

University of Michigan Journal of Law Reform

Volume 18

1985

Pretextual Fourth Amendment Activity: Another Viewpoint

James B. Haddad
Northwestern University

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), [Law Enforcement and Corrections Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J. L. REFORM 639 (1985).

Available at: <https://repository.law.umich.edu/mjlr/vol18/iss3/3>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

PRETEXTUAL FOURTH AMENDMENT ACTIVITY: ANOTHER VIEWPOINT

James B. Haddad*

Pretextual detentions, arrests, and searches pose knotty fourth amendment problems. With an air of plausibility, defense attorneys often accuse police of pretextual use of arrest warrants, search warrants, and various exceptions to the warrant requirement. Specifically, they contend that officers have utilized a particular fourth amendment doctrine to obtain certain evidence even though courts have not assigned as a reason for approving the doctrine the need to discover such evidence.

Through the 1970's leading commentators offered no unified analysis of pretext issues. Professor Wayne LaFave's impressive 1978 treatise touched upon pretext problems in each of its three volumes but provided no analytical framework for viewing common issues pertinent to discussions scattered over several places in the treatise.¹ Earlier, in his powerful Holmes Lectures at the University of Minnesota, Professor Anthony Amsterdam defined the pretext issue with brilliant conciseness and described alternative solutions.² After a too brief discussion, however, he rejected a solution that is popular with many reviewing courts and that, years later, after more extended analysis, Professor John Burkoff would endorse. Amsterdam instead proposed in a few contexts a response that I do not believe he would advocate in other contexts where he envisions that police engage in pretextual fourth amendment activity.³

Within the last six years, however, LaFave and Burkoff have devoted deserved attention to pretext problems, spurred by language in *Scott v. United States*,⁴ where, ironically, the defense

* Professor of Law, Northwestern University. B.A., 1964, University of Notre Dame; J.D., 1967, Northwestern University; LL.M., 1969, Northwestern University.

1. LaFave himself cites ten different sections in the 1978 treatise touching upon pretext and related fourth amendment problems. See 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2(g), at 19 (Supp. 1985) [hereinafter cited as LAFAVE Supp.].

2. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433-39 (1974).

3. See *infra* notes 32-38 and accompanying text.

4. 436 U.S. 128 (1978).

raised no cry of "sham." Updating his treatise, LaFave provided a unified analysis and proposed a new solution.⁵ Burkoff offered a thorough discussion in several articles, culminating in the thoughtful piece that appeared in the valuable fourth amendment symposium issue of the *University of Michigan Journal of Law Reform*.⁶

Burkoff's writings have rekindled my interest in the topic. Years ago I wrote a short response to Professor Amsterdam's brief argument in support of his partial solution to the pretext problem.⁷ Now I write in reaction to Professor Burkoff's suggestions. Along the way, I briefly comment upon LaFave's alternative, reserving further discussion until I understand more fully how LaFave's proposal would function.

I disagree fundamentally with Burkoff's position. I reject his contention that the United States Supreme Court long has utilized the approach that Burkoff favors. Unlike lower courts, it never adopted such an approach. I believe Burkoff is wrong when he claims that the present Court, if the approach in *United States v. Villamonte-Marquez*⁸ prevails, will have abandoned all efforts to curb pretextual fourth amendment activity. Rather, it will only have rejected Burkoff's proposed solution. The Supreme Court has consistently utilized an approach that in 1977 I described as the "least undesirable alternative."⁹ If my enthusiasm for that approach is still tempered, it is because I withhold judgment until I better understand LaFave's new suggestions and not because Professor Burkoff's arguments have persuaded me. Nevertheless, like others interested in the pretext issue, I owe Professor Burkoff thanks for directing substantial attention, long overdue, to troublesome questions posed by pretextual fourth amendment activity.

5. See LaFAVE Supp., *supra* note 1, § 1.2(g), at 19-34.

6. See Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 181-90 (1979) [hereinafter cited as Burkoff, *Inconsistent Exclusionary Doctrine*]; Burkoff, *Pretext Searches*, 9 SEARCH & SEIZURE L. REP. 25 (1982); Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982) [hereinafter cited as Burkoff, *Bad Faith Searches*]; Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984) [hereinafter cited as Burkoff, *Pretext Search Doctrine*].

7. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 204-14 (1977).

8. 462 U.S. 579 (1983).

9. See Haddad, *supra* note 7, at 213.

I. THE PRETEXT ISSUE: WHAT IT IS AND WHAT IT IS NOT

A. *Divergence Between Judicial Reasons for Approving a Fourth Amendment Power and an Officer's Reasons for Using that Power on a Particular Occasion*

Professor Burkoff sees a pretext problem when an officer searches "for reasons that do not constitute a proper legal justification for the search."¹⁰ Professor Amsterdam summarizes the concern:

A power is claimed by a law enforcement officer to engage in conduct that intrudes upon the privacy of a citizen The allowance of that power consistently with the fourth amendment is sought to be justified by the existence of a specific law enforcement need The power may in fact be exercised for some other purpose than one which is asserted to justify it.¹¹

Justice Rehnquist has spoken of situations where "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."¹² All these formulations suggest that the pretext issue arises when there is divergence between an officer's reasons for using a specific fourth amendment power on a particular occasion and the reasons advanced by courts for approving the doctrine which allows such fourth amendment activity.

An alleged misuse of the inventory search doctrine illustrates the issue. As with all exceptions to the search warrant requirement, the inventory search exception is supported by legitimate governmental objectives said to outweigh the individual's interest in being free from the type of search in question. According to the Supreme Court, inventory searches are reasonable because they serve three needs. First, they help preserve property that comes into police custody. Second, they assist the police in combating false claims of police misappropriation of the citizen's possessions. Finally, they prevent dangers that the property

10. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 101.

11. Amsterdam, *supra* note 2, at 434.

12. *United States v. Scott*, 436 U.S. 128, 138 (1978). Rehnquist was not focusing on the specific pretext search issue but on the generic question of whether an officer's state of mind, as distinguished from his conduct, should sometimes require a determination that the officer violated the fourth amendment. See *infra* notes 157-69 and accompanying text.

could pose to the custodians' health or safety.¹³ Nonetheless, a police officer might inventory a citizen's automobile or briefcase for illegitimate reasons. The officer might be uncommonly "nosy." He or she might wish to harass the individual because of intense personal dislike arising out of the officer's encounter with the individual. Alternatively, the officer might harbor a bias against persons of the age, race, or sex of the owner. Finally, the officer might inventory the property in the hope of discovering evidence of a crime.

The exception to the warrant requirement for searches incident to arrest also demonstrates the pretext problem. The search incident to arrest exception seeks to protect the officer and to prevent concealment or destruction of evidence of the crime for which the officer arrested the suspect.¹⁴ An officer who searches a traffic arrestee in the hope of discovering evidence of a burglary has engaged in a pretext search, as has the officer who merely desires to humiliate the arrestee.

In addition to warrantless search exceptions, courts have constitutionally approved other police conduct that gives rise to pretextual fourth amendment activity. Subject to certain preconditions and limitations, the police can, for example, upon reasonable suspicion detain an individual for brief, on-the-street questioning.¹⁵ They can arrest him upon probable cause, sometimes without a warrant, sometimes only under the authority of an arrest warrant.¹⁶ They can execute a search warrant issued in compliance with probable cause and specificity requirements of the second clause of the fourth amendment. Courts consider these powers reasonable because, when exercised within the defined limits and subject to preconditions, they believe these powers serve valid governmental purposes that outweigh an individual's interest in being free from the particular type of intrusion.

The police could use any power for the wrong reason. An officer might curb a vehicle in order to meet its physically attractive driver. An officer might execute a traffic arrest warrant at a suspect's home to gain an opportunity to question the suspect about a murder, to obtain a vantage point for making plain view observations of possible evidence of the murder, or to acquire

13. See *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

14. See *Chimel v. California*, 395 U.S. 752 (1969).

15. See *Terry v. Ohio*, 392 U.S. 1 (1968).

16. See *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Watson*, 423 U.S. 411 (1976).

such evidence in a search of the arrestee's person or of the area within the arrestee's reach at the time of the arrest. Similarly, an officer might obtain and execute a valid search warrant commanding the seizure of marijuana, hoping to come across evidence of an armed robbery while thoroughly searching the premises named in the marijuana warrant.

*B. Operating Within the Boundaries of Warrantless Search
Exceptions and of Other Legal Limitations Upon Fourth
Amendment Activities*

As used in the literature, a pretextual arrest is in issue only if the officer acts within the legal boundaries of a fourth amendment doctrine. Suppose a police officer arrests a burglary suspect on a disorderly conduct charge where no probable cause exists even as to disorderly conduct. If a court finds no probable cause, then it need not reach a claim of pretext. Similarly, a pretextual use of a warrantless search exception is not in issue unless the officer has satisfied the preconditions and acted within the limits of a recognized exception to the warrant requirement. If the officer searches the trunk of a car on the open highway at the place where he or she has stopped it, but searches nowhere else in the vehicle and does nothing to safeguard its contents, the officer simply has not engaged in an inventory search. Thus the prosecutor should lose in efforts to support the search on an inventory theory even without the defense raising a claim of sham.

It is important, however, to understand how warrantless search exceptions operate. Contrary to what Justice Frankfurter might have envisioned, today a prosecutor, to demonstrate the reasonableness of a search, need not contend that on the occasion in question the police officer was confronted with the particular law enforcement need that gave rise to the particular warrantless search exception.¹⁷ To invoke the moving vehicle exception, for example, the prosecutor need not demonstrate that the officer actually was faced with the prospect that a delay to

17. Although a firm supporter of the warrant requirement, Frankfurter, unlike Supreme Court Justices of more recent vintage, did not translate this preference into the notion that there were a few fixed exceptions to the warrant requirement, within the boundaries of which warrantless searches are per se permissible. To Frankfurter a warrantless search was unlawful if, on the *particular* facts, officers were not confronted with a legitimate need to act without taking the time to obtain a warrant. *See, e.g., United States v. Rubinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

obtain a warrant might have prevented seizure of the evidence.¹⁸ Similarly, to justify a search incident to arrest, the prosecutor need not prove that the officer feared for his or her safety or searched in order to prevent the concealment or destruction of evidence.¹⁹ Professor Burkoff ignores this point when he chastises Justice Rehnquist for citing *United States v. Robinson*²⁰ in the discussion of pretext claims. He also ignores the point elsewhere in his article.²¹ He contends that a prosecutor who would defend what he or she knows was pretextual fourth amendment activity must falsely assert that an officer acted for a reason that served to legitimize the warrantless search exception.²² While that might be a rote response to a claim of sham, alternatively the prosecutor can argue that the police can use a particular warrantless search exception even if the rationale for the exception would not appear applicable to the case at hand. This is what rejection of case-by-case adjudication, in cases like *Robinson*, in favor of generalized doctrines is supposedly all about. The importance of this point will become apparent when I discuss Professor Burkoff's solution to the pretext problem.²³

C. *Claims of Pretext in The Trial Courts: When Does Defense Counsel Raise the Issue?*

To judge from reported decisions, defense lawyers pursue claims of pretext only to assert that the police have used a fourth amendment power motivated by a desire to obtain incriminating evidence. Counsel do not argue before reviewing courts that the fourth amendment requires relief when the officer has acted because of other improper motives. In fourth amendment pretext cases, other such motives appear irrelevant: the officer's desire to meet the attractive driver who violated the speeding law; his personal disdain for the smart aleck rich kid

18. See *Florida v. Meyers*, 104 S. Ct. 1852 (1984); *Michigan v. Thomas*, 458 U.S. 259 (1982); *Texas v. White*, 423 U.S. 67 (1975).

19. *United States v. Robinson*, 414 U.S. 218 (1973).

20. *Id.*

21. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 75 n.22.

22. Professor Burkoff repeatedly suggests that a prosecutor engages in unethical behavior when he or she urges a court to admit evidence that has been obtained through pretextual fourth amendment activity, arguing that the prosecutor is using deceit under such circumstances. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 536-37 n.60. See also *id.* at 524, 534, 540 n.79.

23. See *infra* notes 226-30 and accompanying text.

whose car the officer inventoried after arresting the youth on a curfew violation; an officer's prejudice against Blacks or Hispanics or Poles.

Practical reasons may explain defense lawyers' failure to make fourth amendment claims in the latter situations. Perhaps they cannot prove that on an individual occasion the officer's conduct—within the letter of the law—was racially motivated. Perhaps they see no cognizable legal theory arising from an officer's personal dislike for an individual citizen. Suppression of evidence is the most obvious fourth amendment remedy when an officer acts from an improper motive. It is unavailable when the officer's fourth amendment activity yields no evidence. Perhaps officers who stop, detain, arrest, frisk, or search in the hope of obtaining incriminating evidence find such evidence more frequently than do officers who engage in such fourth amendment activity because of fluttering hearts, personal spite, or racial bigotry. Nevertheless, with support from the opinions of Justices Douglas, Brennan, and Rehnquist, I find it ironic that the only "bad" motive that defense counsel urge as worthy of condemnation under the fourth amendment is the officer's desire to obtain criminal evidence.²⁴ Normally we would expect praise for the officer who, while acting within the letter of the law, pursued this motive.

I will return to this point later, but now I make one additional observation about when counsel urge fourth amendment pretext claims. Recall that, to be lawful, a police officer's use of a warrantless search exception need not be affirmatively motivated on a particular occasion by the reasons that led a court to approve that particular exception.²⁵ Posit a situation where an officer, acting constitutionally, rather mindlessly searches a traffic arrestee. He might think traffic arrest searches are silly, but he learned such behavior from fellow officers and knows it meets departmental and judicial approval. If the defense counsel concedes that the officer's conduct was not caused by a desire to gather incriminating evidence, or if he can offer no proof of such

24. In *Abel v. United States*, 362 U.S. 217, 245 (1960) (Douglas, J. dissenting), Douglas said that it made no sense to assert that an officer acts in "bad faith" when he seeks to manipulate fourth amendment powers so as to obtain criminal evidence. Although Douglas disliked both the term "bad faith" and the "bad faith" rationale for excluding evidence obtained through a pretext search, his *Abel* dissent is the only United States Supreme Court opinion in which a Justice adopts an approach to pretextual searches of the type endorsed by Professor Burkoff. See *infra* notes 154-55 and accompanying text. Concerning the views of Justices Brennan and Rehnquist, see *infra* notes 170-91 and accompanying text.

25. See *supra* notes 17-19 and accompanying text.

motive, defense counsel will make no pretext claim. In other words, he or she will urge condemnation of the officer who uses a fourth amendment power in order to gather incriminating evidence, but not the officer who uses the same power for no particular reason at all.

