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Faculty Scholarship

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1990

# Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine

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## Publication Information

79 Kentucky Law Journal 1 (1990-1991)

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## Repository Citation

Butterfoss, Edwin J., "Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine" (1990). *Faculty Scholarship*. Paper 346.

<http://open.mitchellhamline.edu/facsch/346>

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# Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine

## **Abstract**

This Article first analyzes the debate between Professors John M. Burkoff and James B. Haddad over the current state of Supreme Court jurisprudence on the pretext issue. It shows that the Supreme Court's definition of pretext is broader than the definition of pretext used by these commentators. The Supreme Court's definition includes both "legal" and fabricated pretexts. In a "legal" pretext, the government offers a justification that is not the true reason for the police activity, but that, if the motivation of the officer is not considered, legally justifies the activity. In a fabricated pretext, the government offers a justification that is not the true reason for the police activity and, in fact, is legally insufficient because it is not supported by the facts. This Article argues that although fabricated pretexts should be struck down on a case-by-case basis, a pretext doctrine that strikes down "legal" pretexts on a case-by-case basis based on the motivation of the officer is misguided.

This Article demonstrates that the true evil of the "pretext" case is the virtually unlimited authority of police officers to arrest and search based on minor offenses. Thus, an approach that declares "legal" pretexts constitutional but re-examines the underlying authority of police officers to arrest and search based on a minor offense, offers the better solution to the "pretext problem."

## **Keywords**

Searches and seizures (Law)

## **Disciplines**

Criminal Law | Criminal Procedure | Fourth Amendment

# Kentucky Law Journal

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Volume 79

1990-91

Number 1

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## Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine

BY EDWIN J. BUTTERFOSS\*

### INTRODUCTION

Pretextual searches and seizures are those undertaken by police officers at least in part for reasons other than the justifications later offered by the government.<sup>1</sup> Concern over pretextual activity

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<sup>1</sup> Commentators typically define pretext as a situation where the government offers a justification for the activity that, if the motivation of the officer is not considered, would be a legally sufficient justification for the activity. See Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639, 643 (1985) [hereinafter Haddad, *Another Viewpoint*]. They exclude from the pretext definition situations where the proffered justification is legally insufficient. Although they find such activity illegal, they do not term it a pretext. See Haddad, *Well Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 205 (1977) [hereinafter Haddad, *Claims of Sham*]; see also Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 71 n.5, 100-01 (1982) (Burkoff labels situations where the officer "acts entirely and deliberately for reasons that do not constitute a proper legal justification" as bad faith searches regardless of the legal sufficiency of the proffered justification). *But see* Comment, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791, 1802-03 (recognizing both situations as pretexts) [hereinafter Comment, *Abuses of Power*]. The thesis of this article is that the term pretext is sufficiently broad to include both situations and that the failure of commentators to consider this explains much of the difficulty they experience trying to reconcile the language and holdings of various Supreme Court cases. See *infra* notes 78-161 and accompanying text.

has existed for many years,<sup>2</sup> presenting a perplexing problem. The Supreme Court has never directly addressed the pretext issue and has given apparently conflicting signals as to whether pretextual activity is unconstitutional.<sup>3</sup> Consequently, lower courts and commentators disagree over the existence and the content of a pretext doctrine in the Supreme Court's jurisprudence and the approach courts should utilize to analyze the pretext issue.

The issue of the existence and content of the Supreme Court's pretext doctrine is essentially a debate between the positions of Professor John M. Burkoff<sup>4</sup> and Professor James B. Haddad.<sup>5</sup> Professor Burkoff insists that a case-by-case pretext doctrine is alive and well in Supreme Court jurisprudence, and that language in Supreme Court cases demonstrates that the Court will hold police conduct unconstitutional on a case-by-case basis when the pretextual motivations of the officers are demonstrated by subjective or objective evidence.<sup>6</sup> Professor Haddad, on the other hand,

<sup>2</sup> Numerous Supreme Court cases have expressed concern over pretextual police activity. See *Colorado v. Bertine*, 479 U.S. 367 (1987); *Steagald v. United States*, 451 U.S. 204 (1981); *Abel v. United States*, 362 U.S. 217 (1960); *Jones v. United States*, 357 U.S. 493 (1958); *United States v. Lefkowitz*, 285 U.S. 452 (1932). For a discussion of these cases, see *infra* notes 107-81 and accompanying text.

<sup>3</sup> See *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989) (Supreme Court's response to pretext problem ambiguous); Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363, 364-65 (1989) [hereinafter Burkoff, *Pretext Doctrine Returns*]; Burkoff, *Rejoinder: Truth, Justice and the American Way—or Professor Haddad's "Hard Choices"*, 18 U. MICH. J.L. REF. 695, 695 & n.1 (1985) [hereinafter Burkoff, *Rejoinder*]; Haddad, *Claims of Sham*, *supra* note 1, at 204; Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L.Q. 221, 224 (1989) [hereinafter Salken, *The General Warrant*]; Comment, *Abuses of Power*, *supra* note 1, at 1807 n.88; Comment, *Fourth Amendment Pretexts: Are Two Reasons to Stop the Defendant One Too Many?*, 41 BAYLOR L. REV. 495, 497 (1989) [hereinafter Comment, *Two Reasons to Stop*]; Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U.L. REV. 223, 241 (1983) [hereinafter Note, *Pretext Problem*]. The Supreme Court seemed ready to clarify its view of pretext searches when it granted certiorari in *State v. Blair*, 691 S.W.2d 259 (Mo. 1985), *cert. dismissed*, 480 U.S. 698 (1987), but instead dismissed the certiorari petition as improvidently granted. See *infra* notes 245-53 and accompanying text.

<sup>4</sup> Professor Burkoff is a Professor of Law at the University of Pittsburgh. A.B. 1970, J.D. 1973, University of Michigan; LL.M. 1976, Harvard University.

<sup>5</sup> Professor Haddad is a Professor of Law at Northwestern University. B.A. 1964, University of Notre Dame; J.D. 1967, LL.M. 1969, Northwestern University.

<sup>6</sup> See Burkoff, *Pretext Searches*, 9 SEARCH AND SEIZURE L. REF. 25 (1982); Burkoff, *Bad Faith Searches*, *supra* note 1, at 72-84; Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 544-50 (1984) [hereinafter Burkoff, *Pretext Search Doctrine*]; Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 365, 394, 409-10. For a discussion of Professor Burkoff's individual motivation approach, see *infra* notes 28-58 and accompanying text.

argues that the Court does not utilize a pretext doctrine to find police conduct unconstitutional on a case-by-case basis, but that the Supreme Court has adopted the “hard choice” approach to pretextual activity.<sup>7</sup> Under the “hard choice” approach, the Court is not concerned with the motivation of the officer in a particular case. Instead, the Court reexamines the authority that arguably justifies the officer’s conduct to determine whether the authority should be upheld, restricted, or abolished. This decision is made by balancing the government’s interests against the intrusion on the privacy and liberty interests of citizens, including the potential for abuse of the authority through pretextual activity. Once the choice is made to uphold, restrict, or abolish the authority, the Court will not examine police conduct on a case-by-case basis to discover and declare pretextual activity illegal.<sup>8</sup>

The second issue discussed by commentators—how the Supreme Court should treat pretextual activity—has spawned a greater diversity of views. Some commentators argue that pretextual activity should be struck down on a case-by-case basis upon a showing of improper motivation by the officer. These commentators offer different factors to determine the motivation. Professor LaFave<sup>9</sup> suggests evaluating the officer’s motivation (or at least the constructive motivation) based on objective evidence of compliance with standardized procedures.<sup>10</sup> Some lower courts have used a

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<sup>7</sup> Haddad, *Claims of Sham*, *supra* note 1, at 212-14. For a complete discussion of Professor Haddad’s “hard choice” approach, see *infra* notes 59-74 and accompanying text.

<sup>8</sup> An example of this is the decision to permit full searches without a warrant following the arrest of a suspect despite the absence of suspicion of evidence or a weapon on the person. See *United States v. Robinson*, 414 U.S. 218 (1973). This presents the possibility of pretextual activity by police officers. An officer may make a custodial arrest for a minor violation, not in order to vindicate the state’s interest in eliminating such violations, but to conduct a search in hopes of discovering evidence of a more serious offense. Professor Haddad’s position is that once the Court has made the “hard choice” to uphold searches incident to arrest in situations where suspicion of evidence or weapons is absent, despite the possibility of providing an opportunity for pretextual activity, the Court will not examine the issue of whether the arrest was motivated by a pretext in the individual case. Rather, the Court will limit its inquiry to whether the arrest was supported by sufficient objective facts, e.g., the suspect was engaged in the minor offense.

<sup>9</sup> Professor LaFave is a David C. Baum Professor of Law and Professor in the Center for Advanced Study, University of Illinois. B.S. 1957, LL.B. 1959, S.J.D. 1965, University of Wisconsin.

<sup>10</sup> LaFave would characterize his approach as making motivation irrelevant:

[T]he proper basis of concern is not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer’s conduct arbitrary, and it is the arbitrariness which in this context

different objective test to strike down pretextual activity, declaring police activity illegal if a "reasonable officer" would not have made the stop, arrest, or search in question absent illegitimate motives.<sup>11</sup> Professor Burkoff prefers a test based on the officer's subjective intent, although he would accept objective proof of pretext.<sup>12</sup>

Other commentators suggest approaches that do not require examination of the officer's motivation in a particular case. Professor Amsterdam<sup>13</sup> advocates a "use exclusion" approach under which any evidence discovered by police may not be used in a criminal prosecution unless the rationale used to justify the police conduct includes the possibility of discovering the type of evidence in question.<sup>14</sup> For instance, because the inventory search exception<sup>15</sup> is based on the need to safeguard citizens' property and to protect officers from false claims, not on the need to discover evidence, evidence of criminal activity discovered during inventory searches would be excluded under the use exclusion approach.<sup>16</sup>

Additional approaches that do not require examination of the officer's motivation in a particular case focus on the fourth amendment values surrounding the government's proffered justification to determine the level of permissible police conduct. Alexander Eiseman, the author of a student note on the subject, favors a

constitutes the Fourth Amendment violation.

W LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e), at 94 (2d ed. 1987) (emphasis in original). Nevertheless, the approach seems to be an attempt to control discretion, which suggests a concern with motivation. Thus, it seems accurate to read LaFave's approach to be concerned with officer motivation measured objectively, just as contract doctrine is concerned with the contracting parties' intent as measured objectively.

<sup>11</sup> See *United States v. Miller*, 821 F.2d 546, 549 (11th Cir. 1987); *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986). For a discussion of the reasonable officer test, see *infra* notes 305-21 and accompanying text.

<sup>12</sup> Originally Professor Burkoff argued that police conduct should be found illegal only when the officer's sole motive was "improper." Burkoff, *Bad Faith Searches*, *supra* note 1, at 103-04. He later conceded that an approach requiring only a finding that the improper motivation was the primary objective was more workable. Burkoff, *Rejoinder*, *supra* note 3, at 698 n.16; Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 397 n.156.

<sup>13</sup> Professor Amsterdam is a Professor of Law at New York University. A.B. 1957, LL.B. 1960, University of Pennsylvania.

