against Unfair Taxation*, 1994 WL 455553 at *6.

[167] *Id.* It is not clear whether this prong requires a showing only that the law was not enforced against other violators, or whether it requires an additional showing that the government was generally or specifically aware of this practice. Reiss, *supra* note 154 at 1371 n.18.

[168] *See, e.g.*, United States v. Fares, 978 F.2d 52, 58-59 (2d Cir. 1992) (where defendant contended that he was only one of two people prosecuted under particular law during year-long period, and prosecution presented evidence that it had prosecuted 13 other like claims during three-year period, court finds that fact that such prosecutions were not routine insufficient to meet first prong); United States v. Moon, 718 F.2d 1210, 1229-1230 (2d Cir. 1983) (showing that four others had not been prosecuted for tax evasion fails to meet first prong without showing that others were similarly situated); United States v. Berrios, 501 F.2d 1207, 1209-11 (2d Cir. 1974) (affidavit based on belief that only three prosecutions had been conducted in prior five years insufficient to meet first prong); *Contractors Against Unfair Taxation*, 1994 WL 455553 at *6 (allegation in complaint that traffic laws more rigorously enforced against commercial vehicle owners insufficient to meet first prong where plaintiffs failed to cite specific instances in which they were singled out for disparate treatment and failed to allege facts in support of allegation that noncommercial vehicle owners treated differently).

[169] Wayte v. United States, 470 U.S. 598, 608-09 (1985); *Moon*, 718 F.2d at 1230.

[170] *Wayte*, 470 U.S. at 609. Scopo's claim, which would be that he was targeted for enforcement because of his alleged involvement in organized crime, would fail on this prong. As the government noted, "[a] desire to quell a violent conflict within an organized crime family that has resulted in several murders is not the kind of invidious purpose that the selective prosecution doctrine proscribes." Government Brief, *supra* note 117, at 7.

[171] Reiss, *supra* note 154, at 1372 n.25 (citing authorities). Regardless of the

In challenges to enforcement of traffic laws, the burden of meeting the first prong of *Berrios* is significant. First, it is unlikely that a claimant could offer proof of specific instances of

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relevant standard, it is unlikely that, in the absence of extraordinary circumstances, a court would find against an arresting officer with respect to intent. For example, in United States v. Harvey, 788 F. Supp. 966 (E.D. Mich. 1992), *aff'd*, 16 F.3d 109 (6th Cir. 1993), *petition for reh'g denied*, 24 F.3d 795 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 258 (1994), police stopped a vehicle with equipment violations that was exceeding the speed limit by several miles per hour. *Id.* at 967-68. The driver was arrested after police confirmed that he was unlicensed. *Id.* at 968. During a pat-down search, the police discovered crack cocaine. One of the officers conducted an inventory search of the car incident to the arrest and retrieved cocaine and guns from the trunk. *Id.* Harvey made a pretrial motion to suppress the evidence as the fruit of a pretextual arrest. *Id.* at 969. At the hearing on the motion, the following testimony was elicited from one of the arresting officers:

> Q: Officer Collardey, you gave the Prosecutor two reasons for your effecting a traffic stop. One was the traffic infraction, speeding, and the equipment violation[s], and then you referred to something that I hadn't heard yet today, that was, fitting a general description of some sort of profile?
>
> A: It did, yeah, it did fit. . . . I made that statement on the basis of my experience on that highway, and drug traffickers that I have arrested coming to [that] area.
>
> . . . .
>
> Q: What else was it that made you think [that this automobile] fit[] some sort of profile?
>
> A: There were three young black male occupants in an old vehicle.
>
> Q: Three young black male occupants in a car?
>
> A: Yes, sir.
>
> Q: And that was the basis or part of the basis for you stopping the car?
>
> A: The age of the vehicle and the appearance of the occupants.

Transcript of Evidentiary Hearing at 37-38, *Harvey* (No. 90-80957).