D. Distinguishing Pretext Issues from Other Analytically Related Issues

In the supplement to his treatise, Professor LaFave groups the pretext issue with several other issues and fact situations, all of which he analyzes with an eye to deterring fourth amendment violations.²⁶ For example, an officer might act within the letter of the fourth amendment, while being willing to engage in improper conduct if necessary to obtain incriminating evidence. Because such conduct is unnecessary, the officer might not carry out this intent. Alternatively, an officer might knowingly engage in certain conduct incorrectly believing that such conduct is illegal, when in fact such conduct is legal. Or he might act in the mistaken belief that certain facts exist (or do not exist), where, if his belief were true, his conduct would be illegal. Or he might engage in conduct incorrectly believing that one legal theory could support the actions when, in fact, another theory would.

Professor Burkoff has joined Professor LaFave in thoughtful discussion of several of the issues that these situations raise.²⁷ He has, however, correctly warned against confusing these interesting issues with pretext issues.²⁸ Cases posing the former issues, like cases that concern whether the officer acted within the letter of the law, may yield dictum that bears upon the pretext issue, particularly from the viewpoint of scholars who, like LaFave and Burkoff, wish to resolve related fourth amendment problems within a unified, internally consistent framework. Nevertheless, in reviewing judicial responses to claims of pretext, we must not confuse cases posing such claims with cases that raise no such issue.

26. See LAFAVE Supp., *supra* note 1, § 1.2(g), at 19-28.

27. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 81-100.

28. *Id.* at 82-84.

II. AN OVERVIEW OF ALTERNATIVE RESPONSES TO CLAIMS OF PRETEXT

In 1974 Professor Amsterdam outlined three possible responses to claims of pretext.²⁹ In 1977 I supplied a terminology for identifying these approaches: (1) the Use-Exclusion Approach; (2) the Ulterior Purpose or Bad Motive Approach; and (3) the Hard-Choice Approach.³⁰ In providing an overview adequate to embrace Professor LaFave's recent contributions, I would now use the term "Case-by-Case Analysis" to denote the second category. I identify Professor Amsterdam with the first response; Professor Burkoff, some lower courts, and Professor LaFave with differing branches of the second approach; and the United States Supreme Court, consistently through history, especially Justice Brennan and, more recently, Justice Rehnquist, with the third approach.³¹ I remain a supporter of the third approach, at least until I have a fuller understanding of how Professor LaFave's suggested solution would function.

A. *The Use-Exclusion Approach*

Professor Amsterdam proposed that we remove the incentive for police to use fourth amendment powers³² for an improper purpose. If, for example, we believe that the need to protect property, deter false claims of theft, and ward off dangers outweigh the individual's privacy interest, we might permit inven-

29. Amsterdam, *supra* note 2, at 436-39. In their recent efforts to present a unified analysis of the use of pretextual fourth amendment activity as a means of gathering criminal evidence, Burkoff and LaFave both ignore this portion of Amsterdam's Holmes Lectures. They view as his solution to the problem the administrative-regulation approach which he endorsed elsewhere in the lectures. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at note 22 and accompanying text; LaFave Supp., *supra* note 1, § 1.2(g), at 54 n.152. The administrative-regulations approach is designed to narrow discretion, which, in turn, would narrow the opportunity for pretextual fourth amendment conduct, as would any narrowing of fourth amendment powers. See *infra* notes 48-52 and accompanying text. When he specifically addressed pretext problems, however, Amsterdam specifically endorsed what I call the "use-exclusion approach." Amsterdam, *supra* note 2. See *infra* notes 33-38 and accompanying text. Amsterdam urged his administrative-regulation approach as a cure for discretion exercised based upon such matters as a citizen's skin color or manner of dress. Amsterdam, *supra* note 2, at 415-16.

30. Haddad, *supra* note 7, at 206-14.

31. See *infra* notes 170-91 and accompanying text.

32. I recognize that the fourth amendment sets limits and does not grant authority. Nevertheless, I use "fourth amendment powers" to denote searches and seizures that courts deem reasonable because authorities utilized a warrant or acted within a recognized exception to the warrant requirement.

tory searches but prohibit a prosecutor from using at trial any evidence derived from an inventory search.³³ Under the same approach, if we deem searches of traffic arrestees proper to protect police officers and to prevent concealment or destruction of traffic offense evidence, we would allow such searches without a showing that such reasons had applicability in the case at hand. A prosecutor, however, could use as evidence nothing that turned up except the proper objects of such a search: a weapon or evidence of the traffic offense for which the police officer made the arrest.

Professor Amsterdam apparently proposed use-exclusion only as a means of deterring misuse of those fourth amendment doctrines that he disliked to begin with, as, for example, inventory searches or license check stops.³⁴ He did not claim, for instance, that whenever an officer made a valid traffic stop, a court should exclude his or her subsequent plain view observations of evidence of a more serious crime. This was so even though police could use traffic stops in the hope of making plain view observations of evidence of a more serious offense. In more narrow contexts, Professors James B. White³⁵ and Wayne LaFave³⁶ in 1974 also proposed that courts should allow police to engage in certain searches but should exclude at a criminal trial evidence beyond the courts' rationale for such searches.

Because of the deserved reputation of its supporters, the use-exclusion proposal merits serious discussion in any full treat-

33. Amsterdam used stop and frisk rather than inventory search as his prime example. Amsterdam, *supra* note 2, at 437-38. I use the inventory search doctrine because it provides an easier vehicle for explaining the individual motivation approach.

34. *Id.* at 433-39. See Haddad, *supra* note 7, at 209 & n.89.

35. See White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 209-14. White argued that the sole rationale for a search incident to arrest is the need to safeguard the officer from attack. In so doing he completely and astonishingly ignored *Chimel v. California*, 395 U.S. 752 (1969), and the opinions of Justice Frankfurter cited therein, which speak of the need to prevent the concealment or destruction of evidence. Starting with his faulty premise, White concluded that courts should exclude as evidence any item found in a search incident to arrest other than a weapon. *Id.* at 210-14. Thus, I assume, under White's theory, if an officer discovered the fruits of a burglary in a search incident to a burglary arrest, the trial court would exclude such evidence. Although White's erroneous premise led to a preposterous conclusion, he is still to be credited with recognizing the possibility of using use-exclusion as a means of eliminating the incentive for pretextual fourth amendment activity.

36. See LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 156-57. There LaFave suggested that use-exclusion might be used in the case of searches incident to traffic arrests. If such searches yielded a weapon or evidence of the traffic violation, the court would receive such evidence. It would exclude all other evidence found in a search incident to a traffic arrest.

ment of pretext issues. Curiously, in their efforts to establish a comprehensive approach, neither Professor Burkoff nor Professor LaFave has commented upon the proposal. In 1977 I criticized this approach for reasons that justify only a footnote here in the absence of any new commentary in recent years.³⁷ Courts have not adopted this approach even though, in some cases, it makes as much sense as the more popular approach described in the next subsection.³⁸

B. Case-by-Case Adjudication

Under a second approach courts examine pretext claims on a case-by-case basis, excluding the product of the fourth amendment activity if they find that officers exercised the power pretextually. Courts and commentators ordinarily understand this approach to require the predominant motivation for police conduct to lie within the purported, constitutional purpose, although Professor Burkoff would not invoke an exclusionary remedy except where the sole motive was an improper one, a point that I discuss below.³⁹

Many lower courts have adopted this motivation approach.⁴⁰ Consider this example. A narcotics officer desires to get into a narcotic suspect's home. The officer either lacks probable cause or does not wish to expend time and effort to obtain a search warrant. The officer learns that there is an outstanding traffic

37. See Haddad, *supra* note 7, at 206-10. In summary:

My opposition rests on several grounds. *First*, the "costs" of such an approach, while depending upon chance, would inevitably be so enormous as to be intolerable, partly because of derivative evidence consequences. *Second*, in departing from present exclusionary philosophy by attenuating the relationship between misconduct and exclusion, the use-exclusion approach would breed disrespect for the judiciary and would not survive a brief experimental life. *Third*, I am convinced that use-exclusion is such a radical approach that even a zealous advocate would employ the method sparingly. Such an advocate would use it only to combat sham use of those fourth amendment powers which he would gladly see eliminated altogether. He would not propose use-exclusion to curb sham use of fourth amendment doctrines which he believes are legitimate on their face. Thus, like the rest of us, he would be required to turn elsewhere for a solution to the problem of fourth amendment sham.

Id. at 207.

38. I have found no recent decision adopting the use exclusion approach, although it is possible that a few exist. *Cf.* Mayfield v. United States, 276 A.2d 123 (D.C. 1971) (decided several years before Amsterdam recommended the use-exclusion approach).

39. See *infra* notes 205-07 and accompanying text.

40. Holdings or dicta approving such an approach can be found in many of the cases cited in Burkoff, *Bad Faith Searches*, *supra* note 6, at 113 n.213. See also LAFAVE *Supp.*, *supra* note 1, § 1.2(g), at 51-54.

warrant for the suspect. The officer goes to the suspect's residence when he or she has reason to believe that the suspect is at home. The officer enters with the intent to arrest, but predominantly motivated by a desire to find narcotics in plain view or within the scope of a search incident to arrest. Finding that the officer entered with this motive, and noting that a legitimate purpose of a traffic arrest warrant is not to aid in the discovery of narcotics, the court suppresses the evidence.⁴¹

Professor LaFave's recent formulation also would analyze pretext claims on a case-by-case basis. His inquiry, however, is not whether the police motive was improper but whether the police departed from standard procedures.⁴² Unlike Professor Burkoff, I do not discuss LaFave's approach at length because I am not sure how it would operate.⁴³ If, in the hypothetical, the officer completes the steps necessary to bring the suspect to court to answer the traffic charge, would Professor LaFave allow the use of the narcotics discovered in a search of the arrestee's person? Is it only necessary that the narcotics detective do what any other officer could do in executing a traffic arrest warrant? Or under LaFave's test is the seizure bad because normally narcotics detectives do not execute traffic arrest warrants (even though they undoubtedly have the power and probably exercise it on some occasions where no suggestion of pretext exists)?⁴⁴ If the latter is the test, what constitutes standard practice? Standard practice may require narcotics officers to execute traffic arrest warrants when they discover that such a warrant is outstanding for a suspected narcotics offender. In the latter instance the policy may depend not just on the desire to find narcotics. Officials may also desire to bring the full force of the law against a suspected drug dealer even if they cannot establish a narcotics vio-

41. See *Harding v. State*, 301 So. 2d 513 (Fla. Dist. Ct. App. 1974), *cert. denied*, 314 So. 2d 151 (Fla. 1975).

42. LAFAVE Supp., *supra* note 1, § 1.2(g), at 53-54.

43. For his discussion of LaFave's proposal, see Burkoff, *Bad Faith Searches*, *supra* note 6, at 107-11; Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 532-36.

44. Presumably narcotics detectives who make field stops of narcotics suspects do not always just let them go when the detectives learn that the suspects are wanted on outstanding traffic warrants. They may often arrest such individuals even though the officers have already determined through a search (lawful or unlawful) that the suspects have no narcotics on their persons. Moreover, we should not assume that officers who specialize in narcotics enforcement have no other obligations. Even in a jurisdiction the size of Chicago, from time to time some officers specially assigned to narcotics enforcement (such as "Task Force" officers) have been required to give priority to other law enforcement objectives. In smaller jurisdictions, it would frequently be meaningless to declare that an officer, though otherwise acting lawfully, departed from his or her prescribed routine in enforcing an extant traffic warrant.

lation. Elsewhere courts have not provided a remedy for this type of selective enforcement of the law.⁴⁵

Consider also the detective who arrests a narcotics suspect in the suspect's car pursuant to a narcotics arrest warrant related to a crime that occurred one month earlier. Absent probable cause, he or she cannot search the car's trunk under the automobile exception.⁴⁶ The officer might, however, have the right to take the automobile into police custody.⁴⁷ Suppose the officer then inventories the car in the manner that inventorying officers normally perform that function pursuant to departmental policy. Under LaFave's test would it make a difference whether officers employed as property custodians, but not detectives, normally performed inventories? What if narcotics detectives perform this function only when dealing with narcotics suspects? What should constitute the standard practice? Should it make a difference which police officer performs a particular lawful police function? Finally, if the test of "standard" is whether, but for the suspicion of the presence of evidence, the officer would have done as he did, how is LaFave's test different from Burkoff's?

However LaFave's test would operate, it, like Burkoff's, involves case-by-case adjudication of whether evidence *should be suppressed* even though the police operated within the letter of an approved fourth amendment doctrine.

C. *The Hard-Choice Approach*

When faced with claims of sham, the Supreme Court, as detailed below,⁴⁸ has often reexamined the basic power that defense counsel claims the police have used for an improper purpose. Considering the possibility of pretextual use as just one

45. Selective enforcement doctrine does not prohibit a prosecutor from seeking to make a case on a relatively minor charge, even where such matters ordinarily are not investigated and would not be investigated but for the prosecutor's belief that the target has committed major crimes. Selective prosecution doctrines protect only members of specially protected minorities or persons who exercise fundamental rights. See the discussion in *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973).

46. See *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981) (holding permitting search of containers within passenger compartment of a car "does not encompass the trunk."); *Chambers v. Maroney*, 399 U.S. 42, 47 (1970) (finding subsequent search of car at station house unlawful because not incident to arrest) (citing *Preston v. United States*, 376 U.S. 364 (1964)).

47. The officer might invoke a caretaking theory. See *infra* notes 100-07 and accompanying text.

48. See *infra* text at notes 54-156.

factor in determining whether the power is consonant with the fourth amendment, the Court has either upheld the power or else restricted or abolished the power. I call this the hard-choice approach.

To illustrate this approach, let me explain how it would work in a situation where Professor Burkoff and I find pretextual fourth amendment activity offensive, but where the Court has not yet used the hard-choice approach.⁴⁹ Suppose that defense counsel claims that the police have executed a dated but valid traffic arrest warrant as a pretext to enter a narcotics suspect's house, hoping to discover heroin either in plain view or within the scope of a search incident to arrest.

One approach would be to narrow the scope of the underlying power: the right to enter a home to execute an arrest warrant. The Supreme Court could declare that arrest warrants expire after a certain period of time, at least where the police efforts to execute the warrant have lapsed.⁵⁰ Or the Court could make a less drastic alteration in fourth amendment law by declaring that after a period of time, absent continuous diligent effort to execute a *misdemeanor* arrest warrant, the warrant, though still valid for some purposes, would not authorize entry into a suspect's home. The Court would reason that if authorities place such a low priority on a prompt arrest, the governmental interest does not outweigh the individual's right to be free from police entry into his home at the nearly unbridled discretion of the police.⁵¹ Once the Court had struck a balance under the reasonableness clause of the fourth amendment—perhaps by leaving the entry-to-arrest power exactly as it is now, or perhaps by narrowing the power in some fashion—the police would be allowed to use the power, within the letter of the law as outlined by the Supreme Court, without regard to their motives. A narrowing of police power would restrict opportunity and incentive for abuse.