<sup>14</sup> Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-39 (1974).

<sup>15</sup> Inventory search of personal effects of arrestee or automobile being taken into police custody as an administrative procedure does not require a warrant. The functions of the search are to protect officials from false claims by the arrestee, protect the arrestee's possessions, and to preserve the security of the police station. See *Colorado v. Bertine*, 479 U.S. 367 (1987).

<sup>16</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 647-48.

balancing test, upholding pretextual activity if the government interest supporting the proffered justification is sufficiently important to support the government's actions not only when the actions are undertaken with proper motivations, but also when they are undertaken on a pretextual basis.<sup>17</sup> Professor Haddad, under his "hard choice" approach,<sup>18</sup> would undertake a similar balancing test to determine whether, in light of the intrusion on the individual's privacy and liberty, including the possibility of abuse through pretext, the government interests justify the police activity, even with the proper motivation. If the government's interests are sufficiently strong, then the police activity is upheld regardless of the officer's motivation in the individual case. If not, the police are stripped of the authority to undertake the activity, even if their motives are demonstrably nonpretextual.<sup>19</sup>

There are compelling reasons to add to the commentary on the pretext issue. First, commentators have failed to offer a satisfactory analysis of the Supreme Court's conflicting signals concerning the constitutionality of pretextual activity. Second, further analysis of the suggested approaches and possible alternatives is critical because an important question for academic discussion is not only what the Supreme Court has done but what it should do.<sup>20</sup> It is especially important now, because recent activity in the federal circuits suggests that the Supreme Court will have to directly address the issue soon.<sup>21</sup>

This Article first analyzes the debate between Professors Burkoff and Haddad over the current state of Supreme Court jurisprudence on the pretext issue.<sup>22</sup> It shows that the Supreme Court's definition of pretext is broader than the definition of pretext used by these commentators. The Supreme Court's definition includes both "legal" and fabricated pretexts. In a "legal" pretext, the

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<sup>17</sup> Note, *Pretext Problem*, *supra* note 3, at 263-64. Of course, if the government justification is insufficient to support pretextual activity, then the motivation of the officer in the particular case becomes relevant because pretextual activity will be struck down.

<sup>18</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 651-53.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 680; Burkoff, *Rejoinder*, *supra* note 3, at 698-99.

<sup>21</sup> See *Oregon v. Olaz*, 100 Or. App. 380, 786 P.2d 734 (Or. Ct. App. 1990) (Warren, J., dissenting) (discussing the various approaches of the federal circuit courts of appeal to the pretext issue). The Supreme Court has never directly addressed the pretext issue. It recently had the occasion to do so, but after showing initial interest, declined the opportunity. See *Blair*, 691 S.W.2d 259, *cert. granted*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 698 (1987). For a discussion of *Blair*, see *infra* notes 245-53 and accompanying text.

<sup>22</sup> See *infra* notes 28-267 and accompanying text.

government offers a justification that is not the true reason for the police activity, but that, if the motivation of the officer is not considered, legally justifies the activity.<sup>23</sup> In a fabricated pretext, the government offers a justification that is not the true reason for the police activity and, in fact, is legally insufficient because it is not supported by the facts.<sup>24</sup>

This Article argues that the Supreme Court utilizes Professor Burkoff's case-by-case approach to pretextual activity only in cases of fabricated pretexts. When dealing with "legal" pretexts, the Court utilizes the "hard choice" approach suggested by Professor Haddad.<sup>25</sup> This Article demonstrates that the Supreme Court's apparently conflicting signals can be explained by its failure to distinguish references to "legal" pretexts from references to fabricated pretexts. Once this failure is revealed, the Court's apparently inconsistent signals can be reconciled using an approach that combines the alternatives suggested by Professors Burkoff and Haddad.<sup>26</sup>

After reconciling the apparent inconsistency in the Supreme Court's analysis of the pretext issue, this Article examines the approaches suggested by various commentators and adopted by the lower courts. This Article argues that although fabricated pretexts should be struck down on a case-by-case basis, a pretext doctrine that strikes down "legal" pretexts on a case-by-case basis based on the motivation of the officer is misguided. This Article demonstrates that the true evil of the "pretext" case is the virtually

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<sup>23</sup> Professor Burkoff takes issue with the assertion that a justification can be legally sufficient without consideration of the officer's motive. He insists that ignoring the motivation simply begs the question of the legality of the officer's activity. See Burkoff, *Rejoinder*, *supra* note 3, at 699. The justification is legally sufficient, however, in the sense that if another officer was on the scene and possessed identical knowledge of the facts, she could legally undertake the identical activity undertaken by the other officer, provided she was motivated by the justification later offered by the government. The label "legal" pretext for such activity was suggested by Daniel S. Jonas in his student comment examining the pretext problem. See Note, *Abuses of Power*, *supra* note 1, at 1802-03. Use of the term "legal" is not meant to suggest that the activity, when undertaken with pretextual motives, is necessarily constitutional. Mr. Jonas himself argued such pretexts should be unconstitutional. *Id.* at 1803.

<sup>24</sup> See Note, *Abuses of Power*, *supra* note 1, at 1803. Thus, if another officer was on the scene with the officer who acted pretextually and possessed identical knowledge of the facts, that officer could not have undertaken the identical activity as the officer who acted pretextually even if her motivation was the justification offered by the government because the facts do not support such a justification.

<sup>25</sup> See *infra* notes 59-74 and accompanying text.

<sup>26</sup> See *infra* notes 75-161 and accompanying text.

unlimited authority of police officers to arrest and search based on minor offenses. Thus, an approach that declares "legal" pretexts constitutional but reexamines the underlying authority of police officers to arrest and search based on a minor offense, offers the better solution to the "pretext problem."<sup>27</sup>

## I. THE SUPREME COURT'S PRETEXT DOCTRINE

### A. *The Doctrine According to Burkoff*

Much of the commentary concerning the pretext doctrine focuses on its existence and content. Professor Burkoff has been the most passionate advocate for the proposition that the Supreme Court views pretextual activity as unconstitutional and will strike it down when presented with sufficient subjective or objective evidence of an improper motive. He has advocated this position in the face of strong evidence to the contrary. Two of his many articles on the topic attempt to breathe life into a doctrine many people have left for dead.<sup>28</sup> Unfortunately, Professor Burkoff's evidence is not as overwhelming as he apparently believes.<sup>29</sup>

*United States v. Scott*<sup>30</sup> was the first case to suggest that pretextual searches were permissible. Prior to *Scott*, the Supreme Court's pronouncements consistently suggested that pretextual activity was unconstitutional.<sup>31</sup> The Court never declared police activity unconstitutional because it was pretextual, but it often noted in upholding police conduct that the conduct was not undertaken

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<sup>27</sup> See *infra* notes 268-321 and accompanying text.

<sup>28</sup> Perhaps to make his task easier, Professor Burkoff now suggests the worst case scenario is that the pretext doctrine merely "left" rather than died. Compare Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 544, 548 ("Pretext Search Doctrine Lives"; "Resuscitating the Pretext Search Doctrine") with Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 394 ("The Return of Pretext Law").

<sup>29</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 410 (stating that the unconstitutionality of pretextual activity is "clear beyond peradventure").

<sup>30</sup> 436 U.S. 128 (1978).

<sup>31</sup> See *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (automobile inventory searches upheld, Court notes absence of evidence of pretext); *Abel v. United States*, 362 U.S. 217, 226, 230 (1960) (upholding search but asserting that use of an administrative warrant for entirely illegitimate purposes would "reveal a serious misconduct"); *Jones v. United States*, 357 U.S. 493, 500 (1958) (rejecting the government's search incident to arrest rationale because the purpose of entry was to search, not arrest); *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) (stating that "[a]n arrest may not be used as a pretext to search for evidence.").

for pretextual reasons.<sup>32</sup> This language suggested that if the conduct had been pretextual, then the police activity would have been declared unconstitutional. Thus, when the Court in *Scott* seemed to dismiss the claim that officers' activity was unlawful based on their subjective intent, proponents of a pretext doctrine based on officers' subjective intent expressed concern.<sup>33</sup>

In *Scott*, government agents acting pursuant to a court order intercepted phone conversations at a home in Washington, D C., where they suspected a narcotics smuggling ring was operated. Pursuant to the statute authorizing a wiretap, the court order required that the electronic surveillance be conducted in "such a way as to minimize the interception of communications [not] otherwise subject to interception . . ."<sup>34</sup> The defendants moved to suppress the intercepted conversations, alleging that the agents violated the minimization requirement of the order. They offered both objective and subjective evidence of the officers' lack of intent to minimize and their actual failure to minimize.<sup>35</sup> The Supreme Court upheld the lower court's denial of relief.

On the issue of whether the officers' lack of intent to minimize invalidated the interception, the Court held that the officers' conduct must be evaluated "in light of the facts and circumstances then known to [them],"<sup>36</sup> and that "the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification of the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."<sup>37</sup> The motion to suppress the evidence was denied because the Court found that the circumstances of the case prevented characterizing the seizure of the conversations as unreasonable.<sup>38</sup>

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<sup>32</sup> See *Opperman*, 428 U.S. at 376; *Abel*, 362 U.S. at 226, 230. This continues to be the form of Supreme Court pronouncements on the pretext issue. See *Colorado v. Bertine*, 479 U.S. 367, 372, 376 (1987); *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973). For a discussion of these cases, see *infra* notes 142-74 and accompanying text.

<sup>33</sup> See *Burkoff*, *Bad Faith Searches*, *supra* note 1, at 81-82 (citing 2 W LAFAYE, SEARCH AND SEIZURE § 5.2, at 37 (Supp. 1981)).

<sup>34</sup> *United States v. Scott*, 436 U.S. 128, 131-32 (1978) (quoting *United States v. Scott*, 331 F Supp. 233, 236 (D.D.C. 1971)).

<sup>35</sup> The defendants offered objective evidence in the form of a statistic that although virtually all calls were intercepted, only 40% of those calls related to narcotics activity. *Scott*, 436 U.S. at 132. The defendants also offered subjective evidence in the form of testimony from the agents that no effort at minimization was made. *Id.* at 133 & n.7.

<sup>36</sup> *Id.* at 137.

<sup>37</sup> *Id.* at 138.

<sup>38</sup> *Id.* at 141-43.

If the Court's statement—that an officer's state of mind does not invalidate an objectively justified action—is applied broadly to all fourth amendment activity, then a pretext doctrine based on the officer's state of mind does not survive *Scott*. Professor Burkoff rushed to rescue the pretext doctrine from such an early death.<sup>39</sup> He attacked *Scott* on two grounds. First, he argued that the cases cited by Justice Rehnquist in *Scott* were inapposite and misapplied.<sup>40</sup> Second, Burkoff suggested a reading of *Scott* that saves the pretext doctrine by simply limiting the type of proof available to prove pretext. Professor Burkoff suggested that *Scott* merely stood for the proposition that subjective (testimonial) evidence of the officer's state of mind is inadmissible to demonstrate pretext, not that the officer's state of mind is itself irrelevant.<sup>41</sup> He read *Scott* to permit proof of the officer's state of mind through objective evidence.<sup>42</sup>

This reading of *Scott* is wrong for two reasons. First, Justice Rehnquist clearly refers to the irrelevance of the officer's subjective intent, not the inadmissibility of *direct* as opposed to indirect or objective evidence of intent.<sup>43</sup> Second, Professor Burkoff ignores the fact that the defendants offered objective evidence of the officers' intent by demonstrating that nearly all of their phone conversations were intercepted, although only forty percent related to illegal activity.<sup>44</sup> The Court used this evidence not to decide the intent question,<sup>45</sup> but to determine whether there had been sufficient minimization without regard to the officers' subjective motivation.<sup>46</sup> The Court found there was sufficient minimization.<sup>47</sup>

Professor Burkoff misunderstands Justice Rehnquist's command to view the "circumstances" of each case objectively as

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<sup>39</sup> See Burkoff, *Bad Faith Searches*, *supra* note 1; Burkoff, *Pretext Search Doctrine*, *supra* note 6.