Following this exchange, the court proceeded to question the witness further:

> Q: What was it about the appearance of the occupants that got your attention?
>
> A: It wasn't so much the appearance. Almost every time that we have arrested drug traffickers from Detroit, they're usually young black males driving old cars.
>
> Q: Was that why you stopped the car, or did you stop the car for traffic violations?
>
> A: I stopped them for traffic violations.

Transcript of Evidentiary Hearing, at 38-39.

Notwithstanding this testimony, the Sixth Circuit affirmed Harvey's conviction for drug and gun possession. Judge Keith wrote a stinging dissent. He noted that the reason the officer gave for stopping the vehicle was that it was an old car containing three African American males. United States v. Harvey, 16 F.3d 109, 113 (6th Cir.) (Keith, J., dissenting), *cert. denied*, 115 S. Ct. 258 (1994). He argued that because the trial court knew of the true, and impermissible, reason for the stop, "the district judge improperly rehabilitated Officer Collardey's testimony," providing him with the appropriate response. *Id.*

nonenforcement. Records of traffic citations show how often traffic laws *are enforced*, but do not indicate how often violations *are ignored*. Even assuming that police departments kept records of nonenforcement, the Second Circuit does not require discovery in selective-enforcement cases unless a claimant has made a prima facie showing as to both prongs of *Berrios*.[172] On the other hand, it is likely that the government could rebut any purported showing of this kind because police issue traffic citations on a regular basis.

Even if a plaintiff obtains records of nonenforcement, these records may be insufficient to meet the second prong of *Berrios*. Courts generally are unwilling to infer discriminatory intent from nonenforcement statistics alone,[173] and further evidence of intent is likely to be in the control of the police department. As discussed above, however, claimants have no right to discovery in selective-enforcement claims absent a prima facie showing that the two prongs of *Berrios* have been met. One commentator has noted that a claimant seeking to raise a selective enforcement claim is "placed in a Catch-22 type bind [because] she cannot obtain discovery unless she first makes a threshold showing [and] making a sufficient preliminary showing . . . may be impossible without some discovery."[174] Thus, because of both the lack of documentary evidence indicating nonenforcement and the difficulty of obtaining discovery of evidence in the Second Circuit, in order to succeed on a claim of selective enforcement, a claimant may ironically be forced to rely on the testimony of the arresting officer in order to succeed on a claim of selective enforcement.[175]

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[172] *Moon*, 718 F.2d at 1229; *see also Berrios*, 501 F.2d at 1211-10 (prior to permitting discovery of government's records to support claim of selective prosecution "we would first require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements").

[173] Reiss, *supra* note 154, at 1373 (citing 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 13.2 (1984) and Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 693 (1981)). Even if records of traffic citations were generally available, they would be of little help in proving the second prong of the *Berrios* test. Traffic tickets do not indicate the race or ethnicity of the person ticketed. Thus, they would not prove that members of particular groups are disproportionately singled out as targets for enforcement of traffic laws.

[174] Reiss, *supra* note 154, at 1373-74.

[175] Police are not likely to be forthcoming with testimony confirming illicit moti-

2. Disincentives To Bringing a Selective-Enforcement Lawsuit

In addition to the difficulty of establishing the legal sufficiency of a selective-enforcement claim, practicalities mitigate against the likelihood of success on the merits. First, a jury is unlikely to award significant damages to a claimant convicted of a crime. Even with a statutory floor guaranteeing a minimum recovery, a finding of liability is necessary, and requires some empathy for the claimant.[176] Second, it is questionable whether monetary damages adequately compensate a person incarcerated as a result of selective enforcement. Finally, with respect to a defendant who has been convicted on the basis of evidence obtained as a result of a selective enforcement, the doctrine of collateral estoppel might prevent institution of an action under section 1983.[177]

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vation. In his dissent in *Harvey*, Judge Keith noted that in his 26 years as a federal judge "although I have suspected discrimination by police officers, I have never heard an officer admit he stopped an individual based on the color of his skin." 16 F.3d at 114 (Keith, J., dissenting). Ironically, in *Harvey*, the police officer testified that he stopped the car for a reason that can legitimately be construed as an improper one. *See supra* note 171. Regardless, the defendant's motion to suppress in that case was denied. In the civil context, due to the stringent burden of proof placed on the claimant, it is unlikely that many selective-enforcement claims would survive a motion for summary judgment.