Unless the Court completely prohibited use of the power, how-

49. Burkoff discusses at length *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983), a case in which officers executed a contempt arrest warrant, allegedly to get into a suspect's home so as to aid investigation of a more serious offense. The court explicitly rejected the individual motivation approach. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 538-44.

50. Under prevailing interpretation of the fourth amendment, arrest warrants normally do not grow stale. See *United States v. Watson*, 423 U.S. 411, 451 n.16 (1976) (Marshall, J., dissenting).

51. In *Welsh v. Wisconsin*, 104 S. Ct. 2091, 2098 (1984), in a warrantless entry context, the Court, in judging the reasonableness of entry into a home, took into account what it perceived as the low priority that Wisconsin assigned to the offense for which the arrest was to be made.

ever, some possibility of pretextual use would remain. For example, a narcotics detective might still be allowed to enter a suspect's home to execute a day-old traffic arrest warrant where his predominant motivation was the hope of discovering narcotics. The Court would have taken into account possible pretextual use in shaping a particular fourth amendment power. Once it made its decision, however, the Court would not direct lower courts to make case-by-case decisions as to whether the police were engaged in pretextual conduct.

As indicated below, the hard-choice approach is the one espoused by Justice Brennan and utilized by Justice Rehnquist.⁵² It is the only approach to the pretext problem that the Supreme Court has used consistently.⁵³

III. THE UNITED STATES SUPREME COURT'S APPROACH TO CLAIMS OF PRETEXT

Professor Burkoff argues that the Supreme Court for a long time condemned pretextual fourth amendment activity but that now it has seemingly abandoned that concern.⁵⁴ His assertion depends upon an erroneous premise. Burkoff believes his solution to the pretext problem is the only one that reflects a sensitivity to the pretext issue. Unless a court reacts on a case-by-case basis to pretext claims and determines whether particular conduct was improperly motivated, Burkoff believes the court has abandoned all efforts to prevent pretextual fourth amendment activity. He does not acknowledge that a court using the hard-choice approach can consider the possibility of a pretextual use of a particular police practice either by condemning the practice as unreasonable or by narrowing the permissible scope of a fourth amendment power.

In fact, unlike lower courts, the Supreme Court has never ordered lower court exclusion of evidence because on a particular occasion an officer, although acting within the fourth amendment, was improperly motivated. Frequently, however, the Court has expanded fourth amendment limitations upon police in part to reduce the opportunity and incentive for officers to engage in pretextual fourth amendment activity.

52. See *infra* notes 170-91 and accompanying text.

53. See *infra* notes 54-156 and accompanying text.

54. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 544-48.

A. Cases Discussed by Professor Burkoff

1. *United States v. Lefkowitz*— Pursuant to an arrest warrant, in *United States v. Lefkowitz*⁵⁵ federal agents arrested a suspect in a partitioned office that was ten feet by twenty feet. They searched the room extensively, including waste baskets, closed desk drawers, and closed cabinets. They seized books, papers, and other articles.

The Court stated: "The only question presented is whether the searches of the desks, waste baskets and of all drawers and closed cabinets and the seizure of the things taken from them were reasonable as an incident of the arrests."⁵⁶ The Court answered the question negatively by circumscribing the scope of a proper search incident to arrest. Chroniclers of the Court's frequently changing course defining the proper scope of a "search incident" to arrest view *Lefkowitz* as one of the decisions that defined the scope narrowly.⁵⁷ To my knowledge, only Professor Burkoff has suggested that *Lefkowitz* condemned a search that was within the letter of the law because the officers' true motive in making the arrest was to engage in an unconstitutional search. His suggestion stems from a single sentence of dictum, at the end of the opinion, that declares that police officers should not use arrests as pretexts for searches.⁵⁸

If Burkoff's reading were correct, the Court would have had to explore the officers' motive for making the arrests. The opinion contains no discussion condemning these motives. Moreover, if he were right, after *Lefkowitz* a search as extensive and intensive as the one conducted there would have been proper as long as the officers' true motive was to make an arrest. This reading is inconsistent with the language in *Lefkowitz* condemning the search because of its scope.

Perhaps the Court's single dictum concerning pretext arrests suggests that it was concerned that officers might abuse the right to arrest by making arrests motivated by the desire to search incident to arrest. If so, it reacted, much as it would later in *Chimel v. California*,⁵⁹ by narrowing the power to search incident to arrest. It used the hard-choice approach outlined above.

55. 285 U.S. 452 (1932).

56. *Id.* at 463.

57. See *Chimel v. California*, 395 U.S. 752, 757 (1969); Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1058-60 (1975).

58. 285 U.S. at 467.

59. 395 U.S. 752 (1969).

It did not call for case-by-case adjudication of an officer's motives for making an arrest.

2. *Jones v. United States*— Professor Burkoff views *Jones v. United States*⁶⁰ as excluding the use of evidence because arresting officers acted with improper motivation.⁶¹ As does Professor LaFave,⁶² I view it as a case where the police relied upon one theory to justify their conduct, but late in the legal proceedings the prosecutors advanced an alternative theory. The Court found that the alternative theory would not justify the search because the officers' activities, for want of requisite intent, did not fit within the boundaries of that theory.

To understand *Jones* we must call to mind the familiar criminal law distinction between motive and intent.⁶³ Burkoff instead uses the words interchangeably.⁶⁴ Courts have repeatedly held that no proper search incident to arrest can exist absent an intent to take the suspect into custody.⁶⁵ Thus an intent to arrest is the conscious objective of taking a suspect into custody for the purpose of charging him with an offense. The motive for the arrest is the reason the officer decided to make the arrest. Intent concerns whether the officer acted within the letter of the law in conducting a search. Motive concerns whether the officer, while acting within the letter of the law, did so for an improper purpose. Against this background we can understand *Jones*.

In *Jones*, federal agents entering a home apparently held the belief that either of two theories justified their conduct. They had a properly issued search warrant. The warrant was good only for daytime searches; however, the officers entered after dark. By the time the case reached the Supreme Court, prosecutors abandoned the claim that the daytime warrant justified the entry.⁶⁶ Alternatively, the agents claimed the right to enter without a valid warrant because they had probable cause to believe that evidence of an ongoing crime existed within the premises. The Supreme Court held this an insufficient exigency to justify a

60. 357 U.S. 493 (1958).

61. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 545.

62. See LaFAVE *Supp.*, *supra* note 1, § 1.2(g), at 45 n.101.

63. See W. LaFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 29, at 204 (1972); G. FLETCHER, *RETHINKING CRIMINAL LAW* § 6.5.5, at 452 (1978).

64. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 524, 535. In most cases, no confusion is generated by the use of the words interchangeably.

65. See, e.g., *People v. Cox*, 49 Ill. 2d 245, 274 N.E.2d 45 (1971). See also *State v. Cotterman*, 544 S.W.2d 322 (Mo. Ct. App. 1976); *State v. Baker*, 112 N.J. Super. 351, 271 A.2d 435 (1970).

66. 357 U.S. at 496.

warrantless entry.⁶⁷

Before the Supreme Court, prosecutors advanced a theory not previously suggested. They argued that the warrantless entry was justified as an entry to arrest a felon.⁶⁸ The Court did not have to reach that question, however, because it found that the officers did not enter to arrest.⁶⁹ Unless the officers entered with the intent to arrest, that is to take an occupant into custody for the purpose of charging him with an offense, an entry to arrest theory is inapplicable.⁷⁰ If police have the power to make a warrantless nighttime entry to arrest—an issue sidestepped in *Jones*—that power does not arise unless the entry is made with a plan to arrest a suspect, any more than the doctrine of search incident to arrest arises absent an intent to take a suspect into custody.

Jones is thus a case where the officers' conduct (defined to include actions and intent) did not fit within the letter of the fourth amendment doctrine upon which the prosecution relied. The *Jones* Court was not faced with a case where the officer acted within the letter of the law but with an improper motive. Rather, it was a case where the letter of the law required a certain intent and that intent was absent.

Lower court decisions are in accord with this interpretation of *Jones*.⁷¹ Consider a situation where officers have both a search warrant and probable cause to arrest a suspect who they reasonably believe to be on the premises named in the warrant. They, however, have not the slightest intent to arrest the suspect unless the search proves fruitful, perhaps because their probable cause comes from a professional informer who will not testify in court and whose uncorroborated testimony, at any rate, would not convince a jury of the suspect's guilt beyond a reasonable doubt. Officers search, find narcotics, and then arrest. The warrant, for technical reasons, turns out to be invalid. The prosecution seeks to justify the entry as a warrantless entry to arrest. The search can be justified as a search incident to arrest, prosecutors argue, even though it slightly preceded the arrest, as long

67. *Id.* at 497-98.

68. See LAFAVE Supp. *supra* note 1, § 1.2(g), at 46; Burkoff, *Bad Faith Searches*, *supra* note 6, at 95-98. If that theory fit the facts, the Court would have been presented with a question discussed by both LaFave and Burkoff: where officers act under a theory that in fact cannot justify their conduct, should a court uphold their actions under another theory that would justify their conduct? This is an interesting question, but not one involving an issue of pretext.

69. 357 U.S. at 500.

70. See *supra* note 63 and accompanying text.

71. See, e.g., cases cited *supra* note 65.

as the officers had probable cause to arrest the suspect before they searched him.⁷²

In this situation courts, citing *Jones*, have responded that the prosecution cannot rely on an entry-to-arrest theory because the police did not have the required intent to arrest when they entered.⁷³ These courts have not had to discuss pretext issues because the officers, for want of requisite intent, did not act within the letter of the fourth amendment theory alleged to justify their conduct. Indeed, how can police officers abuse the power to enter for the purpose of arrest if they did not have the intent to arrest when they entered?

This is not to say that there is no such thing as a pretextual entry to arrest. In many cases, defense lawyers have argued that officers entered premises with the intent to arrest, acting legally but motivated by the hope of discovering incriminating evidence, either in plain view or in a search incident to arrest. These cases pose the pretext issue.⁷⁴ *Jones* did not because, at least in the Supreme Court's view, for want of the requisite intent, the officers did not act within the letter of the law.⁷⁵

3. *Abel v. United States*—The next major Supreme Court opinion Professor Burkoff relies upon to illustrate the Supreme Court's former demonstration of concern regarding pretextual fourth amendment activity is *Abel v. United States*.⁷⁶ True, dictum in Justice Frankfurter's majority opinion suggests that the Court might exclude evidence, in an appropriate case, where the police, though acting within an approved fourth amendment

72. These were the facts in *People v. Cox*, 49 Ill. 2d 245, 274 N.E.2d 45 (1971).

73. See, e.g., *id.*; *State v. Baker*, 112 N.J. Super. 351, 271 A.2d 435 (1970).

74. In cases where the officer entered a home while in possession of an arrest warrant and, in fact, executed the warrant, it is extraordinarily difficult to argue that the officers did not intend to make an arrest. Nevertheless, defense lawyers, by focusing on motive, often make out plausible pretext claims. See, e.g., *Harding v. State*, 301 So. 2d 513 (Fla. App. 1974), cert. denied, 314 So. 2d 151 (Fla. Dist. Ct. 1975); *State v. Hoven*, 269 N.W.2d 849 (Minn. 1978); Cf. *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983).

75. The *Jones* Court inferred a lack of intent to arrest from evidence which suggested that the officers did not have reason to believe that offenders were within the premises which they entered, 357 U.S. at 496 n.1, 500. In summarizing the Court's approach, I do not necessarily agree with it. Officers could have intent to arrest contingent upon the obvious requirement that a suspect will be found within the premises. The Court could have taken a different route without abandoning the hard-choice approach. It could have said that the entry was unlawful for want of probable cause to believe that some particular suspect was within, thus requiring (1) probable cause to believe that a particular person had committed a crime, and (2) probable cause to believe that such a suspect was within the premises. Concerning the first requirement, see *Johnson v. United States*, 333 U.S. 10 (1948); *People v. Harshbarger*, 24 Ill. App. 3d 335, 321 N.E.2d 138 (1974). Concerning the second requirement, see *infra* notes 151-52 and accompanying text.

76. 362 U.S. 217 (1960). See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 545.

doctrine, did so for an improper purpose. On the other hand, neither in *Abel*, where the claim of pretext was rather compelling, nor in any other case has the Supreme Court acted in accordance with this suggestion. Frankfurter's formulation of what constituted pretextual fourth amendment activity made it difficult for defense counsel to invoke his dictum. On the other hand, Justice Brennan's dissent in *Abel*, never discussed by Professor Burkoff, contains a strong attack upon the approach suggested in Frankfurter's dictum, which is also Burkoff's solution. It instead endorses the concept of narrowing the fourth amendment doctrine that gives rise to the abuse, which is the solution I have discussed under the label "hard-choice."

The Federal Bureau of Investigation (FBI) had been investigating *Abel* in connection with espionage. The Justice Department felt that available evidence was too slim to justify an arrest or an indictment. An FBI agent then informed the Immigration and Naturalization Service (INS) that the FBI believed that *Abel* was an illegal alien. The FBI arranged to participate in the INS arrest of *Abel* on an administrative warrant. At his hotel room just before the arrest, INS agents allowed FBI officials to question *Abel* about espionage activities. When interrogation yielded no evidence, the FBI agents signalled the INS agents to arrest *Abel* on the deportation warrant. They then watched as INS agents searched the room incident to the administrative arrest. After agents removed *Abel* and allowed him to check out of the hotel, FBI agents searched the room under the theory of abandonment.

In the espionage prosecution, defense counsel sought to exclude, on a pretext theory, evidence discovered during the search incident to the administrative arrest. They contended that the true purpose of the arrest was to discover evidence of espionage. They argued that an INS warrant cannot properly be used for such purpose. They claimed that government agents were not motivated by a desire to take *Abel* into custody pending the outcome of deportation proceedings.

Frankfurter wrote: "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts."⁷⁷ Frankfurter did not state that such stern resistance should take the form of an exclusionary remedy, although some of his words implied

77. 362 U.S. at 226.

that such relief would be proper in an appropriate case.

In the case at hand, however, over a strong dissent by Justice Douglas,⁷⁸ Frankfurter deemed the Court bound by lower court determinations that the INS agents had acted in "good faith." Going beyond this specific determination, Frankfurter seemed to employ a test for "bad faith" that was very difficult to meet. He stressed that the INS acted on information about alleged alienage as they would in a case where no hint of a more serious crime existed. The agents simply obtained an administrative arrest warrant and executed it with the assistance of the FBI. As Professor LaFave notes, Frankfurter's opinion in *Abel* emphasized that the INS officers did not depart from routine procedures.⁷⁹ But, if the police need only follow standard procedures, what motivates the officer will be irrelevant and findings of pretext will almost never influence a suppression ruling.