<sup>40</sup> Burkoff, *Bad Faith Searches*, *supra* note 1, at 75-81. Even if true, this criticism merely proves that the doctrine should live, not that it does.

<sup>41</sup> See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 525-26, 532.

<sup>42</sup> *Id.*

<sup>43</sup> *Scott*, 436 U.S. at 136-38. See *Graham v. Connor*, \_\_\_\_\_ U.S. \_\_\_\_\_, \_\_\_\_\_, 109 S. Ct. 1865, 1872 (1989) (reasonableness under fourth amendment depends on "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").

<sup>44</sup> *Scott*, 436 U.S. at 132.

<sup>45</sup> The court already had found that intent was irrelevant. See *supra* note 43 and accompanying text.

<sup>46</sup> *Scott*, 436 U.S. at 139-43.

<sup>47</sup> *Id.* at 141-43.

license to assess, using objective evidence, the intent of the officer.<sup>48</sup> Justice Rehnquist's command is to view the facts objectively to determine whether the officer's knowledge justifies her action without regard to her subjective intent.<sup>49</sup> The question is, for example, does the officer's knowledge establish reasonable suspicion justifying the stop of a vehicle regardless of the reason the officer made the stop, even if the officer's action was motivated not by reasonable suspicion but by a mistaken belief that such routine stops were lawful?<sup>50</sup> This misunderstanding of Rehnquist's command in *Scott* dramatically disrupted Professor Burkoff's theory when *Scott* was applied in a later case, *United States v. Villamonte-Marquez*.<sup>51</sup>

In *Villamonte-Marquez*, customs agents accompanied by a state law enforcement officer boarded a boat to conduct a documentation check pursuant to a federal statute authorizing boardings and documentation checks of vessels with access to the open sea at any time and without reasonable suspicion.<sup>52</sup> There was substantial subjective and objective evidence that the agents were more interested in the possibility that the vessel was smuggling illegal drugs than the documentation.<sup>53</sup> The defendants argued that improper motivation precluded reliance on the statutory authority to board the vessel.<sup>54</sup> Justice Rehnquist dismissed this claim in a footnote stating, "This line of reasoning was rejected in a similar situation in *Scott v. United States* and we again reject it."<sup>55</sup> Professor Burkoff reacted to this footnote not by conceding that he misread *Scott* in his earlier articles, but by criticizing Rehnquist for misreading his own opinion. Burkoff wrote, "*No, no, a thousand*

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<sup>48</sup> See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 525-26; Haddad, *Another Viewpoint*, *supra* note 1, at 674 n.158; Note, *Two Reasons to Stop*, *supra* note 3, at 534-35 n.191.

<sup>49</sup> See *Graham*, 109 S. Ct. at 1872 (citing *Scott*).

<sup>50</sup> Although the facts within the officer's knowledge did provide reasonable suspicion of criminal activity, she may not have realized this and may simply have effected a routine stop that she thought she had the authority to do without reasonable suspicion.

<sup>51</sup> 462 U.S. 579 (1983).

<sup>52</sup> *Id.* at 584-85.

<sup>53</sup> The subjective evidence included trial testimony by the officers regarding their subjective intent to board the vessel to search for narcotics. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 530-31 n.33. The objective evidence included an anonymous tip that a vessel in the channel was believed to be carrying narcotics and the fact that the federal customs officers were accompanied by a Louisiana state patrol officer at the time of the boarding. *Id.* at 531.

<sup>54</sup> *United States v. Villamonte-Marquez*, 426 U.S. 579, 584 n.3.

<sup>55</sup> *Id.* (citation omitted).

*times no!* The *Scott* decision only involved the issue of the significance of *subjective* evidence of pretext, and even then, arguably in dictum."<sup>56</sup>

At the time, Professor Burkoff's belief that *Villamonte-Marquez* misread *Scott* apparently was based on his conviction that such a doctrine was intolerable as a matter of fourth amendment jurisprudence, and that earlier Supreme Court cases demonstrated a concern for pretextual activity that would not permit such a result. Burkoff's analysis of earlier cases was extensively criticized by Professor Haddad.<sup>57</sup> Recently, Professor Burkoff renewed his attempts to revive the pretext doctrine by analyzing four new Supreme Court cases.<sup>58</sup> This latest effort simply repeats the mistakes of his previous efforts. To fully appreciate Burkoff's errors, it is necessary to understand Professor Haddad's view of the Supreme Court's pretext doctrine.

### B. *The Doctrine According to Haddad*

Professor Haddad agrees that the Supreme Court views pretextual activity as troublesome, but disagrees that the Court demonstrates its concern by examining the subjective motivation of the officer on a case-by-case basis and striking down activity it finds to be pretextual.<sup>59</sup> Instead, in Professor Haddad's view, the Court considers the *possibility* that a given police activity is susceptible to use as a pretext "as just one factor in determining whether the power is consonant with the fourth amendment"<sup>60</sup> and upholds, restricts, or abolishes the power accordingly.<sup>61</sup> Haddad refers to this as the "hard choice" approach.<sup>62</sup> Once the Court makes this

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<sup>56</sup> Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 532 (emphasis in original). Of course, *Scott* did not directly address even the issue of subjective evidence of pretext because it was not a pretext case. See Burkoff, *Bad Faith Searches*, *supra* note 1, at 83-84; Haddad, *Another Viewpoint*, *supra* note 1, at 674, 679. Nevertheless, even if *Scott* failed to reject the individual motivation pretext doctrine specifically, it certainly did not preclude such a result when the same "line of reasoning" was raised in the pretext context. Thus, Justice Rehnquist's statement in *Villamonte* does not seem as puzzling as Professor Burkoff and others suggest. See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 532; Haddad, *Another Viewpoint*, *supra* note 1, at 679.

<sup>57</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 653-73.

<sup>58</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3 (analyzing *Bertine*, 479 U.S. 367; *Maryland v. Garrison*, 480 U.S. 79 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); and *New York v. Burger*, 482 U.S. 691 (1987)).

<sup>59</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 670.

<sup>60</sup> *Id.* at 651-52.

<sup>61</sup> *Id.* at 652.

<sup>62</sup> *Id.*

choice, then the subjective intent of the officer in a particular case is irrelevant. If an officer exercises the power within the parameters the court has set (that is, only when the objective facts that the court has held permit use of the power exist), the conduct is upheld.<sup>63</sup>

Professor Haddad argues that this "is the only approach to the pretext problem that the Supreme Court has used consistently"<sup>64</sup> He believes the Court utilized this approach in *Chimel v California*<sup>65</sup> to limit the scope of the power to search incident to arrest, in *Coolidge v New Hampshire*<sup>66</sup> to limit the power to seize evidence in plain view, in *Payton v. New York*<sup>67</sup> to limit the power to enter homes to effectuate an arrest without a warrant, and in *United States v Steagald*<sup>68</sup> to limit the authority to enter homes of third parties to effectuate an arrest. More importantly, Professor Haddad explains *Villamonte-Marquez*, the case that causes the most difficulty for Professor Burkoff's individual motivation approach, as an example of the hard choice approach.<sup>69</sup>

Professor Haddad notes that the agents in *Villamonte-Marquez* were exercising a statutorily granted power to inspect, without any suspicion, documents of vessels. The question for the Court asked whether this power was constitutional. The defendants also argued that even if the power to make suspicionless boardings to check documents was constitutional, the power did not extend to instances where the inspectors were searching for narcotics. This is the individual motivation approach to pretext advocated by Professor Burkoff. As noted above, the Court squarely rejected that argument, citing *Scott*.<sup>70</sup> Instead, *Villamonte-Marquez* utilized the

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<sup>63</sup> *Id.* at 673.

<sup>64</sup> *Id.* at 653.

<sup>65</sup> 395 U.S. 752 (1969) (holding that the search must be confined to the area within the suspect's immediate control); Haddad, *Another Viewpoint*, *supra* note 1, at 669.

<sup>66</sup> 403 U.S. 443 (1971) (holding that the discovery of evidence must be inadvertent); Haddad, *Another Viewpoint*, *supra* note 1, at 662.

<sup>67</sup> 445 U.S. 573 (1980) (holding that homes may not be entered without a warrant absent exigent circumstances or another exception to the warrant requirement); Haddad, *Another Viewpoint*, *supra* note 1, at 669.

<sup>68</sup> 451 U.S. 204 (1981) (holding that a search warrant is required to enter the house of third parties); Haddad, *Another Viewpoint*, *supra* note 1, at 662.

<sup>69</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 662.

<sup>70</sup> Professor Haddad agrees that *Scott* did not require rejection of the *Villamonte-Marquez* defendant's argument because *Scott* was not a pretext case. See Haddad, *Another Viewpoint*, *supra* note 1, at 679. He suggests the ironic possibility that *Scott* was viewed as the death knell of the individual motivation approach to pretexts only because Professors Burkoff and LaFave suggested and argued the plausibility of such a reading. *Id.* As

hard-choice approach. Recognizing the possibility that the exercise of the power in question could be used pretextually, the Court nevertheless chose not to restrict the exercise of the power.<sup>71</sup> It could have chosen to abolish the power or to restrict it, as suggested in Justice Brennan's dissent, by requiring the officers to request the documentation from the operator prior to boarding and not permitting boarding if the operator produced the documents in good order.<sup>72</sup> This rule would eliminate the opportunity to discover contraband in "plain view" while on board to check documentation and eliminate the incentive to make document checks rather than seek a warrant or the requisite level of suspicion to conduct a search for the contraband.<sup>73</sup> Professor Haddad concludes that both the majority opinion in *Villamonte-Marquez* and Justice Brennan's dissent demonstrate the "rejection of the individual motivation approach in favor of reexamination of the power or doctrine that, the defense claims, law enforcement officials used pretextually."<sup>74</sup>

### C. *Who's Right?*

Both Professor Burkoff's and Professor Haddad's positions on the Supreme Court's view of pretextual activity have weaknesses. Professor Burkoff fails to point to any Supreme Court decision declaring police activity unconstitutional based on the individual motivation approach.<sup>75</sup> Moreover, to justify his position that the Court remains open to pretext arguments based on the individual motivation of the officer, he must argue that *Villamonte-Marquez* was incorrectly decided. Professor Haddad is able to reconcile all Supreme Court holdings with his position, but is unable to satisfactorily explain the dicta in numerous cases<sup>76</sup> on which Professor

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mentioned above, however, even if *Scott* failed to reject the individual motivation approach to pretext cases specifically, it did not preclude such a result when the "same line of reasoning" was raised in a pretext case. See *supra* note 56.