[176] *Cf.* Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500 (1955) (discussing difficulties in successfully prosecuting actions against police when claimants are "marginal types," such as convicted criminals). Even with respect to otherwise law-abiding citizens, it is unclear that a relatively brief roadside stop would lead to a monetary award substantially large enough to justify the expense of litigation.

[177] Chief Judge Newman's selective-enforcement remedy fails to address some subtle and difficult issues with respect to convicted criminals who are victims of selective enforcement. For example, a guilty plea to the underlying charges in a criminal action will generally not preclude a litigant in a § 1983 action from raising a claim of selective enforcement because the issue of selective enforcement will not be litigated at the trial level. Haring v. Prosise, 462 U.S. 306, 318 (1983). It is possible, however, that a defendant who raises an affirmative defense of selective enforcement at her criminal trial and is convicted may be estopped from pursuing that claim in an action for money damages. In such instances, by definition, the trier of fact must necessarily consider, and reject, the defense of selective enforcement. Moreover, at least one court in the Second Circuit has refused to permit a convicted claimant to raise a claim of selective enforcement under § 1983 where the issue was *not* raised at the trial court level. Green v. City of New York Medical Examiner's Office, 723 F. Supp. 973, 975-76 (S.D.N.Y. 1989). Finally, the

IV. ALTERNATIVE APPROACHES TO PRETEXT

Alternative approaches to pretext could both operate to deter arbitrary arrest practices and ensure that courts meaningfully review pretextual arrests. Deterrence could be accomplished by removing the incentive for police to make such arrests, either by limiting the scope of the search that may be made incident to traffic offense arrests or by limiting the authority to make arrests for certain infractions. In the alternative, adequate review of police practice would result if courts are permitted to examine and weigh the objective facts surrounding the arrest, even when those facts implicate the intent of the arresting officer.

A. *Limiting the Scope of Searches Incident to Traffic Offense Arrests:* Belton *Revisited*

Pretextual traffic arrests are proof that the *Belton* bright line has dimmed. The bright line fails in this situation because it does not provide a balance between the state's dual interests in enforcing of traffic laws and ensuring police safety and citizens' interest in remaining free from intrusive searches resulting from arrests for minor traffic infractions. Courts strike a proper balance between these interests when they tailor search and seizure powers to the interests they purportedly serve. Yet the *Belton* bright line clearly shifts the balance in favor of the police. The state's interests can be adequately ensured by a less intrusive search rule.

Searches incident to arrest protect police officers and ensure the preservation of evidence. Because arrests for minor traffic violations implicate only one of these concerns—the safety of the police officer—application of the *Belton* rule in this context is unnecessary. Probable cause to arrest for a non-

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Supreme Court has held that a person currently incarcerated cannot pursue a claim for damages based on an alleged violation of his constitutional rights leading to the fact of incarceration. Heck v. Humphrey, 114 S. Ct. 2364 (1994) (holding that state prisoner who brings § 1983 claim that questions the lawfulness of incarceration based on constitutional violation must prove that sentence has been invalidated in order to prevail, and that absent such showing the claim is not cognizable under § 1983).

evidentiary crime does not warrant search powers that address the need to preserve evidence. A scope limitation that provides adequate protection to the police officer sufficiently addresses that concern in such cases.[178]

Although a scope limitation for non-evidentiary crimes is a radical departure from the *Belton* bright line, it does not radically depart from the *Belton* rationale. First, in *Belton*, police arrested the occupants of the automobile for possession of marijuana prior to searching the car.[179] The search of the car therefore was justified on evidentiary grounds. Traffic offenses implicate no such evidentiary concerns because, by definition, there is no tangible evidence of the offense. Second, in *Michigan v. Long*,[180] a post-*Belton* decision, the Supreme Court explicitly recognized that the *Belton* rule is justified in large part by the need to preserve evidence.