Frankfurter added other comments that make one wonder whether he would have found pretextual fourth amendment activity in any case. Specifically, he denounced the notion that authorities should lose the power to make a deportation arrest simply because they also suspect the arrestee of espionage.⁸⁰ I interpret that denunciation to imply that courts should not prevent an officer from making an otherwise valid traffic stop merely because the officer also suspects the driver of having marijuana in his or her car. Likewise, they should not prevent a police officer from conducting an otherwise proper inventory search merely because he also suspects that the search may yield heroin. Finally, Justice Frankfurter's denunciation suggests, as Justice Rehnquist has said, much to the consternation of Professor Burkoff, that there is nothing wrong with customs officials acting within the vessel document inspection exception to the warrant requirement of the fourth amendment, even though the officials suspect they might observe contraband in plain sight once they board the vessel.⁸¹ Frankfurter's declaration that the government should not have to choose between two proper governmental functions (deporting illegal aliens and investigating

78. *Id.* at 241 (Douglas, J., dissenting). Douglas argued that the FBI agents' purpose was to obtain espionage evidence. He refused to invoke the term "bad faith" because he believed that such a purpose was perfectly natural. *Id.* at 245. He concluded, however, that FBI agents must not be allowed to utilize an immigration administrative arrest in pursuit of such a goal. *Id.* at 247.

79. LAFAVE Supp., *supra* note 1, § 1.2(g), at 51.

80. 362 U.S. at 228-29.

81. *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983). *See infra* notes 170-91 and accompanying text.

espionage)⁸² sounds as if he would not have condemned agents who acted within the letter of the law, even where surrounding circumstances strongly suggested a motive for using the letter of the law for some unintended purpose.

Justice Brennan's dissent in *Abel* is the most extensive Supreme Court opinion analyzing pretextual search claims.⁸³ Brennan's proposed solution would remove the incentive to use an exception to the fourth amendment for the wrong reason by narrowing the exception. He would have deemed unreasonable, within the meaning of the fourth amendment, a search of an entire hotel room incident to an administrative arrest. This approach in *Abel* mirrors one Brennan urged nearly a quarter century later in *United States v. Villamonte-Marquez*:⁸⁴ narrow the governmental power instead of making case-by-case assessments of whether government agents acted from improper motives, as Professor Burkoff would have courts do. In his *Abel* dissent, Brennan specifically denounced the approach that Professor Burkoff later endorsed. In his eagerness to blame a Burger Court insensitive to individual rights for not adopting his solution to the pretext problem, Burkoff has not once noted Brennan's opinion in *Abel* or the consistent approach that Brennan took in *Villamonte-Marquez*.

In *Abel*, Brennan specifically declared that it was useless to make the admissibility of evidence turn upon a question of good faith.⁸⁵ Once a court finds that the officers acted within the limits of a recognized fourth amendment doctrine, it is impossible to state what the court should deem a subterfuge.⁸⁶ He pointed out that a search incident to any administrative arrest might turn up evidence of a serious crime and "this possibility will be well known to the arresting officer."⁸⁷

Brennan then presented a logical means of determining an officer's true motive, suggesting that the more the officer had reason to suspect a serious crime, the more we should suspect that he acted for an improper purpose. Brennan concluded, however, that the use of such a standard demonstrates the folly of the "bad faith" approach. "[I]t would appear a strange test as to

82. 362 U.S. at 229.

83. 362 U.S. 217, 248 (1960) (Brennan, J., dissenting). Chief Justice Warren, Justice Douglas, and Justice Black joined Brennan's dissent.

84. 462 U.S. 579, 593 (1983) (Brennan, J., dissenting). See *infra* notes 190-91 and accompanying text.

85. 362 U.S. at 253.

86. *Id.*

87. *Id.*

whether a search which turns up criminal evidence is unreasonable, that the search is the more justifiable the less there was antecedent probable cause to suspect the defendant of crime.”⁸⁸ Although some recent decisions that reject a bad faith approach reflect no awareness of Brennan’s declaration, some courts have made the very same observation: when the letter of the law allows certain fourth amendment activity, why should we prohibit such activity only when government agents have reason to suspect serious crime?⁸⁹

At some length in *Abel*, Brennan suggested that the remedy is to narrow the power that gave rise to the abuse. He proposed circumscribing the scope of a search incident to arrest, at least where a neutral judicial magistrate does not authorize the arrest. He further declared “[t]he remedy is not to invite fruitless litigation into purity of official motives or the specific direction of officials’ motives.”⁹⁰ Echoing the *Abel* dissent of Justice Douglas, he added, “[o]ne must always assume that the officers are zealous to perform their duties.”⁹¹

4. *Coolidge v. New Hampshire and Texas v. Brown*— Professor Burkoff also finds support for his position in the plurality opinion of *Coolidge v. New Hampshire*.⁹² That opinion declared that, subject to certain exceptions, a post-intrusive seizure of evidence in plain view is proper only if the discovery of such evidence is inadvertent.⁹³ As Burkoff notes, the Court in *Texas v. Brown*⁹⁴ left open the possibility that the fourth amendment requires inadvertence.⁹⁵

As Burkoff argues, in *Coolidge* the Supreme Court reflected obvious concern that officers would use the right of “entry to

88. *Id.*

89. See *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983) (citing *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980)). See generally *infra* notes 226-30 and accompanying text.

90. 362 U.S. at 254.

91. *Id.*

92. 403 U.S. 443 (1971).

93. By a “post-intrusive” seizure I mean one made after the officers already have engaged in some fourth amendment activity, such as an entry to arrest. See generally Moylan, *supra* note 57, at 1073-78. Because the *Coolidge* plurality invoked the inadvertence concept in order to reduce incentive for pretextual use of fourth amendment activity, it would make no sense to limit the plain view doctrine where officers see evidence in a public place without having engaged in some prior search or seizure.

94. 460 U.S. 730 (1983).

95. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546-48. Thus *Brown*, without resolving the question, noted that some courts had refused to enforce an inadvertence limitation because only four of the *Coolidge* Justices had concurred in the portion of the opinion which recognized such a limitation on plain view seizures. 460 U.S. at 743 n.8.

arrest" in order to get onto the suspect's property (and often into his home) and spot evidence that, from their newly and lawfully acquired vantage point, would be in plain sight. Indeed, numerous lawful fourth amendment intrusions—from stops of traffic offenders to inventories of an arrestee's vehicle—could be motivated by a desire to spot and seize evidence under the plain view doctrine.

The Court did not, however, invoke Burkoff's approach. It did not declare that courts should invalidate a post-intrusive plain view seizure where the officer made the initial intrusion motivated by the desire to gain a vantage point for spotting evidence. Instead the *Coolidge* Court used the hard-choice approach. It narrowed the doctrine that gives rise to the potential for abuse. The Court said that post-intrusive plain view seizures are only proper if the discoveries were inadvertent. Individual motives are irrelevant. What counts is whether the officers, before they set out to make the arrest, had a substantial reason to believe (typically quantified as probable cause) that they would discover the items.⁹⁶

Professor Burkoff finds an inconsistency between other recent decisions, such as *Villamonte-Marquez*⁹⁷ and *Texas v. Brown*.⁹⁸ He says that *Brown* shows a concern for pretext searches while other recent decisions do not.⁹⁹ But both *Brown* and the other decisions reject Burkoff's approach. None calls for case-by-case examination of police officers' motives. *Coolidge*, *Brown*, and the other decisions like *Villamonte-Marquez* all show the hard-choice approach at work. To the extent that *Coolidge* and *Brown* adopt an inadvertence requirement, the Court has examined a fourth amendment doctrine, found it susceptible to frequent pretextual use, and then narrowed the doctrine in the hope of reducing the possibility for abuse.

5. *South Dakota v. Opperman*—Some observers of police activity believe that the police frequently use the inventory search power as a pretext for discovering incriminating evidence. Before *South Dakota v. Opperman*,¹⁰⁰ some lower courts expressed fear of such pretextual use. Some employed the hard-choice method and greatly limited the powers of the police to inspect property that had come into police custody. Others may

96. See, e.g., *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979); *State v. Davenport*, 510 P.2d 78 (Alaska 1973).

97. See *infra* notes 170-91 and accompanying text.

98. Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546-48.

99. *Id.* at 523-38, 547-48.

100. 428 U.S. 364 (1976).

have embarked upon a case-by-case exploration of police motivation.¹⁰¹ Undoubtedly, the Supreme Court was aware of the pretext possibility even though in *Opperman* no suggestion arose that the possibility of discovering evidence motivated the particular inventory.

At any rate, the *Opperman* Court upheld the inventory search doctrine. Professor Burkoff finds in *Opperman* a judicial expression of concern in a single sentence: "As in *Cady*, there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive."¹⁰² This sentence hardly directs lower courts to embark upon a case-by-case analysis of police motives and suppress evidence when they detect an investigatory motive. Such an approach might be consistent with the quoted sentence, but it is not a course that the sentence commands. In fact, many lower courts responded by using the hard-choice approach. They reduced the number of instances where the police could properly invoke the inventory search theory. Some reminded the police that a search is simply not an inventory unless performed in accordance with prescribed departmental rules as to time, place, and procedures.¹⁰³ Others limited the circumstances in which the police were allowed to take custody of property.¹⁰⁴ Still others required the police to safeguard closed containers without inspecting their contents.¹⁰⁵ All of these measures decrease the possibility that the police will use inventory searches motivated by a desire to find incriminating evidence. Of course, such decisions may also undermine somewhat the three purposes of inventory searches that the Supreme Court recognized as legitimate.¹⁰⁶ That is the hard choice

101. For an extensive discussion, see *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973).

102. 428 U.S. at 376, cited in Burkoff, *Bad Faith Searches*, *supra* note 6, at 78.

103. See, e.g., *United States v. Hellman*, 556 F.2d 442 (9th Cir. 1977); *State v. Hudson*, 390 A.2d 509 (Me. 1978).

104. See, e.g., *Arrington v. United States*, 382 A.2d 14 (D.C. 1978); *Session v. State*, 353 So. 2d 854 (Fla. Dist. Ct. App. 1977); *G.B. v. State*, 339 So. 2d 696 (Fla. Dist. Ct. App. 1976); *People v. Fox*, 62 Ill. App. 3d 854, 379 N.E.2d 917 (1978).

105. See, e.g., *People v. Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied*, 453 U.S. 923 (1981); *People v. Hamilton*, 74 Ill. 2d 457, 386 N.E.2d 53 (1979). The debate over whether authorities must secure containers without inspecting their contents predated *Opperman*. Compare *United States v. Robbins*, 424 F.2d 57 (6th Cir. 1970) (held that warrantless search of suitcase at police station was valid), *cert. denied*, 402 U.S. 985 (1971) with *State v. McDougal*, 68 Wis. 2d 399, 228 N.W.2d 671 (1975) (held that warrantless search of locked suitcases was unreasonable). *Illinois v. LaFayette*, 462 U.S. 640 (1983), is arguably inconsistent with decisions that require authorities to secure containers without inventorying them.

106. See *supra* note 13 and accompanying text. The requirement that officers retain

that lower courts have made.

Similarly, the four dissenting justices in *Opperman*, Marshall, Brennan, Stewart, and White, did not advocate that the Court adopt a case-by-case analysis of police motives for conducting an inventory search.¹⁰⁷ Instead, they indicated that, absent consent from the owner, the police simply should not be allowed routinely to inspect property that comes into their control. Justice Marshall's opinion did not argue that otherwise the police might misuse an inventory search to try to catch a criminal. He contended instead that the right to search *any* citizen's property that falls into lawful police custody is an invasion of privacy that outweighs the reasons advanced as justifying the inventory search exception. Justice Marshall objected to the very existence of the power even when exercised for the reasons that the *Opperman* majority thought legitimate, and not just to the possibility of misuse for the illegitimate purpose of gathering incriminating evidence.

6. *Steagald v. United States*— According to Professor Burkoff, *Steagald v. United States*¹⁰⁸ exemplifies the Supreme Court's laudable application of "pretext search doctrine."¹⁰⁹ In fact, *Steagald* demonstrates the hard-choice approach at work and contains not a hint of support for Professor Burkoff's case-by-case, individual motivation methodology.

Burkoff notes that the *Steagald* Court spoke of the potential for pretextual searches that would have existed had the Court adopted the Government's position.¹¹⁰ The Court said that entries of third persons' homes, made for the purpose of arresting a suspect within, *might have been employed* as pretexts for searches of the homes. Because of the pretext possibility and other reasons, the Court mandated the use of search warrants in most instances where police enter a third person's home in the exercise of their right to arrest a suspect. By imposing a search warrant requirement, the Court expanded a fourth amendment limitation, partly from a desire to reduce the opportunity for pretextual use of the power. This is the hard-choice approach, pure and simple.

Under Burkoff's case-by-case methodology, the Court would

custody of a container without inspecting its contents undermines the second and possibly the third rationales for inventory searches: protection against false claims of theft and against dangers posed by the property.

107. 428 U.S. 364, 384 (Marshall, J. dissenting) (1976).

108. 451 U.S. 204 (1981).

109. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546.

110. *Id.*; see 451 U.S. at 215.

have reacted quite differently when presented with a claim that the possibility of pretextual searches arises from the doctrine espoused by the Government. The Court would have permitted the police, armed only with an arrest warrant, to enter a third person's home to arrest a suspect reasonably believed to be within. The Court, however, would require exclusion of any evidence found within when an analysis of the individual facts demonstrated that the officers' true motive for entering was the hope of discovering evidence. The Supreme Court simply did not take this approach in *Steagald*. In lauding the *Steagald* Court, Burkoff has unwittingly lauded the hard-choice approach to pretextual search problems.

7. *Massachusetts v. Painten*— From his reading of Justice White's dissenting opinion in *Massachusetts v. Painten*,¹¹¹ Professor Burkoff draws inferences about the majority's views in that case.¹¹² He suggests that the inferred majority viewpoint demonstrates the Court's concern about pretextual fourth amendment activity. I doubt whether this is so, but, at any rate, I feel certain that nothing in *Painten* constitutes support for Burkoff's solution to pretext problems.

The *Painten* dissent summarized the lower courts' view of the *Painten* facts.¹¹³ Police officers went to the suspect's home determined to make a warrantless entry, even though they lacked probable cause to arrest the suspect. The officers, however, did not carry out their plan to enter without probable cause. They obtained probable cause before they entered because *Painten*, in response to the approach of the police, engaged in activities, visible to the police, that created probable cause.

Justice White argued that if all this were true, the Court still should not require the suppression of evidence. However willing they were to violate the law, the officers did not do so because they had probable cause before they entered.¹¹⁴ As Burkoff acknowledges, *Painten* presented no pretext issue. It concerned the significance of an unfulfilled plan to violate the Constitution.¹¹⁵ Pretext problems occur where the officers, motivated by an improper purpose, utilize a recognized fourth amendment doctrine to justify their conduct.¹¹⁶

111. 389 U.S. 560 (1968).

112. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 77-78.

113. 389 U.S. at 563-64 (White, J., dissenting).

114. *Id.* at 564-65.