<sup>71</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 679-80.

<sup>72</sup> See *Villamonte-Marquez*, 462 U.S. at 598-610 (Brennan, J., dissenting).

<sup>73</sup> The Court also could have required that agents possess reasonable suspicion of criminal activity before stopping a vessel, as is the case with automobiles. See *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>74</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 680.

<sup>75</sup> Professor Burkoff views *Jones v. United States*, 357 U.S. 493 (1958), as such a case, but other commentators disagree. See Haddad, *Another Viewpoint*, *supra* note 1, at 655. For a discussion of *Jones*, see *infra* notes 121-29 and accompanying text.

<sup>76</sup> See, e.g., *United States v. Ceccolini*, 435 U.S. 268 (1978); *Massachusetts v. Painten*, 389 U.S. 560 (1968).

Burkoff relies for support of the individual motivation approach. Professor Haddad offers several unsatisfactory explanations for the dicta<sup>77</sup> and is forced to concede that a case-by-case approach based on the motivation of the officer would be consistent with the language in the cases as he understands it.<sup>78</sup>

Professor Haddad's difficulty explaining the Court's language results from a misunderstanding of the Court's meaning of the word pretext. He assumes that the Court is referring to actions by police officers that, if the motivation of the officers is ignored, are within the legal boundaries of the fourth amendment doctrine.<sup>79</sup> This is the "legal" pretext defined above.<sup>80</sup> Thus, Haddad explains that if a police officer arrests a burglary suspect on a disorderly conduct charge for which no probable cause exists, then no pretext issue arises. Only if probable cause exists for the disorderly conduct charge, but not the burglary charge, does the issue of pretext arise.<sup>81</sup>

In Haddad's view, in the first case, the court need not reach a claim of pretext in order to find the officers' actions illegal,<sup>82</sup> but this is precisely the opposite of the Supreme Court's definition of pretext—at least of a pretext that requires a finding of unconsti-

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<sup>77</sup> Professor Haddad makes several observations about the Court's dicta on which Professor Burkoff relies. First, Professor Haddad notes that several of the statements relate to the individual motivation of the officer in nonpretext cases. See Haddad, *Another Viewpoint*, *supra* note 1, at 666-68 (discussing *Ceccolini*, 435 U.S. 268 and *Painten*, 389 U.S. 560). According to Haddad, although one can try to extrapolate the Court's concern about the individual motivation of the officer to pretext cases, the language in the cases does not support the proposition that the Court has adopted the individual motivation approach to the pretext issue. In fact, Haddad points out that in many of the cases where the Court has expressed concern about the possibility of pretext, the result has been an adoption of the hard choice approach to restrict the underlying power of the officer. *Id.* at 654-55, 661-65 (citing *Texas v. Brown*, 460 U.S. 730 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), *reh'g denied*, 404 U.S. 874 (1971); *Steagald v. United States*, 451 U.S. 204 (1981); and *Lefkowitz*, 285 U.S. 452, as examples). Professor Haddad also points out that the language cited by Professor Burkoff merely expresses concern about the possibility of pretextual activity but does not state that the Court would utilize the exclusionary rule to correct the problem or that it would utilize the rule on a case-by-case basis based on the individual motivation of the officers involved. Haddad, *Another Viewpoint*, *supra* note 1, at 659, 663, 667. This is not wholly satisfactory. Even Haddad admits that the language cited by Burkoff, as he understands it, implies "such relief would be proper in an appropriate case." *Id.* at 659.

<sup>78</sup> See *id.* at 663.

<sup>79</sup> See *id.* at 643; Haddad, *Claims of Sham*, *supra* note 1, at 205.

<sup>80</sup> See *supra* notes 22-24 and accompanying text.

<sup>81</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 643; Haddad, *Claims of Sham*, *supra* note 1, at 205.

<sup>82</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 643.

tutionality on a case-by-case basis. When the Court suggests finding police conduct in a particular case illegal due to a pretext, it is referring to a fabricated pretext. For example, consider the situation where the officer arrests a burglary suspect for disorderly conduct, but the officer lacks probable cause for either the burglary or the disorderly conduct charge. Although this activity may seem clearly illegal without utilizing a “pretext” doctrine, both the dictionary definition of pretext and language in Supreme Court decisions support the conclusion that this is the meaning the Court attaches to the word pretext in this context. Utilizing this definition reconciles the Supreme Court’s actions with its words—something that other theories of the Supreme Court’s view of pretexts fail to do.

The dictionary definition of pretext is “something that is put forward to conceal a true purpose or object; an ostensible reason; excuse.”<sup>83</sup> This definition does not specify whether the ostensible reason is true or false, but it certainly includes fabricated ostensible reasons and that is arguably the more typical situation.<sup>84</sup> Fabricated pretexts often are used because they are difficult to disprove and less offensive than the truth. For instance, a guest may be bored with her host’s company, and rather than insulting the host, she may feign a headache in order to be excused. It is easy to lie about a headache,<sup>85</sup> and the host is not insulted, as she would be if the guest revealed that she was leaving because she was bored with the host’s company.<sup>86</sup> For the same reasons, fabricated pretexts are attractive to police undertaking illegal fourth amendment activity. A police officer who has a hunch about a narcotics suspect may

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<sup>83</sup> THE RANDOM HOUSE DICTIONARY (Unabridged) 1534 (2d ed. 1987). See also WEBSTER’S NEW INTERNATIONAL DICTIONARY (Unabridged) 1959 (2d ed. 1951); BLACK’S LAW DICTIONARY 1069 (5th ed. 1979).

<sup>84</sup> Pretext is listed as a synonym for pretense, a word that includes a fabricated ostensible reason. See WEBSTER’S NEW INTERNATIONAL DICTIONARY, *supra* note 83, at 1959. Even if pretense is considered the more accurate term to refer to fabricated ostensible reasons, the Supreme Court uses the terms interchangeably. In *Texas v. Brown*, 460 U.S. 730 (1983), for instance, the Court in one instance paraphrased the decision in *Coolidge*, 403 U.S. 443, as requiring inadvertence as part of the plain view exception in order to prevent the officers from relying on the exception as a pretext. A few pages later, the Court paraphrased the same language as preventing the officers from relying on the exception as a pretense. *Brown*, 460 U.S. at 737, 743.

<sup>85</sup> It is easy to lie about a headache because it is a common occurrence, so the host will have no reason to doubt the guest, and proof of pretext is difficult to obtain.

<sup>86</sup> If the guest actually has a headache and uses it as an excuse for leaving (if the host were more interested the guest would stay despite the headache), it would be an example of a legal pretext.

fabricate a traffic offense in order to stop the suspect. It is easy to lie about a traffic violation,<sup>87</sup> and the court is not offended by a police officer stopping an individual for a traffic violation, as it would be by an officer stopping a narcotics suspect on a mere hunch. Thus, from a linguistic standpoint, it is appropriate to adopt the term pretext to describe putting forth a false, fabricated, or concocted reason to conceal a true purpose. This is what the Court appears to have done and explains many of the "cryptic" statements that trouble Professor Burkoff and other commentators.

Chief Justice Warren's dissenting opinion to the Court's dismissal of certiorari in *Wainwright v. New Orleans*,<sup>88</sup> which Professor Burkoff cites as supporting the use of a case-by-case pretext doctrine,<sup>89</sup> uses the term pretext to describe the government's offering of a fabricated justification. In *Wainwright*, the defendant, a law student, was stopped by police because they believed he fit the description of a murder suspect.<sup>90</sup> The police knew the suspect had a distinctive tattoo on his left forearm. When the defendant refused to remove his jacket the police arrested him on the charge of vagrancy by loitering and then frisked him. Later, at the station, the defendant continued to resist removal of his jacket, resulting in additional charges of disturbing the peace by assaulting police officers and resisting an officer.<sup>91</sup> The defendant was convicted on these latter charges.

On appeal, the defendant argued that his arrest and the subsequent search were unlawful, entitling him to resist the search. His appeal was denied,<sup>92</sup> and he sought review in the United States Supreme Court.<sup>93</sup> After granting certiorari and hearing oral arguments, the Court dismissed the writ as improvidently granted, apparently because the record was not sufficiently clear to permit proper evaluation of the issues.<sup>94</sup> Chief Justice Warren dissented,

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<sup>87</sup> It is easy to lie about a traffic offense because it is a common occurrence so the court will have little reason to doubt the officer, and proof of pretext is difficult to obtain.

<sup>88</sup> 392 U.S. 598 (1968).

<sup>89</sup> See Burkoff, *Bad Faith Searches*, *supra* note 1, at 103.

<sup>90</sup> *Wainwright v. New Orleans*, 392 U.S. 598, 600 (1968) (Warren, C.J., dissenting).

<sup>91</sup> These charges were not made until six months after the incident, after the original charges apparently had been abandoned. *Id.* at 602.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 603.

<sup>94</sup> *Id.* at 598-600. Justice Douglas believed the vagrancy arrest was illegal and dissented. *Id.* at 610, 612-13. Justice Harlan agreed that the vagrancy arrest was illegal, but concurred in the dismissal because he felt that the issue of the reasonableness of the defendant's resistance to the arrest remained and could not be decided on the record. *Id.* at 598. Justices

although he agreed that the facts were insufficient to determine the level of suspicion the officers had for the murder, he thought it irrelevant because the record “establish[ed] that petitioner was not arrested for murder.”<sup>95</sup> Chief Justice Warren would have decided that the arrest was illegal based on the vagrancy charge because it was the only crime for which the police booked the defendant.<sup>96</sup>

Chief Justice Warren pointed out that the vagrancy arrest was “based on the inconsequential circumstance that petitioner had been standing still for 5 to 10 seconds before the police approached him.”<sup>97</sup> He described the charges as “trumped up,”<sup>98</sup> “baseless,”<sup>99</sup> and, in language cited by Professor Haddad,<sup>100</sup> “imaginary.”<sup>101</sup> Professor Haddad asserts that the use of the word “‘imaginary’ suggests that Warren believed the police lacked probable cause for a vagrancy arrest.”<sup>102</sup> This assertion is too mild. In addition to the adjectives set out above, Chief Justice Warren expressly stated that “[t]he officers had neither a warrant nor probable cause to arrest petitioner for vagrancy by loitering.”<sup>103</sup> Chief Justice Warren clearly viewed the underlying vagrancy charge as unconstitutional because it was fabricated. More importantly, he described the government’s attempted use of this fabricated offense as a pretext.<sup>104</sup> Of course, if the vagrancy charge was fabricated, then the case was *not* a pretext as defined by the commentators. Chief Justice Warren suggested a case-by-case approach only for fabricated pretext cases, not the “legal” pretext cases on which the commentators dwell.<sup>105</sup>

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Fortas and Marshall, who also concurred in the dismissal, felt the record insufficient to decide the issue of the legality of the arrest, but their uncertainty seemed to focus on the level of suspicion the police had concerning the murder, not the vagrancy. *Id.* at 598-600.

<sup>95</sup> *Id.* at 605.