In *Long*, the Court permitted a warrantless search of an automobile based on reasonable suspicion that the driver was armed.[181] Although the officers had probable cause to arrest Long for driving under the influence, they failed to do so before conducting the search.[182] The Court distinguished the rationale that permits automobile searches incident to arrest (where the police have probable cause to believe that the driver has committed a crime) from the rationale that permits such

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[178] Lower courts could define the contours of such a scope limitation. At a minimum, police arresting for a non-evidentiary crime would be permitted to remove occupants from the car and search their persons fully, in accord with United States v. Robinson, 414 U.S. 218 (1973), discussed *supra* part I.A.1. However, once police have taken steps to protect their safety adequately, no further search would be permissible. A prophylactic bar against automobile searches under these circumstances could be balanced against a need for a further search on a case-by-case basis. A rebuttable presumption that a search of the automobile is unreasonable under these circumstances would ensure that police would not have an incentive to circumvent the rule.

[179] New York v. Belton, 453 U.S. 454, 455 (1981).

[180] 463 U.S. 1032 (1983).

[181] *Id.* at 1048. Investigatory stops, as opposed to full arrests, are supported by "reasonable suspicion," a standard less stringent than probable cause. Because at times a legitimate need exists for law enforcement officers to investigate criminal activity before probable cause to make an arrest has arisen, the Supreme Court in Terry v. Ohio, 392 U.S. 1 (1968), recognized a limited class of intrusions commonly referred to as "stop and frisks" which may be made upon reasonable suspicion that a person is engaged in criminal activity and that the person is armed. *Id.* at 30.

[182] *Long*, 463 U.S. at 1035 n.1.

searches incident to investigatory stops (where police have reasonable suspicion that the driver is armed):

> We stress that our decision does not mean that the police may conduct automobile searches whenever they conduct an investigative stop, although the 'bright line' that we drew in *Belton* clearly authorizes such a search whenever officers effect a custodial arrest. *An additional interest exists in the arrest context, i.e., preservation of evidence, and this justifies an 'automatic' search. However that additional interest does not exist [in this case]... because the interest in collecting and preserving evidence is not present... we require that officers who conduct area searches during investigative stops must do so only when they have the level of suspicion identified in Terry.*[183]

Thus, while explicitly reaffirming the *Belton* rule, the *Long* Court suggested that the evidentiary rationale of *Belton* does not apply where there is no evidence to be preserved.

Third, a bright-line rule prohibiting searches of automobiles incident to arrests for non-evidentiary crimes is as easily applied by the officer in the field as a bright-line rule that permits such searches. Therefore, such a scope limitation does not undermine the Court's concern in *Belton* for workable definitions of the scope of the search.[184] The limitation also addresses the Court's concern over the inherent danger of automobile stops by permitting searches aimed at protecting the officer.[185]

Finally, a scope limitation conveys society's disapproval of pretextual arrests in a more effective manner than vitiating otherwise lawful conduct on the basis of the officer's state of mind. One commentator has observed that:

> [I]t is strange to instruct police officers that they act improperly when, for the purpose of obtaining incriminating evidence, they act within the boundaries of a recognized exception to the warrant re-

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[183] *Id.* at 1049-50 n.4 (emphasis added).

[184] *Belton*, 453 U.S. at 460.

[185] *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (per curiam) ("we . . . specifically recognize the inordinate risk confronting an officer as he approaches a person seated in an automobile"); United States v. Robinson, 414 U.S. 218, 234 & n.5 (1973) ("Nor are we inclined . . . to qualify the breadth of the general authority to search incident to a lawful custodial arrest on the assumption that persons arrested for [traffic offenses] are less likely to possess dangerous weapons. . . . The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for the arrest.").