115. Burkoff makes this point at length. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 99-100.

116. See *supra* notes 10-12 and accompanying text.

Painten's significance to the pretext debate lies in the broad language of White's dissent that declares that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."¹¹⁷ Some who would condemn Professor Burkoff's "bad motivation" approach invoke White's language.¹¹⁸ As I note below, I do not subscribe to the simplistic notion that Burkoff's approach is wrong because it is hopeless to try to determine what was in a police officer's mind.¹¹⁹ Nevertheless, I cannot make the quantum leaps necessary to find support for Burkoff's position in the *Painten* majority's actions. The majority in *Painten* simply vacated the grant of certiorari because it found the record too unclear to resolve important constitutional questions. Even if, with Professor Burkoff, we drew the conclusion that the majority disagreed with Justice White's expressions concerning governing principles, we would not necessarily conclude that the majority favored the individual motivation resolution of pretextual search problems.

Recall that *Painten* did not pose a pretextual search problem. One can disagree with the broad proposition that inquiries "into the minds of police officers" should be irrelevant to a resolution of fourth amendment issues without endorsing such an inquiry to resolve the pretextual search issue. As Burkoff has noted¹²⁰ and as I discuss below,¹²¹ in some fourth amendment contexts the Supreme Court has deemed such an inquiry relevant. As Burkoff has again noted,¹²² a context involving an unfulfilled plan to violate the law (as in *Painten*) is different from a context involving a fulfilled plan to adhere to the letter of the law motivated by improper reasons (as in pretext searches). Perhaps the majority in *Painten*, if it had reached the issue, could have argued that a need exists to deter officers who intend to violate the law (as in *Painten*), but no need exists to deter officers who are determined to follow the letter of the law (as in pretext searches). At any rate, Professor Burkoff's apparent agreement with the result reached by the dissenters in *Painten*,¹²³ together with his adherence to an individual motivation approach in pretext searches, demonstrates, as he acknowledges, that resolution

117. 389 U.S. at 565.

118. See *infra* notes 193-94 and accompanying text.

119. See *infra* notes 195-203 and accompanying text.

120. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 107.

121. See *infra* notes 195-203 and accompanying text.

122. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 99-100.

123. *Id.* at 100.

of the *Painten* issue need not dictate resolution of the pretextual search issue.

8. *Other miscellaneous opinions*— Professor Burkoff cites other majority, concurring, and dissenting opinions to demonstrate Supreme Court concern for pretext searches in the era before *Scott* and *Villamonte-Marquez*. All contain the word “pretext,” but none lends support to Burkoff’s proposed resolution of pretextual search issues.

*Colorado v. Bannister*¹²⁴ involved a *Carroll* search of a vehicle after an officer approached the car to issue a ticket for a moving violation and observed in plain view incriminating evidence that created probable cause to search. Burkoff points to a footnote for support of his approach: “There was no evidence whatsoever that the officer’s presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants.”¹²⁵ The Court in *United States v. Robinson*¹²⁶ similarly noted the absence of evidence of pretext. The Supreme Court, however, did not say what it would have done if it had found evidence of pretext in *Bannister* or *Robinson*. In *Robinson*, for example, perhaps strong evidence of pretext would have persuaded the Court to prohibit searches incident to traffic arrests absent some objective data establishing the likelihood that a search would produce a weapon or evidence of the offense for which the police officer made the arrest. Neither in *Bannister* nor in *Robinson* does the Court suggest that courts should exclude the fruits of a search, on a case-by-case basis, where evidence supports the claim of pretext.

Burkoff also cites a footnote in Justice Rehnquist’s opinion for the Court in *United States v. Ceccolini*.¹²⁷ There the Court treated the scope of derivative evidence principles and said nothing about pretextual search issues. The majority refused to suppress the testimony of a witness whose identity as a potential witness had been discovered through a violation of the defendant’s fourth amendment rights. Rehnquist declared that the Court’s analysis might have been different if officers had violated a suspect’s rights for the “specific purpose of discovering witnesses.”¹²⁸

124. 449 U.S. 1 (1980).

125. 449 U.S. at 4 n.4, cited in Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546.

126. 414 U.S. 218, 221 n.1 (1973).

127. 435 U.S. 268, 276 n.4 (1978), cited in Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546 n.106.

128. *Id.*

This footnote suggests that even Justice Rehnquist might agree—contrary to Justice White’s broad assertion in *Painten*—that sometimes a fourth amendment issue should turn upon what is in a police officer’s mind. But if motivation has a proper role in derivative evidence analysis, it does not necessarily follow that courts ought to apply an individual motivation approach in the quite different context of pretextual search issues. When the Court in *Brown v. Illinois*¹²⁹ deemed the officer’s “purpose” relevant to the suppression of a statement secured following an illegal arrest, it might have been at odds with White’s dissent in *Painten*, but surely it said nothing about pretextual use of lawful fourth amendment activity.

Burkoff also relies upon other opinions of individual Justices to support his approach to problems of pretext searches and arrests. Burkoff notes Chief Justice Warren’s dissenting opinion to the Court’s dismissal of the writ of certiorari in *Wainwright v. City of New Orleans*.¹³⁰ Warren believed that the record clearly indicated that authorities arrested Wainwright on a vagrancy charge to gain a chance to interrogate him about a murder. The Chief Justice declared that “using a minor and imaginary charge to hold an individual . . . deserves unqualified condemnation.”¹³¹

The word “imaginary” suggests that Warren believed the police lacked probable cause for a vagrancy arrest. Thus, in his view, the case was not one where the police acted within the fourth amendment. We are left to speculate about what Warren would have said if he had believed that the police had acted within the fourth amendment but for an improper purpose. Would he have condemned the police, and what form would that condemnation have taken? *Wainwright* contains no evidence that Chief Justice Warren would have supported Professor Burkoff’s case-by-case approach to pretextual search problems.

Finally, consider Burkoff’s citation of Frankfurter’s dissent in *United States v. Rabinowitz*.¹³² Burkoff quotes text from that dissent that one can read to express concern that the police might use the powers to enter to arrest and to search incident to

129. 422 U.S. 590, 604 (1975).

130. 392 U.S. 598, 600 (1968) (Warren, C.J., dissenting), *discussed in* Burkoff, *Bad Faith Searches*, *supra* note 6, at 79 n.46. Contrary to Burkoff’s assertion, the case had nothing to do with whether evidence should be excluded.

131. 392 U.S. at 607.

132. 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting), *cited in* Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546 n.106.

arrest as a pretext to conduct warrantless searches of homes.¹³³ Yet Professor Burkoff ignores Frankfurter's proposed solution: limiting the right to search incident to arrest and the scope of such a search to instances where delay in obtaining a warrant would frustrate the legitimate reasons for a search incident to arrest.¹³⁴ Frankfurter thus would have narrowed a particular fourth amendment power in part from a desire to limit opportunities for pretextual searches. He acted in accordance with the hard-choice approach and avoided case-by-case analysis of police officers' motivation.

B. Cases Not Discussed by Professor Burkoff: Chimel, Payton, and Others

Undoubtedly all of us who have written about pretextual fourth amendment activity have overlooked some Supreme Court cases where defendants raised the specter of pretext. In *Zap v. United States*,¹³⁵ for example, the defendants unsuccessfully advanced an argument similar to the one later made in *Abel*¹³⁶ concerning the use by the FBI of administrative powers as a guise to aid law enforcement authorities in gathering evidence for prosecution. Without examining the briefs in all fourth amendment litigation before the Court, we cannot learn of every instance where defendants asked the Court to consider pretext possibilities.

There are, however, at least two decisions not discussed by Professor Burkoff that I believe we should consider in discussing claims of pretext, *Chimel v. California*¹³⁷ and *Payton v. New York*.¹³⁸ Although not directly confronted by claims of pretext in those cases, the Supreme Court used the hard-choice approach to narrow the opportunities authorities would have to manipulate the powers of arrest, entry to arrest, and search incident to arrest.

In the years before the *Chimel* decision, police were often suspected of using arrest and related powers to maximize the possibility of discovering, without search warrants, evidence of the crime for which they made the arrest. For example, the police

133. *Id.*

134. 339 U.S. at 79, 84, 85.

135. 328 U.S. 624 (1946), *vacated*, 330 U.S. 800 (1947).

136. See *supra* notes 76-91 and accompanying text.

137. 395 U.S. 752 (1969).

138. 445 U.S. 573 (1980).

might bypass opportunities to arrest a suspected felon until he entered his home. Then, without an arrest warrant or a search warrant, they would enter his home, arrest him, and conduct a search of the entire home "incident to arrest."¹³⁹ Or they might go to the arrestee's house, intending to arrest him if he were home, but primarily motivated by an opportunity to make "plain view" observations anywhere in his home (including closets) where the suspect conceivably might be hiding. Naturally, the police claimed the power to seize any incriminating evidence spotted during the course of their search for the suspect.¹⁴⁰

The *Chimel* Court noted the possibility that authorities would delay efforts to arrest until a suspect had entered his home.¹⁴¹ In response, it chose to restrict the scope of a proper search incident to arrest to that area that was within the arrestee's reach.¹⁴² *Chimel* thus reduced the incentive for police to bypass opportunities to arrest a suspect until after he had entered his house. It did not, however, eliminate the incentive altogether. The police could still make plain view observations in some parts of the suspect's home. They also could still search areas of the home within the arrestee's reach.

Professor Burkoff fails to tell us how he would resolve the problem of the "timed" or "delayed" arrest. "Delayed" police conduct does not fit his definition of a pretextual arrest. The officer does not arrest the suspect motivated solely by a desire to obtain evidence concerning a separate offense.¹⁴³ The officer's purposes are to secure successful criminal prosecution on the very charge for which he makes the arrest. Indeed, even if "predominant" motivation determined whether an arrest were pretextual, we still would have difficulty classifying delayed arrests as pretextual. The problem of delayed arrests is not the pretextual use of an arrest to gather unrelated but incriminating evidence, but rather the timing of the arrest so as to maximize the possibility of obtaining evidence. The pretextual arrest vocabulary simply does not fit.

Nevertheless, I assume Professor Burkoff, with his admirable

139. See, e.g., *People v. Johnson*, 45 Ill. 2d 283, 259 N.E.2d 57 (1970), cert. denied, 407 U.S. 914 (1972), a case where, as a defense lawyer, I unsuccessfully urged the Illinois Supreme Court to adopt a *Payton*-type rule.

140. See *infra* notes 148-52 and accompanying text.

141. 395 U.S. at 767.

142. *Id.* at 763.

143. See *Burkoff, Bad Faith Searches*, *supra* note 6, at 103-04; *Burkoff, Pretext Search Doctrine*, *supra* note 6, at 534 n.52.

desire for intellectual consistency, would use an individual motivation test. He probably would have responded to the delayed arrest problem by instructing judges to determine the officers' true motive for delaying an arrest. If judges found that officers delayed in order to be able to enter the suspect's home in quest of evidence, Burkoff probably would have directed the suppression of evidence found within.¹⁴⁴ If not, he may well have continued to tolerate expansive searches incident to arrest. By contrast, the Supreme Court used the hard-choice approach, ignoring individual motivation and narrowing the scope of searches incident to arrest.

In *Payton*, the Court further limited the incentive for police to use the delayed arrest tactic. The Court mandated the use of arrest warrants for non-consensual, non-emergency entries to arrest.¹⁴⁵ Of course, armed with an arrest warrant, the police still can delay efforts to arrest a suspect until after he has entered his home. In two respects, however, the *Payton* arrest warrant requirement should discourage use of the delayed arrest as a tactic for avoiding the search warrant requirement. As Professor Burkoff has reminded us,¹⁴⁶ pretextual activity often occurs because officers do not want to expend the time and energy necessary to get a warrant. It is not always true that officers who use a pretext lack probable cause necessary to get a warrant. Some officers avoid the warrant process at all costs.¹⁴⁷ After *Payton* they might choose to make arrests in a public place where arrest warrants are not mandated, thereby sacrificing the evidentiary advantages that follow from delaying an arrest until the suspect is at home. Second, some officers who choose to make a non-emergency arrest at the suspect's home, even though that requires a warrant, might also apply for a search warrant as long as they must apply for an arrest warrant. In either event, the *Payton* rule results in fewer delayed entries to arrest that are motivated by the desire to obtain evidence in the suspect's home without a search warrant.

The Court in dictum in *Payton* also addressed another abuse of the power to enter to arrest. A significant number of pre-*Pay-*

144. Prosecutors might offer other explanations to justify the police delay. For example, they might assert that public safety is better served by an arrest in a home rather than on the street. Cf. *Florida v. Royer*, 460 U.S. 491, 504-05 (1983).

145. 445 U.S. at 603.

146. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 101.

147. I will always recall the boast of Detective Butz that in fifteen years on the police force he had never obtained a warrant. *People v. Johnson*, 45 Ill. 2d 283, 259 N.E.2d 57 (1970), *cert. denied*, 407 U.S. 914 (1972) (Abstract of Record 20). See *supra* note 139 and accompanying text.

ton cases followed a scenario that the police repeated in *Payton* itself. In this scenario, the police enter a home, ostensibly to make an arrest, but fail to find the suspect inside. While looking in places where the suspect might be hiding, however, they come upon and seize incriminating evidence. The police have acted lawfully. The power to enter to arrest and the plain view doctrine, in combination, allow such lawful seizures.¹⁴⁸ From his discussion of *Jones*, I assume that Professor Burkoff would make legality of these seizures turn upon whether the officers' true motive was to make an arrest or was instead to discover incriminating evidence.¹⁴⁹ Before *Payton* some trial judges used just such a method.¹⁵⁰

The Court, however, implicitly rejected such an approach in dictum in *Payton*. It instead required that the police have probable cause to believe that the suspect is within at the time they enter.¹⁵¹ This requirement eliminates the possibility of pretext entries in most cases where a trial judge, using the individual motivation approach, would have suppressed evidence.¹⁵²

Once again, then, the Supreme Court used the hard-choice approach. As usual, that approach involved some impairment of law enforcement interests. Much merit resided in the old Illinois rule under which an officer, with probable cause to arrest a suspect, could enter the suspect's home as long as any real possibil-

148. See, e.g., *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970); *People v. Morales*, 48 Ill. 2d 396, 271 N.E.2d 33 (1971); *People v. Sprovieri*, 43 Ill. 2d 223, 252 N.E.3d 531 (1969).

149. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 79-81.

150. See *People v. Sprovieri*, 43 Ill. 2d 223, 252 N.E.2d 531 (1969), *aff'g* 95 Ill. App. 2d 10, 238 N.E.2d 115 (1968). The trial judge there had made an express finding that the officers had entered for the purpose of discovering evidence and not to arrest the defendant. Although I argued this case for the State, I must concede that the evidence supported his finding. The testimony suggested that the suspect might have fled twenty-four hours earlier. The officers looked through an undraped window and saw no one in the house. They entered and found no one. They then went to a garage and, through a keyhole, were able to see all but one corner of the garage. They saw no one. They entered the garage on an "entry to arrest" theory and found in plain view a bloody bicycle chain which might have been the murder weapon. The Illinois Supreme Court rejected an individual motivation approach. It also held that the officers did not need probable cause to believe that Sprovieri was in the garage. The court reasoned that where the officers have probable cause to believe that a suspect has committed a crime, it is reasonable for them to look for him at his home before turning the quest elsewhere.