<sup>96</sup> *Id.* at 605-07. This suggests Justice Warren was willing to accept a “legal” pretext. He was deciding the case based on the legality of the ostensible reason for the arrest (vagrancy), not the “true” reason for the arrest (suspicion of murder).

<sup>97</sup> *Id.* at 604.

<sup>98</sup> *Id.* at 604, 610.

<sup>99</sup> *Id.* at 604 n.2.

<sup>100</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 668.

<sup>101</sup> *Wanwright*, 392 U.S. at 607 (Warren, C.J., dissenting).

<sup>102</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 668.

<sup>103</sup> *Wanwright*, 392 U.S. at 604 (Warren, C.J., dissenting).

<sup>104</sup> *Id.* at 607.

<sup>105</sup> In fact, Chief Justice Warren’s opinion suggests he would have reached a different result if the case was a “legal” pretext case. Although Professor Haddad asserts that “[w]e are left to speculate about what Warren would have said if he had believed that the police had acted within the fourth amendment,” Haddad, *Another Viewpoint*, *supra* note 1, at

Under Chief Justice Warren's definition of pretext, the only pretextual police conduct that would be declared unlawful on a case-by-case basis is activity undertaken by police for reasons that do not justify the activity and that they attempt to justify with a concocted or fabricated reason. As mentioned, this is not the definition of pretext used by commentators.<sup>106</sup> Under the commentators' definition, the officers offer a justification that is not fabricated and is valid, or would be valid if the officers' true motivation is ignored. However, as demonstrated above, a definition of pretext which posits the ostensible reason as a fabricated reason is logical under the dictionary definition of pretext and from a fourth amendment jurisprudence standpoint. Moreover, a careful reading of the cases relied on by Professor Burkoff suggests that the Court was referring to fabricated pretexts when expressing its concern over pretextual activity by police.

The first case Professor Burkoff points to as condemning pretextual activity is *United States v Lefkowitz*.<sup>107</sup> At the end of its opinion, the Court states that "[a]n arrest may not be used as a pretext to search for evidence."<sup>108</sup> Interestingly, the government's theory justifying the search in *Lefkowitz* was not that the search was authorized as incident to a lawful arrest pursuant to a warrant, but that it was authorized as incident to an arrest for the felonious conspiracy that the agents allegedly observed. The government apparently believed that the observation of a crime permitted agents to seize items being used to commit that crime. The Court rejected

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668, the opinion suggests Warren would have upheld the activity.

In support of his statement that "[u]sing a minor and imaginary charge to hold an individual, in my judgement deserves unqualified condemnation," 392 U.S. at 607, Warren cited two cases in a footnote. *Id.* at 607 n.8 (citing *United States v. Carignan*, 342 U.S. 36 (1951), and *Culombe v. Connecticut*, 367 U.S. 568 (1961)). In one of those cases, a murder confession obtained while the individual was being detained on an assault charge was deemed admissible because the arrest on the underlying assault charge was lawful. *Carignan*, 342 U.S. at 43-44. In the other case, a murder confession was held inadmissible when obtained while the suspect was being detained on a "concocted" charge of breach of the peace. *Culombe*, 367 U.S. at 631-35. Warren's citation to these cases with the directive to compare favorably suggests he would uphold police activity justified by the objective facts, within the letter of the fourth amendment in Haddad's words, but would declare illegal police activity justified by a fabricated reason and thus not within the letter of the fourth amendment.

<sup>106</sup> See *supra* note 1; *supra* notes 79-82 and accompanying text. One commentator has noted that the proffered reason may be either valid or fabricated, but treats both situations identically. See Note, *Abuses of Power*, *supra* note 1, at 1802-03.

<sup>107</sup> 285 U.S. 452 (1932); Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 545.

<sup>108</sup> *Lefkowitz*, 285 U.S. at 467.

that argument because “[t]here is nothing in the record to support the claim that, at the time of the arrest, . . . any . . . crime was being committed in the presence of the officers.”<sup>109</sup> In other words, the government tried to use a *fabricated* offense to justify the search. It was in this context that the Court condemned pretextual activity by the police.<sup>110</sup>

Professor Burkoff also cites Justice Frankfurter’s opinion in *Abel v United States*<sup>111</sup> as evidence that the Court would hold pretextual activity unconstitutional on a case-by-case basis.<sup>112</sup> In *Abel*, the F.B.I., which suspected the defendant of espionage but had insufficient evidence to arrest him on that charge, informed immigration officials of the defendant’s illegal status. Immigration officials arrested the defendant for deportation. The defendant challenged his arrest on pretextual grounds because F.B.I. agents were present at his arrest and searched his hotel room immediately after he checked out to accompany the immigration officers to detention. The Court rejected the defendant’s argument. Professor Burkoff, not being dissuaded, points to Frankfurter’s statement that the ruling was premised on the lower court’s finding that the arresting agents did not act in bad faith. Burkoff quotes Frankfurter’s statement that if “bad faith” had been found, it would “reveal a serious misconduct by law-enforcing officers [that] must meet stern resistance by the courts.”<sup>113</sup> From this Burkoff concludes that in Frankfurter’s view, the court would have decided the case differently had the arrest been pretextual. But it is Burkoff who inserts the word pretext into the analysis and assumes Frankfurter was denouncing legal pretexts. It is more likely that the “bad faith” to which Frankfurter referred was fabricated pretextual activity

At the start of his discussion, Frankfurter framed the issue as whether the government engaged in a subterfuge and whether the I.N.S. warrant supporting the arrest was a *pretense* and a sham.<sup>114</sup>

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<sup>109</sup> *Id.* at 462-63.

<sup>110</sup> *Id.* at 462-67. In the sentence immediately preceding the Court’s denunciation of pretextual activity, the Court stated that the case “does not differ materially from the *Go-Bart* case and is ruled by it.” *Id.* at 467. In *Go-Bart*, the police used a fabricated justification for an arrest to attempt to justify their activity. See *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931).

<sup>111</sup> 362 U.S. 217 (1960).

<sup>112</sup> Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 545.

<sup>113</sup> *Id.* (quoting *Abel*, 362 U.S. at 226).

<sup>114</sup> *Abel*, 362 U.S. at 225.

Webster's Dictionary explains that pretense "applies in general to that which is falsely or deceitfully held out as true."<sup>115</sup> According to Frankfurter, the defendant's claim was that the administrative warrant was used for "entirely illegitimate purposes."<sup>116</sup> In other words, there was no basis for the warrant because the suspicion of illegal status was fabricated. The notion of declaring illegal an arrest on an I.N.S. warrant, based on legitimate evidence of illegal status, merely because the true motive was to arrest a spy, seemed ludicrous to Frankfurter:

The facts are that the F.B.I. suspected petitioner both of espionage and illegal residence in the United States as an alien. That agency surely acted not only with propriety but in discharge of its duty in bringing petitioner's illegal status to the attention of the INS, particularly after it found itself unable to proceed with petitioner's prosecution for espionage. It would make no sense to say that branches of the Department of Justice may not cooperate in pursuing one course of action or the other, once it is honestly decided what course is to be preferred.

The Constitution does not require that honest law enforcement should be put to such an irrevocable choice between two recourses of the Government.<sup>117</sup>

The key to Frankfurter's pretext doctrine is that the proffered justification is legal, not fabricated. Provided the proffered justification is true, there is no basis for declaring the conduct illegal.<sup>118</sup> Thus, Professor Burkoff's conclusion that the bad faith referred to by Justice Frankfurter is equivalent to a legal pretext appears incorrect.<sup>119</sup>

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<sup>115</sup> WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged), *supra* note 83, at 1159.

<sup>116</sup> *Abel*, 362 U.S. at 226 (emphasis added).

<sup>117</sup> *Id.* at 228-29.

<sup>118</sup> To further illustrate this point, Frankfurter offered the case of *Coyler v. Skeffington*, 265 F. 17 (1920), *rev'd*, 277 F. 129 (1922), as an example of the improper use of an immigration rationale by the FBI. In *Coyler*, the Department of Justice requested hundreds of administrative warrants, many unsupported by evidence, for the arrest of suspected alien Communists. *Id.* at 37-45. Thus, in many cases, the purported justification offered by the Justice Department was fabricated—there was no evidence to support their claims of immigration violations in the warrant application. Moreover, before the warrants arrived, the FBI proceeded to arrest those named in the warrants. *Id.* at 40. Because the agents arrested individuals before the warrants arrived, the justification for the arrests was fabricated even in those cases in which the agents had presented evidence supporting the warrants.

<sup>119</sup> Professor Haddad recognizes this but does not offer an explanation for Frankfurter's dictum concerning "bad faith." He merely states that Frankfurter "seemed to employ a test for 'bad faith' that was very difficult to meet," and argues that Frankfurter's comments "make one wonder whether he would have found pretextual fourth amendment activity in any case." Haddad, *Another Viewpoint*, *supra* note 1, at 659. Further evidence

Instead, careful analysis suggests Frankfurter was concerned with fabricated justifications.<sup>120</sup>

Professor Burkoff cites *Jones v. United States*,<sup>121</sup> as a case where the Court “squarely and explicitly” refused to permit a pretextual justification by the government.<sup>122</sup> In *Jones*, the government attempted to justify a warrantless search<sup>123</sup> of defendant’s home under the search incident to a lawful arrest exception.<sup>124</sup> As Professor Burkoff notes, Justice Harlan rejected this argument, stating, “the record fails to support the theory now advanced by the Government. The testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest petitioner.”<sup>125</sup>

Professor Burkoff characterizes this language as an example of the Court’s refusal to sanction “search and seizure on the basis of a proffered ‘objective’ legal analysis of the officers’ actions.”<sup>126</sup> The evidence, however, suggests that the proffered justification was fabricated: The government failed to offer the justification in any of the lower courts, and the testimony of the officers demonstrated a directly contrary purpose for the intrusion. In fact, the government did not assert that the agents’ purpose in entering was to arrest. Instead, the government asserted only that it was rational to infer this purpose from the facts.<sup>127</sup> This inference was not

that Frankfurter considered fabricated justifications to be pretexts can be found in Frankfurter’s dissent in *United States v. Rabinowitz*, 339 U.S. 56 (1950). Professor Burkoff cites this dissent as standing for the proposition that “pretext arrests [were] one of the abuses [the] Framers sought to curb.” Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546 n.106. In describing the type of pretextual arrest that the Framers sought to prevent, Frankfurter referred to searches “under the guise of a warrant of arrest for a venial or spurious offense,” “searches and seizures made under general warrants in support of charges real or imaginary,” and “[a]rrest[s] for minor or trumped up charges.” *Rabinowitz*, 339 U.S. at 82 (emphasis added).

<sup>120</sup> The reason for fabricating this suspicion rather than simply fabricating suspicion of espionage may have been that the espionage warrant required judicial approval, while the I.N.S. warrant was issued by the District Director of the I.N.S. *Abel*, 362 U.S. at 232.

<sup>121</sup> 357 U.S. 493 (1958).

<sup>122</sup> Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 545.

<sup>123</sup> Although the agents had a warrant, it authorized only daytime entry and the intrusion was made at night. *Jones*, 357 U.S. at 494-95.