> quirement. If an ordinary citizen acts within the boundaries of a statute to achieve ends not contemplated by the statute, we do not criticize the citizen. We may congratulate the citizen for his or her creativity. Or, if we consider the citizen's conduct to constitute an abuse, we demand that legislators rewrite the statute to eliminate the possibility of abuse.[186]

This limitation on police search authority will not resolve the problem of pretextual police activity entirely. Police may still stop an automobile to gather plain-view evidence or to search the driver. In some instances, police might even arrest in order to impound and conduct an inventory search of a vehicle. That option might have been attractive to the Strike Force members, who had prior knowledge of Scopo's involvment in organized crime and had reason to believe that violence was impending. In most instances, however, police will lack such prior knowledge and the authorization to impound and inventory a vehicle will not provide the degree of incentive to arrest provided by an immediate on-the-scene search. Additionally, the intrusion that occurs when police stop an automobile is negligible compared with the intrusion that occurs when the occupant is arrested and the car fully searched.

B. *Limiting the Right to Arrest for Minor Traffic Violations: A Fourth Amendment Balancing Approach*

One commentator suggests an alternative approach for curbing pretext: stringently limit the circumstances under which police may make an arrest for a traffic violation.[187] Balancing the intrusion on the driver's liberty against the state interests served by permitting arrests for traffic infractions, arrests for traffic offenses are patently unreasonable in almost all situations.[188]

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[186] Haddad, *supra* note 2, at 691-92.

[187] Salken, *supra* note 43, at 273.

[188] The Supreme Court has not passed on the question of whether arrests for traffic infractions are per se unreasonable, but members of the Court have indicated that they are. *See, e.g.*, Robbins v. California, 453 U.S. 420, 450 n.11 (1981) ("a police officer's authority to restrain an individual's liberty should be limited in the context of stops for routine traffic violations") (Stevens, J., dissenting); Pennsylvania v. Mimms, 434 U.S. 106, 122 n.11 (1977) ("I assume . . . that [driving an automobile without a license plate] would not have warranted a full custodial arrest without some additional justification.") (Stevens, J., dissenting); Gustafson v.

An arrest for a traffic offense seriously intrudes on the driver's liberty. Among other indignities suffered during the arrest process are loss of freedom of movement, booking, fingerprinting, and a search of the traffic offender and his vehicle.[189] On the other side of the scale are the state interests in enforcing traffic laws. Although weighty, the state interests are insufficient to support full-blown arrests because they can be served by far less intrusive means. The purpose of motor vehicle laws is to ensure safety on the roads and highways. For several reasons, an arrest is not necessary to accomplish this goal.

The primary governmental interests served by any custodial arrest are insuring that the suspect will be present to answer charges brought against him or her, preventing future harm, and obtaining evidence of the crime of which the suspect is accused.[190] The interest in preventing future harm is rarely present in the case of a motor vehicle infraction. Presumably a driver who acts recklessly once may do so again in the future. When police give a citation in lieu of an arrest (which is the more frequent course of action), the driver is permitted to get back in her car and drive away. Yet, the state's interest in safety is no better served by arresting the driver because the arrested offender will be released after posting bail and still will get into her car and drive away.[191] The only offense that poses a danger to others sufficient to warrant an arrest is driving while intoxicated.[192]

Identifying the suspect is a crucial step in securing appearance at future proceedings, but an arrest is not necessary to accomplish this goal so long as the driver can be identified through license and registration.[193] Moreover, the seriousness of the crime is directly related to the probability of appearance. Generally, the less serious the offense and anticipated punish-

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Florida, 414 U.S. 260, 266-67 (1973) ("It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments.") (Stewart, J., concurring).

[189] Salken, *supra* note 43 at 264.

[190] Salken, *supra* note 43, at 266 (citing WAYNE R. LAFAVE, ARRESTS: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 177-82; 186-89; 193-95 (1965)).

[191] Salken, *supra* note 43 at 270.

[192] Salken, *supra* note 43, at 271.