151. 445 U.S. 573, 583, 602-03 (1980). See also *id.* at 616 n.3 (White, J., dissenting); *Steagald v. United States*, 451 U.S. 204, 211 n.6 (1981).

152. Viewing the objective evidence, in cases where the evidence suggests that the officers had little reason to believe that the suspect was at home, a court is likely to conclude that the purpose in entering was a quest for evidence. See, e.g., *People v. Sprovieri*, 43 Ill. 2d 223, 252 N.E.2d 531 (1969), *aff'g* 95 Ill. App. 2d 10, 238 N.E.2d 115 (1968).

ity existed that the suspect might be inside.¹⁵³ By requiring probable cause to believe that the suspect is within, the Court in *Payton's* dictum attached greater value to the sanctity of the home while, at the same time, it reduced the possibility that police would make pretextual use of the power to enter to arrest.

C. A Summary of the Supreme Court Approach: The Hard-Choice Methodology at Work

Like Professor Burkoff, I have found many instances in which the Supreme Court evidenced concern over the possibility of pretextual use of a fourth amendment power. I have found none, however, where a majority of the Justices has directed the suppression of evidence upon a determination that the police obtained such evidence through pretextual conduct. I cannot even find clear dictum that supports such an approach, unless I erroneously consider references to the pretext problem to be calls for the case-by-case solution that Burkoff endorses. Justice Douglas, speaking for himself in *Abel*, is the only Justice who has ever endorsed the individual motivation approach.¹⁵⁴ His dissent occurred in a case that, I believe, presented a strong claim that authorities had acted pretextually.¹⁵⁵

By contrast, the Supreme Court has consistently taken into account the possibility of pretextual fourth amendment activity in determining whether to expand a particular fourth amendment limitation upon police conduct. Sometimes it has left police practices untouched, sometimes it has narrowed the scope of police practices; always it has considered governmental and individual interests and not just pretext possibilities. This is the hard-choice approach.¹⁵⁶

153. See *People v. Morales*, 48 Ill. 2d 396, 271 N.E.2d 33 (1971); *People v. Sprovieri*, 43 Ill. 2d 223, 252 N.E.2d 53 (1969); *People v. Stibal*, 56 Ill. App. 3d 1048, 372 N.E.2d 931 (1978); *People v. Carter*, 132 Ill. App. 2d 572, 270 N.E.2d 603 (1971), *cert. denied*, 406 U.S. 962 (1972).

154. 362 U.S. 217, 241 (Douglas, J., dissenting). See *supra* note 78 and accompanying text.

155. See *supra* notes 76-91 and accompanying text.

156. If anyone remains unconvinced, let that person take up this challenge: represent before the highest court of a state an accused who advances the argument that the trial judge should have suppressed evidence because a police officer's conduct was improperly motivated by a quest for evidence. Try to find United States Supreme Court decisions to support the contention that the Court has utilized or spoken approvingly of the individual motivation approach. I suspect that most persons will do as I did as defense counsel in the summer of 1984: abandon efforts to rely on Supreme Court authority and resort to the use of lower court opinions. That seems a wiser course than selecting a sentence of

IV. THE CURRENT CASES: *Scott v. United States* AND *United States v. Villamonte-Marquez*

A. Scott

Shortly after the Supreme Court decided *Scott v. United States*,¹⁵⁷ both Professor Burkoff and Professor LaFave suggested that *Scott* might have great significance for the pretext search debate. Burkoff was somewhat tentative, outlining, both then and later, a variety of interpretations of *Scott*.¹⁵⁸ Although critical of *Scott's* underpinning, LaFave seemed to read *Scott* as firmly dictating a rejection of the "individual motivation" test endorsed by Professor Burkoff.¹⁵⁹ In retrospect, Burkoff and LaFave may be proved to have been right in emphasizing the importance of *Scott* to pretext issues. I wonder, however, if their analysis of *Scott* did not function as a self-fulfilling prophecy, making respectable an interpretation which is not at all obvious from a reading of that decision.

Simply put, *Scott* did not involve a pretext claim. The issue was whether authorities complied with a statutory and constitutional requirement, not whether they acted for an improper purpose while acting within an accepted fourth amendment doctrine. More particularly, the Court considered whether, in conducting certain court-authorized wiretaps, agents honored the statutory requirement that interceptions "shall be conducted

Supreme Court dictum here or there which will appear very weak under any close scrutiny of what the Court actually did in the cited cases. See Appellant's Brief at 37-40, *People v. Hattery*, No. 58789 (Ill. Nov. 21, 1985) (available Jan. 6, 1986, on LEXIS, States library, Ill. file). The facts there are basically those of the hypothetical outlined in the text accompanying *infra* note 206.

157. 436 U.S. 128 (1978).

158. See Burkoff, *Inconsistent Exclusionary Doctrine*, *supra* note 6, at 181-90; Burkoff, *Bad Faith Searches*, *supra* note 6, at 81-84; Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 525-30. I find especially puzzling Burkoff's suggestion that *Scott* might have forbidden consideration of "subjective" evidence of pretext while permitting "objective" evidence. See *id.* at 530, 532. By subjective evidence, Burkoff seems to mean the testimony of the officer as to his own motive. By objective evidence, Burkoff seems to mean circumstantial evidence of motive or what he calls "extrinsic rather than testimonial evidence," a dichotomy which escapes my understanding. *Id.* at 526. I find absolutely no support for this interpretation of *Scott*. That decision, in a particular context, declared motive irrelevant to legality. It was not concerned with whether the proof of an improper motive was established by an admission of the officer rather than by an inference drawn from testimony concerning the circumstances of the intrusion. Burkoff never explains why a court might condemn a search because of an inference of an officer's bad motive but not because of the officer's direct admission of a bad motive.

159. LaFAVE Supp., *supra* note 1, § 1.2(g), at 19-84.

in such a way to minimize the interception of communications not otherwise subject to interception."¹⁶⁰ The agents intercepted all conversations over a particular phone for a period of one month. They monitored each such conversation to its conclusion. They did not act in accordance with any criteria designed to require termination of monitoring of apparently innocent and non-targeted conversations.

The Court decided that "subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional."¹⁶¹ Justice Rehnquist's majority opinion adopted what he termed "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time."¹⁶² Under this approach, Justice Rehnquist analyzed what would have happened if authorities had adopted standards designed to prevent the monitoring of non-target conversations without frustrating the purposes of the interception order. He concluded that the result would have been about the same.¹⁶³ Agents would have terminated the monitoring of few, if any, of the conversations.

Whether courts should construe minimization in this "objective" fashion, without regard to the agent's apparent willingness to make no effort to avoid interception of any conversations, however unrelated to the authorized surveillance, is an interesting question. In defense of the *Scott* result, perhaps we can analogize the issue, as Burkoff once did,¹⁶⁴ to the one outlined in Justice White's *Painten* dissent: where agents are willing to violate the law if necessary but do nothing unlawful, should we invoke an exclusionary remedy?¹⁶⁵ We can also note the anomaly of reaching two different results in cases where agents engage in identical conduct, solely because one acted with a pure heart while another was willing to disregard legal requirements.

Whether we should define "minimization" to exclude all references to an agent's purpose, however, does not necessarily dictate whether we should exclude an agent's purpose in all analyses of the constitutionality of governmental action. Professor Burkoff has also recognized, unlike Professor LaFave, that the Court has debated the relevance of purpose in a wide variety of constitutional law contexts¹⁶⁶ and has ascribed relevance to pur-

160. 436 U.S. at 130.

161. *Id.* at 136.

162. *Id.*

163. *Id.* at 141-42.

164. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 83-84.

165. See *supra* notes 111-14 and accompanying text.

166. See *infra* notes 195-203 and accompanying text.

pose according to the particular context.¹⁶⁷ He expressed the hope that the Court would not import the discussion of purpose from the minimization debate for use in the pretextual search debate.¹⁶⁸ After *United States v. Villamonte-Marquez*, however, he expressed the belief that perhaps his worst fears had come true.¹⁶⁹

B. *United States v. Villamonte-Marquez*

In *Villamonte-Marquez*¹⁷⁰ the Supreme Court considered the validity of one portion of a statute that authorized customs agents to engage in a variety of warrantless intrusions against certain vessels.¹⁷¹ Specifically, the Court passed judgment on the portion of the statute that allows officials to board a vessel and inspect the vessel's documentation. The Court recognized that one purpose of the document-inspection provision is to assist agents in detecting efforts to import contraband substances.¹⁷²

A single footnote in the majority opinion indicates that defense counsel made a claim of pretext.¹⁷³ Although the Court does not spell out that argument in detail, we can hypothesize concerning the nature of the pretext claim in the terms defined in this article. A proper purpose of the board-and-inspect-documents power is to allow authorities to read written documents that might help create cause for a warrantless search. A proper purpose, however, is not to allow authorities to board the ship to

167. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 114. I do not find this point made in LaFave's discussion of *Scott*. See LAFAVE Supp., *supra* note 1, § 1.2(g), at 43-54.

168. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 83-84.

169. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 524.

170. 462 U.S. 579 (1983).

171. Unfortunately the Court does not quote the full statute, expressly focusing only on the document inspection power. In fact, the statute authorizes warrantless searches of vessels in quest of contraband, without any requirement of reasonable suspicion or probable cause. See 19 U.S.C. § 1581(a), (g) (1982). The Court explicitly chose not to rule on the validity of that power. Yet that portion of the statute clearly indicates that Congress enacted the statute to aid authorities in their efforts to discover contraband.

172. The Court wrote that documentation laws assist "in the prevention of entry into this country of controlled substances . . ." 462 U.S. at 591. Professor Burkoff does not squarely acknowledge that a rationale for document inspection deemed legitimate by the Court is to aid authorities in detecting smuggling. He never really says what he believes to be the *proper* purpose of the document inspection power. Yet we must know this if we are to determine whether use of the power was pretextual. See *supra* notes 10-12 and accompanying text. Burkoff seems to assume that the proper purposes of vessel document inspections are entirely analogous to the proper purposes of motor vehicle title and driver's license inspections and exclude the need to prevent the smuggling of contraband.

173. 462 U.S. at 584 n.3.

gain a position to make "plain view" observations of non-transportable items such as narcotics. In *Villamonte-Marquez*, evidence established that the boarding was motivated by the hope of making plain view observations of narcotics. Hence, the trial court should have suppressed evidence observed and seized under plain view principles.¹⁷⁴

Professor Burkoff seems outraged that the majority, which upheld the document-inspection provision, did not apply the pretext doctrine to suppress the evidence.¹⁷⁵ Yet he is completely silent about Justice Brennan's dissent,¹⁷⁶ which makes no suggestion that the Court should have utilized an individual motivation test to require exclusion of the evidence. In fact, *Villamonte-Marquez* was an especially poor case in which to employ Burkoff's recommended approach.

The pretext claim in *Villamonte-Marquez* consisted of proof that the officers had some reason to believe that the ship in question was transporting narcotics. Recall that a *legitimate* purpose of a document inspection (assuming the validity of the statute) is to allow authorities to gain, from a document inspection, cause to conduct a warrantless search of the vessel.¹⁷⁷ Accordingly, the very evidence supporting the claim that the officers sought to use the document-inspection exception as a guise to gain a vantage point for plain view observations would also constitute evidence that the officers were motivated by desires to get further probable cause to search through a document inspection. It would be impossible, therefore, to tell whether the motive was predominantly legitimate (to gain evidence through a document inspection) or illegitimate (to gain evidence through plain view observations) without officers' admissions of their motivations. Under Professor Burkoff's test, which requires the officers' motive be entirely illegitimate, a claim of pretext could never prevail absent the officers' admission that their sole purpose was to make plain view observations.

I assume, of course, that the officers acted within the letter of the law. They must either have made a document inspection or have embarked upon a course that suggested that they would have made such an inspection if their plain view observations of

174. I do not mean to suggest that Burkoff or the respondents would have articulated the pretext argument in this fashion. If one assumes that the authority to inspect documents is not intended to aid the quest for marijuana, one can make a much simpler pretext claim.

175. Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 528-36.

176. 462 U.S. at 693 (Brennan, J., dissenting).

177. See *supra* notes 172-74 and accompanying text.

incriminating evidence had not intervened before they reached the documents. If my assumption is incorrect, no pretext problem exists because the officers did not act within the scope of their document-inspection power.¹⁷⁸

Numerous "administrative search" statutes allow entry to inspect documents of regulated industries in search of clues that suggest a violation of the law.¹⁷⁹ Agents might use these powers in the hope of making plain view observations of contraband. Professor Burkoff's "sole motivation" test for pretext proves useless in most of these cases because evidence that suggests that the desire to obtain evidence about contraband motivated agents to try to make plain view observations will also demonstrate a motive to inspect the documents for clues about other criminal activity.

More generally, *Villamonte-Marquez* demonstrates a major problem that occurs in most situations where Burkoff's proposal serves as a solution to the pretext problem. Absent an officer's admission of an improper motive, Burkoff's approach would rely upon circumstantial evidence to establish that an officer's real reason for exercising a fourth amendment power was to make a warrantless search for evidence. The more reasons authorities had to believe that incriminating evidence was at hand, the stronger the claim that the desire to obtain such evidence motivated authorities to search. This leads to the anomaly that Justice Brennan articulated in his *Abel* dissent and that I elaborated upon in my 1977 article: "[I]t would appear a strange test as to whether a search which turns up criminal evidence is unreasonable, that the search is the more justifiable the less there was antecedent probable cause to suspect the defendant of crime."¹⁸⁰

The *Villamonte-Marquez* Court, without citing Brennan's views in *Abel*, made the identical point in disposing of the pretext claim by way of a footnote. It cited a 1980 First Circuit opinion that declared: "We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding

178. See *supra* notes 16-17 and accompanying text. The officers who discover criminal evidence before completing the document inspection need not complete the inspection. Compare cases holding that an officer who makes a traffic stop and discovers evidence of a serious crime need not complete steps necessary to prosecute the traffic violation. See, e.g., *People v. Clark*, 9 Ill. 2d 400, 137 N.E.2d 820 (1956); *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359 (1950); *People v. Ambrose*, 84 Ill. App. 2d 128, 228 N.E.2d 517 (1967).