<sup>124</sup> *Id.* at 499. Although searches incident to a lawful arrest are now limited in scope to the “lunging area” of the arrestee, *Chimel v. California*, 395 U.S. 752 (1969), *reh’g denied*, 396 U.S. 869 (1969), at the time of *Jones*, the exception would have authorized a broader search. See *Rabinowitz*, 339 U.S. 56 (authorizing the search of an entire office, including a desk, file cabinets, and a safe as incident to a lawful arrest).

<sup>125</sup> *Jones*, 357 U.S. at 500.

<sup>126</sup> Burkoff, *Bad Faith Searches*, *supra* note 1, at 81.

<sup>127</sup> *Jones*, 357 U.S. at 499.

rational because the officers did not arrest the defendant since he was not home.<sup>128</sup> Prior to the entry, the agents knew that the defendant was not home and were asked to delay the search until he returned.<sup>129</sup> There was no evidence that probable cause existed to believe that the defendant was home. Without probable cause, the proffered justification was itself insufficient; it was fabricated.

Professor Burkoff points to several other cases where, in single sentences, the Court states that pretextual activity was not present.<sup>130</sup> Again, Professor Burkoff assumes that the Court is referring to "legal" pretexts when it more likely is referring to fabricated pretexts. In *Texas v Brown*,<sup>131</sup> *Colorado v Bannister*,<sup>132</sup> and *United States v Robinson*,<sup>133</sup> the police activity began with investigation of a purported traffic violation, an area of police authority notorious for abuse in the form of fabricated offenses. In each case, the Court noted the absence of any claim of pretext in a single sentence or footnote. The Court did not explain what it meant by pretext and could easily have been taking care to distinguish the case before it from those notorious cases where officers fabricate traffic offenses to detain individuals for whom no suspicion of wrongdoing exists. Unless one is willing to suspend credibility, such a definition makes more sense.

In *Texas v Brown*, the Court upheld, under the plain view exception, the seizure of a balloon containing heroin, which was discovered during a stop at a "routine driver's license checkpoint."<sup>134</sup> Discussing the exception's "inadvertence" requirement, the Court stated, "The circumstances of this meeting between [the officer] and [the defendant] give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses."<sup>135</sup> It is unlikely that the Court meant that the officer's motivation for performing the driver's license checkpoint did not include a desire to nab narcotics violators. The Court conceded that "the officers no doubt had an expectation that some of the

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<sup>128</sup> *Id.* at 495.

<sup>129</sup> *Id.* at 496 n.2.

<sup>130</sup> See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 546-50.

<sup>131</sup> 460 U.S. 730 (1983).

<sup>132</sup> 449 U.S. 1 (1980) (per curiam).

<sup>133</sup> 414 U.S. 218 (1973).

<sup>134</sup> *Brown*, 460 U.S. at 733.

<sup>135</sup> *Id.* at 743.

cars they halted would contain narcotics or paraphernalia<sup>136</sup>

The Court more likely was making the point that there was no evidence that the officer fabricated the routine license checkpoint rationale in order to stop the defendant. In other words, the officer did not pretend to stop cars in a nondiscretionary fashion in order to apprehend the defendant or others suspected of narcotics violations.<sup>137</sup> Instead, the officer conducted the checkpoint in nondiscretionary fashion, hoping (or intending) that this would result in the stopping of some narcotics suspects.<sup>138</sup> To hold otherwise would prevent police from utilizing the plain view exception whenever they perform routine license checks in areas suspected of a high level of illegal activity. It is efficient to permit the police to attempt to "kill two birds with one stone" by conducting license checkpoints in high crime areas if the police also believe a greater incidence of license violations are likely to occur in these areas. Even Justice Brennan has stated that "it would appear a strange test as to whether a[n] [administrative] 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."<sup>139</sup> Permitting such "efficient" behavior may be obnoxious because it allows the police to selectively enforce minor offenses against low income groups and particular racial groups who may live in high crime neighborhoods. However, the Court has been unwilling to prevent such abuses through a case-by-case pretext analysis unless the minor charges are fabricated.

The Court's concern about pretextual activity in *Colorado v. Bannister*<sup>140</sup> is consistent with a definition of pretext as a fabricated justification. In *Bannister*, the Court upheld the seizure of contraband in plain view during a stop for speeding. The officer initially

<sup>136</sup> *Id.* at 743-44.

<sup>137</sup> The Court noted that "there is no indication that [the officer] had any reason to believe that any particular object would be in [the defendant's] glove compartment or elsewhere in his automobile." *Id.* at 744.

<sup>138</sup> The Court noted that the checkpoint was conducted in a "medium area of narcotics traffic." *Id.* at 743.

<sup>139</sup> *Abel*, 362 U.S. at 253 (Brennan, J., dissenting). Other Justices have expressed the same sentiment. See *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967) ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.") (White, J., opinion of the Court); *United States v. Villamonte-Marquez*, 462 U.S. at 584 n.3 (describing such a result as "incongruous") (Rehnquist, J., opinion of the Court).

<sup>140</sup> 449 U.S. 1 (1980).

observed the defendants speeding but was unable to pursue them before their car disappeared from view. He then received a report of a theft of motor vehicle parts in the area and a description of the perpetrators. The defendant's car, still speeding, reappeared and pulled into a service station. While issuing a speeding citation, the officer observed items reported to have been stolen in the recent theft. Upholding the seizure of the contraband, the Court noted in a footnote, "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."<sup>141</sup> The suggestion is that the result might have been different if evidence of a pretext was presented. But again, the question of what the Court meant by a pretext is unresolved.

It is hard to imagine that the result in *Bannister* would have differed if the Court believed the officer had a hunch (but not reasonable suspicion) that the car was involved in the reported theft, thereby creating an investigatory motive for stopping the car after it reappeared. If that were the case, individuals suspected of criminal activity would be less subject to traffic laws as they make their getaway than otherwise law-abiding citizens who happen to exceed the speed limit. It is more reasonable to believe that the Court was simply making clear that the officer did not fabricate the traffic offense.

In *United States v. Robinson*,<sup>142</sup> the Court rejected the defendant's argument that a traffic arrest was merely a pretext for the officer to conduct a search for evidence of a narcotics violation. The court stated: "We think it is sufficient for purposes of our decision that [defendant] was lawfully arrested for an offense and that . . . placing him in custody following that arrest was not a departure from established police department practice."<sup>143</sup> Although this suggests a case-by-case pretext approach based on deviation from standardized procedures, the companion case to *Robinson*, *Gustafson v. Florida*,<sup>144</sup> suggests otherwise. In *Gustafson*, the defendant maintained that no police department regulation required a custodial arrest for the traffic offense or established when a full custodial search should occur.<sup>145</sup> The Court held that

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<sup>141</sup> *Id.* at 4 n.4.

<sup>142</sup> 414 U.S. 218 (1973).

<sup>143</sup> *Id.* at 221 n.1.

<sup>144</sup> 414 U.S. 260 (1973).

<sup>145</sup> *Id.* at 263.

these differences were not determinative of the constitutional issue. The important fact was "that the officer had probable cause to arrest the [defendant] and that he lawfully effectuated the arrest and placed [defendant] in custody"<sup>146</sup> Although the Court likely would have ruled differently had the officers in *Robinson* and *Gustafson* fabricated the traffic offenses, the motive of the officers was irrelevant to the Court because probable cause existed for the offenses justifying the officers' actions.

Finally, in another context, the Court referred to the use of a fabricated justification when it denounced the use of a pretext by police. In *Schneckloth v Bustamonte*,<sup>147</sup> the Court held that consent searches are valid if, considering the totality of the circumstances, the consent was voluntary. The Court specifically ruled that the government need not prove the consent was given with knowledge of the right to refuse. The Court warned, however, that the consent must be truly voluntary and not coerced, either by explicit or implicit means. The Court explained that "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion."<sup>148</sup> The Court's meaning of pretext is a false or fabricated justification. The Court was concerned that the government would argue voluntary consent as a justification for a search when, in fact, the consent was coerced.

Once it is understood that the Court is referring to the use of fabricated justifications when it suggests striking down pretextual activity on a case-by-case basis, it is easy to see that Professor Burkoff's criticism of the Court for not following precedent in cases where the Court upholds police activity that may fit the definition of a "legal" pretext is unfounded. For instance, Professor Burkoff has leveled his strongest criticism against *United States v. Villamonte-Marquez*.<sup>149</sup> He asserts that ample evidence existed to show that the agent's true purpose in boarding the vessel was to search for narcotics. He bemoans the fact that the Court ignored this evidence, particularly the objective evidence.<sup>150</sup> But the evidence Professor Burkoff refers to does not indicate that the government's proffered justification was fabricated. Rather, the justification was

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<sup>146</sup> *Id.* at 265.

<sup>147</sup> 412 U.S. 218 (1973).

<sup>148</sup> *Id.* at 228.

<sup>149</sup> 462 U.S. 579 (1983).

<sup>150</sup> See Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 528-32.

a legal one—the vessel was subject to boarding for a document check. The Court properly ignored the evidence that the officers' activity was pretextual because even if that were so, the pretext was a legal one and not subject to being struck down on a case-by-case basis.<sup>151</sup>

This is not to say the Court's concern is limited to fabricated justifications when it refers to pretext. Rather, the Court's definition of pretext includes fabricated justifications, and the Court refers to fabricated pretexts when it suggests striking down pretextual activity on a case-by-case basis. Where the Court has been concerned with pretextual activity based on "legal" justifications, the Court has followed the "hard choice" approach identified by Professor Haddad.

For instance, in *Steagald v United States*,<sup>152</sup> the Court determined whether a search warrant is required to enter a third party's home to arrest a suspect for whom the police have an arrest warrant. The government argued that an arrest warrant should suffice. The Court decided that a search warrant was required, in part, because "an arrest warrant may serve as the pretext for entering a home in which police have a suspicion, but not probable cause to believe, that illegal activity is taking place."<sup>153</sup> The Court is referring to a scenario where police, who have an arrest warrant, wait for the suspect to enter a home they would like to search but for which they have insufficient suspicion. Such conduct would be a legal pretext under the rule advocated by the government. If an arrest warrant authorized entry into a third party's home, then the police actions, irrespective of motive, would be lawful. As Professor Haddad has pointed out, the Court did not announce a case-by-case approach based on the officer's intent. Instead, the Court addressed this potential pretext problem by restricting the authority of police to enter homes of third parties, regardless of intent.<sup>154</sup>

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<sup>151</sup> Of course, under the hard choice approach the activity was subject to being restricted in all cases if the Court felt the opportunity to board vessels for document inspections without suspicion was subject to unacceptable levels of abuse. However, the Court refused to take this route despite the urging of Justice Brennan in dissent.

<sup>152</sup> 451 U.S. 204 (1981).

<sup>153</sup> *Id.* at 215.

<sup>154</sup> By requiring a search warrant, the Court also avoided the possibility of abuse through a fabricated pretext—that is, the police fabricating the possibility of the presence of a suspect for whom they hold an arrest warrant in order to enter a home without a search warrant—for which a case-by-case approach would have been appropriate.