[193] Salken, *supra* note 43, at 268.

ment, the more likely that the suspect will appear.[194] The only circumstance where future appearance warrants an arrest is where the driver lacks identification.

In short, notwithstanding the existence of probable cause, a full-blown arrest for a traffic offense is unreasonable because the quality of the intrusion is not justified under the circumstances. Balancing the state interest served by the intrusion against the individual's liberty interest, arrests are justified only where the driver is intoxicated or has no identification.[195] In all other instances, the state interest in road safety is ensured equally through the issuance of a citation.[196]

C. *Limiting the Application of the* Scott *Trilogy*

Broad application of the *Scott* trilogy to pretextual traffic-offense arrests presupposes that the Supreme Court has held that a finding of pretext is not possible because it requires inquiry into intent. Assuming that the Court's concern with pretext retains vitality, the *Scott* language can and should be read more narrowly when dealing with questions of pretext. In these circumstances, *Scott* should limit direct inquiry into the officer's intent,[197] but should not preclude a finding of pretext where the facts inevitably lead in that direction even when those facts implicate the officer's intent and ultimately lead to the conclusion that the officer acted with a specific motivation.

In *New York v. Quarles*,[198] the Supreme Court articulated a "public safety" exception to the requirement that *Miranda*

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[194] Salken, *supra* note 43, at 268.

[195] Salken, *supra* note 43, at 273.

[196] Although limiting the authority to arrest for traffic offenses may curb pretextual arrests effectively, it will not deter pretextual stops. Police officers still have the authority to stop a vehicle after witnessing an infraction, and they may choose to do so for illicit reasons. *See supra*, note 123. However, the state interest in highway safety balanced against the minor intrusion that occurs when a driver is pulled over militates in favor of permitting such stops at the officer's discretion. Although the power to stop may be used arbitrarily in much the same way as the power to arrest, realistically, only the most egregious pretextual stops can be prevented.

[197] During the suppression hearing in *Scopo*, Judge Glasser sustained an objection by the prosecutor when Scopo's attorney directly asked one of the arresting officers his motive in stopping Scopo's car. Transcript of Suppression Hearing, *supra* note 67, at 71.

[198] 467 U.S. 649 (1983).

warnings[199] be given before a suspect's answers to police interrogation may be admitted into evidence.[200] In doing so, the Court stressed that the facts of a given situation determine whether questioning is warranted by a legitimate concern for public safety.[201] The subjective motivations of the officer questioning the suspect have no bearing on whether or not public safety is implicated, even though one of those motivations may be the desire to obtain incriminating evidence.[202]

The *Quarles* analysis is equally applicable to pretextual arrests: the officer's subjective intent to search a car is not determinative of whether a pretextual arrest has occurred. What is determinative are facts that objectively indicate or negate pretext. An analysis that precludes consideration of facts that strongly suggest pretext merely because they also implicate intent is illogical. It forces courts to ignore the very facts that are most helpful in making a finding of pretext and places the "Constitution [at war with] common sense."[203]

CONCLUSION

Pretextual police conduct raises unique problems and concerns not adequately addressed by a *Scott* analysis. By limiting its analysis of pretext to the strictures of the *Scott* trilogy's objective reasonableness standard, the Second Circuit in *Scopo* failed to enunciate a standard of review that provides any measure of protection against arbitrary, pretextual police conduct. Therefore, the Second Circuit and other courts should approach the problem by applying fourth amendment analyses that do more than validate a practice that values enforcement of traffic laws and the satisfaction of police officers' hunches above a citizen's right to be free from unreasonable searches and seizures.

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[199] In Miranda v. Arizona, 384 U.S. 436 (1966), the Court held that certain warnings must be given to persons in custody prior to questioning by police.

[200] *Quarles*, 467 U.S. at 655-56.

[201] *Id.* at 655-56.

[202] *Id.* at 656.

[203] Mapp v. Ohio, 367 U.S. 643, 657 (1961) ("[t]here is no war between the Constitution and common sense").