179. See, e.g., 21 U.S.C. § 880 (1982); 30 U.S.C. § 813 (1982).

180. 362 U.S. at 253 (Brennan, J., dissenting). See Haddad, *supra* note 7, at 212.

them in the case of suspected smugglers.”¹⁸¹ In summarizing arguments against the individual motivation approach, I will expand upon this point below.¹⁸²

The *Villamonte-Marquez* Court also asserted that the defendant’s “line of reasoning was rejected in a similar situation in *Scott*.”¹⁸³ But *Scott* did not concern a pretext search. It condemned a “subjective” approach to fourth amendment analysis in an entirely different context.¹⁸⁴ As Professor Burkoff notes, rejection of an “individual motivation” or “bad faith” approach in resolving the minimization dispute in *Scott* does not compel rejection of such an approach in the pretextual search context.¹⁸⁵

Because the *Scott* defendants had made no claim of pretext, the declaration that the claim in *Scott* involved the same reasoning advanced in *Villamonte-Marquez* might puzzle the average reader of *Scott*. Professor LaFave’s interpretation of *Scott*, which cited Burkoff, provides the possible missing link.¹⁸⁶ Perhaps the author of *Villamonte-Marquez*’s footnote three, Justice Rehnquist, was familiar with LaFave’s declaration that *Scott* was inconsistent with an individual motivation approach to pretext searches, although the footnote does not cite LaFave. As lower court opinions in other cases indicate, LaFave’s interpretation of *Scott* has made respectable the claim that *Scott* spelled the end of an individual motivation approach to pretextual search problems.¹⁸⁷ Like Professor Burkoff, I disagree that *Scott* required rejection of that approach. Accordingly, reference to *Scott* in *Villamonte-Marquez* makes me speculate that LaFave’s reading of *Scott* has resulted in a self-fulfilling prophecy.

Examining the approaches of both Justice Rehnquist’s majority opinion and Brennan’s dissent, we again find the hard-choice approach at work. The majority reexamined the power that the defendant claimed customs agents used pretextually. It noted the pretext possibility.¹⁸⁸ It weighed the governmental interests against the individual’s interests in being free from vessel docu-

181. *United States v. Arra*, 630 F.2d 836, 846 (1st Cir. 1980), cited in 462 U.S. at 584 n.3.

182. See *infra* notes 226-30 and accompanying text.

183. 462 U.S. at 584 n.3.

184. 436 U.S. at 135-43.

185. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 83-84.

186. LaFAVE Supp., *supra* note 1, § 1.2(g), at 43-45.

187. *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983), invoked LaFave’s interpretation of *Scott* in rejecting the pretext search approach endorsed by Professor Burkoff. Burkoff discusses this decision at length. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 540-44.

188. 462 U.S. at 584 n.3.

mentation inspection in the absence of any requirement of reasonable suspicion or any limitation upon the power of customs agents to board and inspect vessels under the broad circumstances outlined in the statute. The majority concluded that the statutory authority was reasonable.¹⁸⁹

In dissent, without pausing to refer to the claim of pretext, Justice Brennan argued for a narrowing of the statutory power that provided an opportunity for authorities to engage in pretextual fourth amendment activity, just as he had voted to narrow the power of police to search incident to arrest in *Abel*.¹⁹⁰ He viewed the power to make a document-inspection boarding of vessels as wrong in the absence of reasonable suspicion or some other check on discretion. He declared the power unreasonable not because customs agents could use the power as a pretext to catch suspected criminals but because it permitted what he viewed as too great an intrusion upon tens of thousands of seagoing individuals, including those whom authorities did not suspect of criminal activity.¹⁹¹ In using the hard-choice approach, Justice Brennan gave no hint that he would disallow only those boardings that were motivated by the agents' hopes that they would spot contraband in plain view. Thus, from *Abel* to *Villamonte-Marquez*, a span of twenty-three years, Justice Brennan's opinions reflect the same consistency shown by the Supreme Court itself: rejection of the individual motivation approach in favor of reexamination of the power or doctrine that, the defense claims, law enforcement officials used pretextually.

In the last analysis, of course, for purposes of academic discussion, the most important thing is what the Supreme Court should do, not what it has done. I have provided extensive discussion of reported decisions because I think it important that we have an accurate chronicle of how the Supreme Court has reacted to claims of pretext. Like Professor Burkoff, I am a critic of many of the "Burger Court's" fourth amendment decisions.¹⁹² I do not believe it fair, however, to blame the Burger Court for abandoning an approach which neither the Warren Court nor its predecessors had ever adopted. The fact that Justice Brennan

189. *Id.* at 587-92.

190. *Id.* at 593 (Brennan, J., dissenting).

191. *Id.* at 568-607 (Brennan, J., dissenting).

192. See generally, Burkoff, *Inconsistent Exclusionary Doctrine*, *supra* note 6, where, as the title reflects, Burkoff claims that the Burger Court "devoured" the fourth amendment. For an example of my disagreement with some of that Court's fourth amendment decisions see *infra* note 229 and accompanying text.

has consistently avoided the individual motivation approach convinces me that the pretext problem is the type of fourth amendment issue most worth discussing: the kind where one's solution is not dictated by one's position on the liberal-conservative spectrum. Moreover, the fact that the Supreme Court, including both brilliant liberal and brilliant conservative Justices, has never adopted the individual motivation approach, although it has often had the opportunity, is persuasive authority that such a methodology does not provide the best answer to the pretextual fourth amendment activity question.

V. CHOOSING BETWEEN THE INDIVIDUAL MOTIVATION APPROACH AND THE HARD-CHOICE APPROACH

For several reasons, I am critical of Professor Burkoff's individual motivation, case-by-case analysis of pretext search claims. The hard-choice test is easier to administer, requiring only a determination of whether authorities operated within the letter of the law. The individual motivation methodology punishes the prosecution where an officer has acted within the letter of the law to further the laudable goal of obtaining incriminating evidence. More importantly, an individual motivation methodology shifts the focus away from the most important issues: the existence and scope of fourth amendment limitations. Unlike the hard-choice approach, it tends to inhibit critical reassessment and deserved expansion of fourth amendment limitations.

On the other hand, I believe that Professor Burkoff has made a valuable contribution to constitutional law analysis by demonstrating the oversimplification in much of the criticism of the individual motivation approach. I join him in arguing that his critics' references to the difficulty of ascertaining motive should not preclude a search for motive in any particular constitutional law context.

A. *Motive and Constitutional Law Analysis: The Difficulty of Ascertaining Motive*

The typical criticism of Professor Burkoff's approach is quite unsophisticated. Ignoring the many areas of constitutional law analysis where the Court has assigned motive a role, or where the Court has denied it a role only after extensive discussion, the critics often dismiss, in a sentence or two, the individual-motiva-

tion methodology of resolving pretextual fourth amendment activity claims.¹⁹³ Typically they emphasize the difficulty of ascertaining motive, borrowing a sentiment from Justice White's dissent in *Painten*: "[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."¹⁹⁴ But if constitutional law sometimes makes motive determinative of outcome—even in contexts where the search for motive is more difficult than in the pretextual search context—difficulty of ascertainment cannot suffice to defeat the use of motive in pretextual search analysis.

1. *The use of motive in other contexts*— The decision to exclude evidence in a criminal case can sometimes depend upon what had been "in an officer's mind" or, more particularly, what his purpose or motive had been in engaging in certain conduct. For example, in cases where, after a defendant's right to counsel has attached, the police have obtained a statement in the absence of counsel and without a waiver, admissibility under *Massiah v. United States*¹⁹⁵ depends upon whether the police "deliberately elicited" the statement. Similarly, under *Brown v. Illinois*,¹⁹⁶ one factor in determining the admissibility of a statement made by a suspect following his or her unlawful arrest is the "purpose" for which the officers made the arrest. Moreover, as Professor Burkoff has pointed out, dictum in Justice Rehnquist's opinion in *United States v. Ceccolini*¹⁹⁷ suggests that if a police officer violates the fourth amendment for the purpose of learning the identity of potential witnesses against a suspect, a court might have to exclude testimony of witnesses so discovered under circumstances where it would not have to exclude evidence if the officer violated the fourth amendment without such purpose.

Thus, under each of these cases, *Massiah*, *Brown*, and *Ceccolini*, admissibility might depend solely upon what had been "in the minds" of the officers. This holds true also in cases not strictly involving "motive." For example, the right to search incident to arrest might depend upon whether the officer intends to take a suspect into custody regardless of whether the search

193. See, e.g., *Amsterdam*, *supra* note 2, at 436-37.

194. 389 U.S. at 565, *quoted in* LAFAYE Supp., *supra* note 1, § 1.2(g), at 46.

195. 377 U.S. 201 (1964). *United States v. Henry*, 447 U.S. 264 (1982), may have supplemented this test but, even after *Henry*, deliberate elicitation suffices to trigger a sixth amendment violation.

196. 422 U.S. 590 (1975).

197. 435 U.S. 268, 276 n.4 (1978).

of the suspect yields evidence.¹⁹⁸ The difficulty of determining the inner thoughts of a police officer has not prevented the law from assigning relevance to an officer's intent in such instances.

By contrast, sometimes the Supreme Court, taking an "objective view," has deemed irrelevant what an officer actually had been thinking when he engaged in a challenged police practice. As Burkoff notes, under *United States v. Robinson*,¹⁹⁹ a safety rationale allows a search incident to a custodial arrest on a minor charge even if the particular officer had no fear for his safety. Similarly, the Court in *New York v. Quarles*²⁰⁰ recognized a public safety exception to *Miranda* that does not require that the interrogating police officer believe that public safety requires questioning a suspect without first providing *Miranda* warnings.

Examining other areas of constitutional law, for example those involving equal protection challenges to legislative action, we would find numerous instances where the Court, after substantial discussion, has deemed motive either relevant or irrelevant. Decisions like *Palmer v. Thompson*²⁰¹ and *Washington v. Davis*²⁰² are among the better known. I find it especially interesting that some Justices on occasion condemn the use of motive in one context, because of difficulty of ascertainment, but those same Justices approve the use of motive as a standard for adjudication in a different context.²⁰³ We should examine, context-by-context, whether sound reasons, including difficulty of ascertainment, support rejection of the use of motive in shaping a rule of law.

2. *Difficulty of ascertaining motive in the pretext search context*— As indicated above, some critics suggest that it would prove too difficult and time-consuming for a court, in applying pretext search doctrine, to determine why an officer operated under a particular fourth amendment doctrine.²⁰⁴ Clearly the hard-choice approach is easier to administer. The issue under

198. See *supra* notes 63-74 and accompanying text.

199. 414 U.S. 218 (1973).

200. 104 S. Ct. 2626 (1984).

201. 403 U.S. 217 (1971) (closing of municipal swimming pools allegedly to avoid integration).

202. 426 U.S. 229 (1976) (enacting statute allegedly for racial discriminatory purpose).

203. Thus, in contexts not involving fourth amendment adjudication, Justices White and Rehnquist sometimes argue that motive should be relevant to constitutional adjudication. See Burkoff, *Bad Faith Searches*, *supra* note 6, at 114 n.217. See also *Hunter v. Underwood* 105 S. Ct. 1916 (1985).

204. See *supra* notes 193-94 and accompanying text.

that test is only whether an officer acted within the letter of the law, not why the officer engaged in such conduct. The difficulty of administering an individual motivation approach, however, will vary depending upon the precise nature of the legal test.

I agree with a thoughtful student commentator who has argued that a court would face an extraordinarily difficult task in determining, as is necessary for exclusion under Burkoff's approach, whether an officer acted *solely* for the wrong purpose.²⁰⁵ Consider this hypothetical. The police have probable cause to arrest a suspect for aggravated battery. The victim, however, is a narcotics addict who may not appear for trial. Moreover, because the suspect has left the jurisdiction, bringing him to trial might require substantial expenditure of funds. Consequently, the officers bring no charge. Weeks later, they learn that the same suspect might have committed a triple homicide. Lacking probable cause for a murder arrest, officers obtain a warrant on the unrelated aggravated battery charge. They arrest him on that charge after he voluntarily returns to the jurisdiction. Immediately thereafter they question him about the homicides until they obtain a confession. Prosecutors obtain murder convictions and a death sentence, and then drop the aggravated battery charge, acknowledging that they made no real effort to locate the alleged battery victim.²⁰⁶

I cannot say that the officers' sole reason for making the aggravated battery arrest was to question the suspect about unrelated homicides. Perhaps the officers felt that the suspect had committed three murders and should be prosecuted for something, even if they could not obtain sufficient evidence to charge him with murder.

If the test instead asks whether the improper purpose—to question the suspect about unrelated homicides—was the predominant motivation for the aggravated battery arrest, I would more readily conclude that the facts demonstrated a pretextual arrest. I would find it still easier if, borrowing from Professor Brest's motivation test formulated for use in a different context,²⁰⁷ the law required suppression if the improper motivation played a *significant* role in the officers' decisional process.

205. Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violation*, 63 B.U.L. REV. 223, 257-63 (1983).

206. The hypothetical parallels the facts in an Illinois case. See Appellant's Brief at 37-40, *People v. Hattery*, No. 58789 (Ill. Nov. 21, 1985) (available Jan 6, 1986, on LEXIS, States library, Ill file).

207. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 SUP. CT. REV. 95, 130-31.

At any rate, under any standard, I believe that in some circumstances the evidence will demonstrate the requisite improper motive. Sometimes the officer will admit his motivation. Other times circumstantial evidence will establish the improper motive. For example, a police officer might seek to justify stopping a vehicle by truthfully testifying that the vehicle had been speeding. If he or she made the stop while responding to a robbery in progress, however, the court can conclude that the officer's motive was not to enforce the traffic code. The officer acted with hope of gaining a vantage point to observe evidence of the robbery, even when the data that gave rise to the officer's suspicion did not provide adequate grounds for a *Terry* stop in connection with the robbery.

The law could assign to the defense the burden of proving that a police officer acted with an improper purpose. If the defense failed, the court would reject the suppression motion. With the burden thus allocated, the "difficulty of ascertainment" criticism should not suffice to defeat an individual motivation approach to pretextual fourth amendment activities. The worst that one could say is that under such an approach, because of the difficulty of proof, the prosecution would sometimes benefit from evidence discovered through pretextual fourth amendment activity. Other reasons exist, however, for rejecting the individual motivation approach.

B. Difficulty of Ascertaining the Rationale for Fourth Amendment Doctrines

Up to this point, I have assumed that clearly defined purposes underlie all fourth amendment powers. With Professors Amsterdam and Burkoff, I have defined a pretext search as one where the motives underlying a particular exercise of a power diverge from the rationale that courts have given to uphold the doctrine under which the police act.²⁰⁸ The individual motivation solution requires that we identify a doctrine's proper rationale so that we can determine whether, on a particular occasion, the police acted under the doctrine for an improper purpose.