The Court took a similar approach in *Chimel v California*,<sup>155</sup> restricting searches incident to a lawful arrest to the area within the immediate control of the suspect. Part of the Court's rationale was that a broader power to search would "give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere."<sup>156</sup> The Court was concerned with a "legal" pretext—officers delaying the arrest of a suspect for whom they have an arrest warrant<sup>157</sup> to effect the arrest in the suspect's home and conduct a search. The pretext is "legal" because, ignoring the intent to search, under the broad authority urged by the government the actions of the officers in entering the home with an arrest warrant and searching incident to that arrest are lawful. Again, the Court restricted the power to search incident to lawful arrest in all cases, rather than imposing a rule that required a case-by-case analysis of intent, because it was concerned with the possibility of abuse based on a legal pretext rather than a fabricated one. Only if police fabricated a pretext—claimed authority to enter with an arrest warrant when in fact they lacked probable cause to believe the suspect was at the premises—would a case-by-case approach be appropriate. In fact, it was in just such a case, *Jones v. United States*,<sup>158</sup> that the Court utilized a case-by-case approach and refused to tolerate a search under the search incident to arrest rationale.<sup>159</sup>

The Supreme Court uses the word pretext to refer to both legal and fabricated justifications for police activity undertaken for reasons other than those used to justify the conduct. Unfortunately, the commentators' failure to recognize this has resulted in confusion over the Court's view of pretextual activity. Some commentators have ignored the possibility that the Court uses pretext to refer to fabricated justifications, believing that such activity is so obviously illegal it does not require the use of a pretext doctrine to find it unlawful.<sup>160</sup> Others, particularly Professor Burkoff, ig-

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<sup>155</sup> 395 U.S. 752 (1969).

<sup>156</sup> *Id.* at 767.

<sup>157</sup> A warrant would be required under current fourth amendment doctrine. See *Payton v. New York*, 445 U.S. 573 (1980). In *Chimel*, the Court assumed the entry to arrest was valid despite the arrest warrant being invalid. 395 U.S. at 755.

<sup>158</sup> 357 U.S. 493 (1958).

<sup>159</sup> See *supra* notes 121-29 and accompanying text.

<sup>160</sup> Haddad, *Another Viewpoint*, *supra* note 1, at 643; Haddad, *Claims of Sham*, *supra* note 1, at 205.

nore the distinction as they find the Court's denunciations of fabricated pretexts useful in their campaign to have less obviously illegal activity (legal pretexts) declared unconstitutional.<sup>161</sup> Ignoring the distinction between legal and fabricated pretexts, Professor Burkoff has constructed a seemingly plausible argument that the Supreme Court would strike down police activity on a case-by-case basis based on evidence of a legal pretext.<sup>162</sup> The discussion above demonstrates why this argument is incorrect.

Although the Court's definition of pretext is not always clear, it is unlikely that it will strike down legal pretextual police activity on a case-by-case basis. Rather, when dealing with legal pretexts, the Court has applied the hard choice approach. The Court strikes down police activity on a case-by-case basis only when police have engaged in a fabricated pretext. In his most recent article, Professor Burkoff persists in his attempt to show that a case-by-case pretext doctrine based on motivation rather than fabrication is alive and well in Supreme Court jurisprudence. His effort is unconvincing.

#### D. Professor Burkoff's Four Cases

In his most recent article on the pretext issue, Professor Burkoff criticizes the Court's recent dismissal of certiorari in *Missouri v. Blair*<sup>163</sup> because the Court deprived itself of an opportunity to finally resolve "the most troubling questions raised by a few judges and commentators relating to the existence and content of the pretext search doctrine."<sup>164</sup> Professor Burkoff takes comfort, however, from the Court's decisions in four other cases that he claims "answered all of the questions raised in *Blair*—and then some."<sup>165</sup> Not surprisingly, Burkoff asserts that the four decisions "make it clear beyond peradventure that pretext searches are unconstitutional and, further, that it is appropriate to utilize evidence of searching officers' motivation in determining constitutionality."<sup>166</sup> Correct analysis of the cases provides little, if any, support for the proposition that the Court will strike down legal pretexts on a case-by-case basis.

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<sup>161</sup> Burkoff, *Bad Faith Searches*, *supra* note 1, at 75-83; Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 544-48; Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 373.

<sup>162</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3.

<sup>163</sup> *State v. Blair*, 691 S.W.2d 259 (Mo. 1985), *cert. granted sub nom. Missouri v. Blair*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 698 (1987).

<sup>164</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 410.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

Professor Burkoff's analysis of four recent Supreme Court cases is flawed in two respects. First, Professor Burkoff continues to ignore indications that the Court is referring only to fabricated pretexts when it suggests striking down pretextual activity on a case-by-case basis. His most recent analysis suffers from the same problems as his analysis of earlier cases. Second, Professor Burkoff mistakes a fundamental shift in the Court's fourth amendment jurisprudence as an application of a pretext doctrine. As explained below, in three of the cases discussed by Burkoff, the Court dealt with special exceptions to the requirements of individualized suspicion, probable cause, and a warrant, because the government's purposes were noncriminal. In these cases the officers' purpose or motivation was relevant only to determine whether the officers were entitled to take advantage of the special exceptions, not because the Court was prepared to strike down the activity as pretextual.<sup>167</sup> Professor Burkoff misinterpreted the Court's analysis in these cases as the application of a pretext doctrine applied on a case-by-case basis to declare legal pretexts unconstitutional. He compounded his mistake by assuming that this pretext doctrine, which does not exist, will apply across the board to the exercise of fourth amendment power by police officers. Even if the Court's approach to cases in these areas could be described as applying a pretext doctrine on a case-by-case basis, there is no suggestion that the Court would adopt this approach to search and seizure cases generally. Available evidence suggests the contrary.

Professor Burkoff cites the recent case of *Colorado v. Bertine*<sup>168</sup> to demonstrate the vitality of the Supreme Court's case-by-case pretext doctrine based on a finding of legal pretext. But *Bertine* is a reaffirmation of the Court's concern with fabricated, not legal, pretexts. In *Bertine*, the defendant was arrested for driving under the influence of alcohol. Before towing Bertine's van to the impound lot, a back-up officer conducted an inventory search that included looking inside a backpack on the front seat of the van. The officer discovered drugs and paraphernalia in the backpack

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<sup>167</sup> Some fabricated, as opposed to legal, pretextual activity may be declared illegal under the approach the Court has adopted in these cases. The Court eliminates from the exceptions based on noncriminal purposes only actions by the police taken *solely* for the purpose of criminal investigation. Therefore, if the police engage in a legal pretext by taking advantage of an actual parking violation to conduct an inventory of a suspected criminal's vehicle, their purpose would not be solely criminal investigation, and their actions would qualify under the inventory exception. See *infra* notes 172-74 and accompanying text.

<sup>168</sup> 479 U.S. 367 (1987).

and charged Bertine with narcotics offenses in addition to drunk driving.<sup>169</sup> The Supreme Court upheld the search under the inventory exception because standard departmental procedures required officers to open all containers and to list their contents.<sup>170</sup> In the process, the Court revealed its concern for fabricated pretextual searches.

In reversing the Colorado Supreme Court, the United States Supreme Court was critical of the Colorado court for relying on two previous fourth amendment Supreme Court cases invalidating searches of containers because those cases "concerned searches solely for the purpose of investigating criminal conduct."<sup>171</sup> An inventory search conducted solely for a criminal investigation purpose—for which the Court was suggesting a different result—is a fabricated pretext, not a legal pretext.

In both fabricated and legal pretext situations, the police have a criminal investigation purpose but lack sufficient suspicion of criminal activity to justify a search. In a fabricated pretext, in order to accomplish the desired search (or at least conduct a search that may accomplish their purpose), the officers fabricate a parking or traffic offense, impound the car, and perform an inventory. The search is solely for a criminal investigative purpose since the traffic offense was fabricated. In a legal pretext situation, however, officers with a criminal investigative purpose decide to take advantage of an actual traffic or parking offense to impound and inventory the suspect's vehicle. Since the suspect has actually committed an offense, the police have both the noncriminal purpose underlying the inventory search exception and a criminal investigative purpose.<sup>172</sup> Even if the criminal investigation purpose predominates, it is not the sole purpose of the police action. Therefore, according

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<sup>169</sup> *Id.* at 368-69.

<sup>170</sup> *Id.* at 371, 375-76.

<sup>171</sup> *Id.* at 371.

<sup>172</sup> It may be argued that the officers' purposes may not automatically expand to include the noncriminal purpose. This seems hard to believe, particularly if they know that by expanding their purposes they can justify their actions. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974); Note, *Pretext Problem*, *supra* note 3, at 261-62 & n.192. Nevertheless, what can be said is that the traffic or parking offense justifies the inventory search by an officer with the desire to uphold the government interests that justify the parking or traffic regulation. Thus, a hypothetical officer on the scene with the officers interested in criminal investigation who was aware of all the facts within the knowledge of the crime investigating officers could legally inventory the vehicle. That is the crucial point for the Court and what the Court means by viewing the circumstances objectively. See *United States v. Judge*, 864 F.2d 1144, 1145-46 (5th Cir. 1989).

to *Bertine*, the conduct should be upheld under the inventory exception.<sup>173</sup> It is incorrect to strike down the search, as the Colorado Supreme Court did in *Bertine*, merely because the police lacked probable cause for the criminal investigation.

Additional language in *Bertine* demonstrates the Court's concern with fabricated, not legal, pretexts and has confused Professor Burkoff in his attempt to use the case to support his analysis of the Court's pretext doctrine. In deciding whether the scope of the inventory search in *Bertine* was permissible, the Court again emphasized that "there was no showing that the police . . . acted in bad faith or for the sole purpose of investigation."<sup>174</sup> Professor Burkoff has characterized this language as a "striking reaffirmation of the so-called case-by-case approach to pretext analysis."<sup>175</sup> Professor Burkoff assumes the language would apply to legal pretexts.<sup>176</sup> This is unlikely.

When Justice Frankfurter referred to bad faith in the pretext context, in *Abel v. United States*,<sup>177</sup> he was referring to fabricated pretexts.<sup>178</sup> Moreover, numerous Justices have opined that it defies common sense to prevent an officer who has less than the required suspicion that an individual is guilty of one crime from stopping that individual when the officer observes the individual committing

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<sup>173</sup> See *Judge*, 864 F.2d at 1147 n.5 ("It would be disingenuous of us to pretend that when the agents opened [the defendant's] bag, they weren't hoping to find some more evidence against him. But, they could have also reasonably had an administrative motive, which is all that is required under *Bertine*.").

<sup>174</sup> *Bertine*, 479 U.S. at 372. This clarifies the Court's statement in *South Dakota v. Opperman*, 428 U.S. 364 (1976), quoted by Professor Burkoff, that in the case before it, there was no suggestion that the inventory procedure "was a pretext concealing an investigatory police motive." *Opperman*, 428 U.S. at 376. By demonstrating a concern with police activity only when the criminal investigation is the *sole* justification, the *Bertine* opinion makes clear that the Court will not strike down inventory searches on a case-by-case basis merely because they are legal pretexts for the discovery of evidence of criminal activity. See *infra* notes 192-96 and accompanying text. This is consistent with the fact that the *Opperman* Court adopted the hard choice approach to deal with the possibility of abuse through legal pretexts—officers taking advantage of an illegally parked vehicle to impound it in order to conduct an inventory search with the hope of finding evidence of criminal activity. The Court restricted the scope of the search the police are permitted to conduct pursuant to the inventory exception. Thus, rather than requiring a case-by-case assessment of the motives of the officer for conducting the inventory in a particular case, by requiring that inventory searches be conducted pursuant to standardized procedures designed to effectuate the noncriminal purposes underlying the exception, the Court reduced the incentive for officers hoping to find evidence of criminal activity to utilize the exception.