This methodology proves troublesome because, unlike in the case of the inventory search,²⁰⁹ the Supreme Court has not always clearly defined the reasons that justify a particular doc-

208. See *supra* notes 10-12 and accompanying text.

209. See *supra* note 13 and accompanying text.

trine. A majority of the Court might sustain a power without agreeing upon a rationale. Sometimes history plays a bigger role than logic.²¹⁰

Consider, for example, the whole constellation of searches classified as administrative. Presumably, one reason that the Court deems such searches reasonable—without traditional probable cause, and either without any warrant or pursuant to a warrant issued without traditional probable cause—is that they serve some legitimate governmental purpose besides the quest for evidence of a crime.²¹¹ But is the quest for such evidence also a proper purpose of an administrative search? The Supreme Court has never clearly spoken on this subject. Yet an individual motivation suppression doctrine requires an answer. Where officers have used an administrative search in quest of evidence, we must know whether this constitutes an improper purpose if we are to apply an individual motivation approach. Some confusion in administrative search cases arises where defendants make pretext claims because of the assumption, perhaps erroneous, that the need to discover evidence of a crime is not a legitimate rationale for an administrative search.²¹² Under the hard-choice approach we need not face this issue. Even if a quest for evidence is not a proper rationale for an administrative search, the discovery of evidence often is a natural consequence of an administrative search conducted in accordance with the letter of the law.²¹³

210. See, e.g., *United States v. Watson*, 423 U.S. 411 (1976).

211. The cases reflect a tension about whether a “benign” purpose for a search is a factor in determining its reasonableness. Compare *Camara v. Municipal Court*, 387 U.S. 523 (1967) (fourth amendment protects against even “benign” searches), with *Wyman v. James*, 400 U.S. 309 (1971) (indicates that a “benign” purpose is a factor in upholding the validity of a search). In this context, a search is “benign” if it serves some purpose other than to aid the investigation or prosecution of a crime. Yet the very existence of administrative search powers presumes that a fourth amendment power designed to serve some purpose other than the quest for evidence is to be judged under less stringent standards than a power designed to solve a crime or to aid a prosecution.

212. I believe, for example, that Professor Burkoff’s analysis of *Villamonte-Marquez* would have been different if he had acknowledged that vessel document inspection powers are designed to aid the detection of unlawful importation. See *supra* notes 172-174 and accompanying text. I find similar confusion in the pretext claim made in *Zap v. United States*, 328 U.S. 624 (1946), *vacated*, 330 U.S. 800 (1947), discussed in *supra* notes 135-36 and accompanying text.

213. Sometimes, for example, drug enforcement agents search pharmacies under an administrative warrant, that is, under a warrant issued without traditional probable cause to believe that criminal evidence is at the place to be searched. See, e.g., *United States v. Acklen*, 690 F.2d 70 (6th Cir. 1982). When their search proves successful, the agents’ discovery almost always constitutes evidence of criminal activity.

Consider another example. The police may take a suspect into custody upon probable cause. Is a legitimate reason for such a power the need to use the custodial detention for investigative purposes, even when authorities have not decided to go forward with a prosecution unless the investigation yields evidence of a crime? If the sole rationale for allowing the police to take a suspect to the station house is for the purpose of initiating prosecution, then an officer acts pretextually if, uncommitted to prosecution, he or she takes a suspect into custody upon probable cause in order to obtain a confession or a lineup identification. To avoid this result, a court must conclude that one of the legitimate reasons for police station custody is a quest for evidence. If so, is this "proper reason" for police station custody limited to a quest for evidence of the crime for which probable cause exists? Unless the latter limitation exists, police station custody on a disorderly conduct charge for the purpose of questioning a suspect concerning a homicide charge turns out not to be pretextual under an individual motivation approach.²¹⁴

The functioning of the hard-choice approach does not depend upon a majority of the Court having agreed upon clearly defined and exclusive reasons legitimating a particular power. Once the Court has upheld a particular power, it does not matter what motivated the Court's decision as long as the police exercise that power within the letter of the law. The hard-choice approach does not depend upon a comparison of the "legitimate" reasons for a doctrine with the officers' true reasons for exercising that power.

Thus the police can hold someone at a police station upon probable cause. The trial court can admit into evidence a lineup identification of someone so held without deciding whether the reasonableness of the power of the police to take a suspect into custody upon probable cause is supported, in part, by the governmental need to use such custody as an investigative tool.

C. Inhibition of the Development of the Law

I strongly believe that the individual motivation approach to pretext searches inhibits proper reexamination and development

214. I think such a result would shock most persons who support an individual motivation approach to pretext problems. They would automatically classify as pretextual an arrest for offense A made for the purpose of discovering evidence of crime B. Those who would uphold such an arrest would do so by rejecting an individual motivation approach. See, e.g., *People v. Dancy*, 69 Ill. App. 3d 543, 387 N.E.2d 889 (1979).

of fourth amendment limitations and doctrines. As much of the preceding discussion indicates, the Supreme Court has had numerous opportunities to use an individual motivation approach to check "abuses" of police powers. Instead it has properly reexamined the powers that, it is alleged, the police have used pretextually.²¹⁵

Consider what the law might be like if the individual motivation approach had prevailed. We might live in a country where the police could search an entire home incident to a suspect's arrest unless a defendant could establish that the police officer was motivated by a quest for evidence.²¹⁶ Without a warrant, officers could enter a suspect's home in non-emergencies, upon probable cause to arrest, even with only slight reason to believe the suspect was at home—unless a defendant could establish that a quest for evidence motivated the officers' entry into the home.²¹⁷

Consider another example, not treated above, of the effect upon fourth amendment law had the Court adopted an individual motivation approach. The Court might have allowed police officers to stop vehicles on the open highway within their unbridled discretion unless a defendant could establish that the officers' true motive was not to enforce the motor vehicle code but rather to gain a vantage point for observing evidence of a crime more serious than one relating to vehicle licensing and registration laws. Fortunately, the Supreme Court protected all drivers, not just those suspected of criminal activity, by examining the license check power.²¹⁸ It considered the possibility of pretextual uses as but one factor in its determination of reasonableness.²¹⁹ It made the hard but, I think, correct choice that the driver's privacy and liberty interests outweigh the governmental needs for such roving patrol license check stops.

Of course, the Court could still reexamine various fourth amendment doctrines while simultaneously retaining an individual motivation approach. I believe, however, that the availability of an individual motivation approach serves as a "crutch." It allows the Court to justify a particular police practice by declaring, sometimes vaguely as in *United States v. Robinson*²²⁰ and

215. See *supra* notes 153-56 and accompanying text.

216. See *supra* notes 141-44 and accompanying text.

217. See *supra* notes 145-53 and accompanying text.

218. See *Delaware v. Prouse*, 440 U.S. 648 (1979).

219. *Id.* at 661.

220. 414 U.S. 218, 221 n.1 (1973).

in *Abel v. United States*,²²¹ that the Court will deal with abuses of the power on a case-by-case basis.

The more "outrageous" the pretextual use of a power, the more likely a defense lawyer will argue pretext and will fail to argue that a court should narrow the underlying power. Consider a dated warrant on a minor charge employed by police as a guise to enter a home in quest of evidence of a more serious crime. I join Professor Burkoff in believing that courts should not allow the police to use this tactic.²²² Defense lawyers invariably raise pretext claims when confronted by this practice.²²³ Sometimes they prevail. Sometimes they do not. Even in jurisdictions that embrace the individual motivation approach, the defense must establish that the predominant motivation was a quest for evidence. (Under Burkoff's approach the defense would have the often impossible burden of demonstrating that the sole motive was the evidentiary quest.)²²⁴ Undoubtedly, because defendants often will be unable to satisfy their burden of proof, the police will continue to abuse the entry-to-arrest power that flows from an arrest warrant where police possess probable cause to believe that the suspect is within the premises.

The hard-choice approach, as explained before,²²⁵ would demand reexamination of the underlying doctrine or statute within which the police act. Today courts deem entries into a home, months or years after the warrant has issued, proper as long as the officers have probable cause to believe that the suspect is at home. I doubt if any change in this doctrine will occur as long as defendants advance solely a pretextual arrest analysis in those instances where the police, after a period of inactivity, have entered a suspect's home, ostensibly to execute a dated arrest warrant.

D. Protection Only for the Suspected Citizen

By focusing attention upon abuse of a fourth amendment doctrine rather than upon the breadth of the doctrine itself, the individual motivation approach protects the suspected wrongdoer

221. 362 U.S. 217, 226 (1960).

222. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 538-44.

223. See, e.g., *Harding v. State*, 301 So. 2d 513 (Fla. Dist. Ct. App. 1974), *cert. denied*, 314 So.2d 151 (Fla. 1975); *State v. Hoven*, 269 N.W.2d 849 (Minn. 1978). Cf. *State v. Bruzzese*, 94 N.J. 210, 463 A.2d 320 (1983).

224. See *supra* notes 205-07 and accompanying text.

225. See *supra* notes 48-52 and accompanying text.

but not the ordinary citizen. It allows the police to direct their powers against the latter but not against the former. Contrary to Professor Burkoff's suggestion,²²⁶ this phenomenon is not the product of the bizarre imagination of Justice Rehnquist or the First Circuit judge whose 1980 opinion he cited in *Villamonte-Marquez*.²²⁷ It is the natural consequence of the individual motivation approach, noted by Justice Brennan twenty-five years ago.

Consider how a defense counsel tries to establish an improper police motive in the absence of the officer's candid admission. Suppose, for example, that counsel theorizes that an officer stopped her speeding client not to enforce the traffic code but to investigate a recent robbery. The defense must offer evidence that the officer knew some facts that suggested that a traffic stop might yield evidence of a robbery. The more suspicious data the defense can show that the officer had, the more likely the defense can establish that the true motive for the stop was unrelated to enforcement of the law against speeding.

Picture, then, the officer who observes two speeding vehicles. Under the individual motivation approach, the officer can stop the ordinary speeder but not the speeder whom he also has reason to suspect of more serious wrongdoing. As jurists from Brennan to Rehnquist have observed, the result is exactly the opposite of what society wishes.²²⁸ We want officers to maximize their resources (including their activities within the fourth amendment) in pursuit of serious offenders.

If in the interest of privacy and liberty we wish to restrict the powers of the police, even when that inhibits law enforcement goals, we want those restrictions to benefit all of the citizenry, not just those especially suspected of criminal activity. Speaking personally, I disliked roving patrol stops under the license-check power. But my objections did not stem from the possibility that the police would make stops of motorists whom they had some slight reason to believe were transporting narcotics. Rather it was because the police could direct that power against any motorist, including ones not in any way suspect. Similarly I dislike the inventory search power,²²⁹ not because police can "abuse" it to catch a criminal, but rather because I believe it unnecessarily opens to inspection the property of thousands of citizens not

226. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 533.

227. See *supra* note 181 and accompanying text.

228. See *supra* notes 71-91 and accompanying text.

229. See *supra* notes 100-06 and accompanying text.

suspected of wrongdoing. If I were to condemn the *Terry*²³⁰ power to stop citizens upon reasonable suspicion, I would not speak from a fear that the police would use the power as a guise to clear the streets of narcotics. Rather I would argue that it gives the police the power to stop too many citizens when the officers have no particular reason to suspect narcotics dealing or use. Finally, if I could identify more closely with the nautical set, the result in *Villamonte-Marquez* might outrage me. Again I would direct my anger at the very existence of the power of government agents to interfere with the liberty and privacy of seagoers by boarding vessels without reasonable suspicion. As long as the power exists, I am not upset by the possibility that agents may exercise that power primarily in pursuit of narcotics investigations.

E. Treating Law-Abiding Police as Wrongdoers

Years ago I noted that my dissatisfaction with the individual motivation approach may have arisen from my uneasiness in explaining it to police officers while lecturing to them in fourth amendment training sessions.²³¹ 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, such as those authorizing inventory searches or license check stops. 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."²³²

I still believe that it is strange to instruct police officers that they act improperly even when, for the purpose of obtaining incriminating evidence, they act within the boundaries of a recognized exception to the warrant requirement. If an ordinary citizen acts within the boundaries of a statute to achieve ends not contemplated by 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

230. *Terry v. Ohio*, 392 U.S. 1 (1968).

231. Haddad, *supra* note 7, at 214.

232. *Id.*

abuse.

I have outlined and defended my arguments against allowing motive to play a role in adjudications concerning pretext searches and arrests. Perhaps the weakest argument is the awkwardness in telling the police that certain searches and seizures are proper only up to the point where officers employ such powers in the hope of finding evidence of the crime for which they searched or seized the suspect. Nevertheless, I am not sure that I would have arrived at my present position if I had not experienced that awkwardness.

F. Reacting to Criticism of the Hard-Choice Approach

After courts have reexamined various fourth amendment rules under the hard-choice approach, eliminating some, narrowing some, and leaving some unmodified, possibilities for pretextual use will remain. Courts have eliminated roving patrol license check stops, for example.²³³ They could limit the power to enter a suspect's home under the authority of a dated warrant.²³⁴ But we know that they will not prevent the police from stopping speeding motorists. Because this is so, under the hard-choice approach the police will always have an opportunity to stop speeding motorists in the hope of observing evidence of a robbery in plain view. The hard-choice approach says "so be it."

My answer is implicit in what I have said before. If we can tolerate the power of the police to stop speeding motorists, then we should not be upset if the police use that power against a speeding motorist when motivated by the belief that the motorist might also have committed a more serious criminal offense.

More importantly, criticism of the hard-choice approach ignores the big picture. Of course, under my approach some officers will "get away" with pretextual fourth amendment activity even where no doubt exists that they exercised a fourth amendment power for the wrong reason. Yet, because of difficulty of proof, officers often will get away with pretext searches under Professor Burkoff's approach as well. The critical difference between our approaches is that, by demanding a reexamination of the underlying fourth amendment doctrines and focusing on the breadth rather than the potential for abuse of the doctrines, in the long run the hard-choice approach will greatly narrow the

233. See *supra* note 218 and accompanying text.

234. See *supra* notes 49-51 and accompanying text.

opportunity for pretextual use. It will also provide greater protection of fourth amendment interests for all the citizenry, not just for suspected wrongdoers.

CONCLUSION

If my tone in criticizing Professor Burkoff's individual motivation approach seems harsh in places, that should not mask my fundamental respect for his work and my gratitude for his rekindling of my interest in the problems of pretextual fourth amendment activity. While I am firm in my belief that the United States Supreme Court has never acted in accordance with his views, I must acknowledge that hundreds of opinions from other courts agree with his basic approach. Professor Burkoff's articles have made me realize that to assert that even an improperly motivated officer acts within the boundaries of an established fourth amendment doctrine begs the question. The issue is whether courts should consider the police to have acted within the letter of the law if they had a certain motive. In Anglo-American law, statutory compliance rarely turns upon an actor's motive. But as Professor Burkoff and I both have noted, sometimes in constitutional law adjudication, compliance with the Constitution does turn upon an actor's motive.²³⁵ The issue is whether motive should play a role in pretextual fourth amendment analysis. The reader is left to decide whose position should be adopted. I understand that they will be assisted by Professor Burkoff's brief response to my remarks.

235. See *supra* notes 195-203 and accompanying text.