<sup>175</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 396.

<sup>176</sup> *Id.* at 394-99.

<sup>177</sup> 362 U.S. 217 (1960).

<sup>178</sup> See *supra* notes 111-20 and accompanying text.

a different offense.<sup>179</sup> It is, therefore, unlikely that the Court would characterize an inventory search conducted pursuant to a legal pretext as a "bad faith" search. The Court's concern with fabricated, not legal, pretexts is demonstrated by the Court's specific reference to officers acting "for the *sole* purpose of investigation."<sup>180</sup> That is not descriptive of the legal pretext that Professor Burkoff wants declared unconstitutional because in a legal pretext the criminal investigation is not the sole purpose.<sup>181</sup> *Bertine* does not stand for the proposition that the Court will strike down police activity undertaken on a legal pretext.

Professor Burkoff insists that *Bertine's* reiteration of the requirement that police follow standardized procedures is a reaffirmation of the appropriateness of an objective pretext analysis on a case-by-case basis. Professor Burkoff mistakes a fundamental shift in the Supreme Court's fourth amendment jurisprudence in a special class of cases for an across the board objective pretext analysis. Once one understands this fundamental shift, it is clear that the requirement of compliance with standard procedures in the inventory cases is not an application of an objective case-by-case pretext doctrine.

Historically, individualized suspicion in the form of probable cause was the prerequisite for finding the government's fourth amendment activity reasonable and therefore constitutional. Generally, a warrant based on that individualized suspicion also was required. In 1967, in *Camara v Municipal Court*,<sup>182</sup> the Supreme Court utilized a different analysis to uphold fourth amendment activity. In *Camara*, the Supreme Court held that routine housing

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<sup>179</sup> See *supra* note 139.

<sup>180</sup> *Bertine*, 479 U.S. at 372. Professor Burkoff describes Justice Rehnquist's disjunctive reference to a showing that the officer acted either in bad faith or for the sole purpose of criminal investigation as "curious." Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 397. But it is curious only because it does not fit Professor Burkoff's analysis. There are many reasons other than criminal investigation for which an officer may fabricate a pretext to inventory a vehicle. The officer may have a desire to harass the owner even without any suspicion of criminal wrongdoing. The Court simply was making clear that fabricating a pretext for purposes of criminal investigation, or any other reason, was impermissible. See Haddad, *Claims of Sham*, *supra* note 1, at 211 (noting that courts applying the individual motivation test often require "bad faith" in addition to criminal investigative purposes).

<sup>181</sup> Professor Burkoff simply dismisses the Court's use of the word "sole" by stating in a footnote that he now favors the "more workable 'primary object' test" Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 397 n.156. He does not explore the importance of the fact that the Court has not adopted the test he favors.

<sup>182</sup> 387 U.S. 523 (1967).

code inspections must be authorized by a search warrant,<sup>183</sup> but in doing so it broadened the definition of probable cause to include instances where authorities lack individualized suspicion. In the Court's view, probable cause was "the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness."<sup>184</sup> The Court balanced the governmental interest that allegedly justified the intrusion against the constitutionally protected interests upon which the search encroached to determine whether the search was reasonable. As the purpose of the government intrusion was noncriminal, the Court authorized area inspections supported by a warrant that was issued on a finding of probable cause based on reasonable legislative or administrative standards instead of individualized suspicion.<sup>185</sup>

A year later, the Court utilized the *Camara* "balancing test" in *Terry v. Ohio*<sup>186</sup> to determine whether the police actions were "reasonable" under the fourth amendment. The Court believed that the probable cause requirement was inapplicable because the police conduct at issue—brief on-the-scene detentions and pat down searches—was not within the scope of the warrant clause of the fourth amendment. The Court stated, "we deal here with an entire rubric of police conduct which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."<sup>187</sup> The police conduct was tested by the fourth amendment's general proscription against unreasonable searches and seizures because the warrant clause was inapplicable. Citing *Camara*, the Court held "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"<sup>188</sup>

The utilization in *Terry* of the reasonableness test rather than the warrant clause spawned one of the most significant changes in fourth amendment jurisprudence since the amendment was enacted. In the twenty plus years since that decision, the Court, in a variety of contexts, has freed itself from the probable cause requirement

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<sup>183</sup> *Id.* at 532. *Camara* involved a routine housing code inspection by the City of San Francisco. *Camara* was arrested when he refused the city inspector admission to his leasehold without a warrant. *Camara* argued that the statute authorizing such warrantless inspections was unconstitutional. *Id.* at 525-27.

<sup>184</sup> *Id.* at 534.

<sup>185</sup> *Id.* at 538.

<sup>186</sup> 392 U.S. 1 (1968).

<sup>187</sup> *Id.* at 20.

<sup>188</sup> *Id.* at 21 (quoting *Camara*, 387 U.S. at 536, 537) (brackets in original).

by utilizing the *Camara* balancing test to determine the reasonableness of governmental conduct. The Court has determined that "the standard of probable cause is peculiarly related to criminal investigations"<sup>189</sup> Thus, the Court has freely utilized the reasonableness standard and the *Camara* balancing test whenever it determines that the government conduct was undertaken to accomplish administrative purposes, to fulfill the "community caretaking function,"<sup>190</sup> or to address "'special needs' beyond normal law enforcement."<sup>191</sup> In these cases, the Court has permitted a trade-off. The Court does not require a warrant, probable cause, or individualized suspicion if the government undertakes the activity for limited purposes. One of the first applications of this analysis, and perhaps the best illustration for purposes of pretext analysis, is the Court's decision in *South Dakota v Opperman*.<sup>192</sup>

In *Opperman*, police officers ticketed defendant's automobile for overtime parking, towed the car to an impound lot, and inventoried the contents of the car, including the unlocked glove compartment. The officers discovered marijuana, and defendant was arrested and convicted on possession charges.<sup>193</sup> The United States Supreme Court upheld the reasonableness of the inventory search under the fourth amendment<sup>194</sup> despite the absence of probable cause because "the standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures."<sup>195</sup> Freed of the probable cause requirement, the Court evaluated the legality of the search by balancing the intrusion on the individual's constitutionally protected interests against the noncriminal, caretaking interest of the state.<sup>196</sup> Finding that the government's non-criminal interests were substantial, the Court upheld the intrusion, even though it resulted in the discovery of evidence used in a criminal prosecution.

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<sup>189</sup> *Opperman*, 428 U.S. at 370 n.5.

<sup>190</sup> *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

<sup>191</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 1414-15 (1989) (drug testing for railroad employees); *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (quoting *New Jersey v. TLO*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)).

<sup>192</sup> 428 U.S. 364 (1976).

<sup>193</sup> *Id.* at 365-66.

<sup>194</sup> *Id.* at 375-76.

<sup>195</sup> *Id.* at 370 n.5.

<sup>196</sup> *Id.* at 367-71. Although the majority opinion did not cite *Camara* and determined reasonableness more by looking to precedent than by explicitly undertaking a balancing of the specific interests at stake in the case, Justice Powell's concurrence makes clear that a balancing test was the basis for the grant of authority. *Id.* at 377-80 (Powell, J., concurring).

If the only government interest in *Opperman* had been the discovery of evidence of criminal activity, then the balancing of interests would have been controlled by precedent, and probable cause would have been required to uphold the intrusion. Therefore, in order to take advantage of the special exception created by the Court, the government must demonstrate a noncriminal justification for conducting the search. Discussions of noncriminal justifications for disputed police activity, in cases such as *Bertine*, are necessary to determine whether to analyze a case as a special exception not governed by the fourth amendment's probable cause requirement. The discussions should not be construed, as Professor Burkoff has,<sup>197</sup> to suggest a subjective case-by-case search for pretextual activity.

Likewise, the Court's requirement that the police follow standardized procedures in inventory cases should not be mistaken for approval of an objective case-by-case approach to pretextual activity. Standardized procedures insure that officers do not exceed the permissible scope of the state's noncriminal interests.<sup>198</sup> This is crucial because the authority to conduct an inventory search without either probable cause or a warrant is based on noncriminal interests, and there is no prior judicial authorization of the searches. Particularly in the inventory search context, officers may be unfamiliar with all the interests involved and the scope of the intrusions that they justify.<sup>199</sup> A search that ignores standardized procedures is unconstitutional whether the procedures were deliberately ignored in order to search for evidence or the officers were unaware of the procedures.<sup>200</sup> In other words, a non-pretextual inventory search can be illegal because standardized procedures were not followed. Justice Marshall's dissent in *Bertine* clarified this: "Accordingly, to invalidate a search that is conducted without established procedures, it is not necessary to establish that the

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<sup>197</sup> See, e.g., Burkoff, *Pretext Search Doctrine*, *supra* note 6, at 548-50.

<sup>198</sup> See *Florida v. Wells*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 1632, 1635 (1990) (absent a departmental policy regarding inventory searches, the search in question "was not sufficiently regulated to satisfy the fourth amendment").

<sup>199</sup> See Haddad, *Another Viewpoint*, *supra* note 1, 683-85. This is not a problem in the criminal investigation context, where either a warrant defines the scope of the search or the scope is defined by the familiar interest of discovering evidence or insuring the safety of the officer.

<sup>200</sup> See *Wells*, \_\_\_ U.S. at \_\_\_, 110 S. Ct. at 1635 (finding inventory search unconstitutional due to lack of departmental policy without inquiring into the purposes of the police in effectuating the search).

police actually acted in bad faith, or that the inventory was in fact a 'pretext.'"<sup>201</sup>

Professor Burkoff characterizes *Bertine* as a case in which the Court

reaffirmed that a defendant may establish that a purported inventory search was unconstitutional where the searching officers: (1) did not possess probable cause, and (2) the defendant can establish *either* (a) that the officers failed to follow "standardized procedures" in their inventory activity, *or* (b) that there was "bad faith" on the part of the searching officers *or* that the search was undertaken "for the sole purpose of investigation."<sup>202</sup>

Although he correctly states *Bertine's* holding, Burkoff incorrectly equates this holding with a reaffirmation of a case-by-case pretext search doctrine for legal pretexts. In fact, the standardized procedures requirement limits all inventory searches, pretextual or not. Moreover, the case-by-case analysis of bad faith searches and searches motivated solely by investigatory purposes represents a concern for fabricated pretexts. Contrary to Professor Burkoff's contention,<sup>203</sup> *Bertine* does not settle the pretext search doctrine issue once and for all, and certainly not in the manner Professor Burkoff would like it settled.

Professor Burkoff also points to the Supreme Court's decisions in *O'Connor v. Ortega*<sup>204</sup> and *New York v. Burger*<sup>205</sup> as evidence of the Court's case-by-case pretext doctrine. Both cases, however, are examples of the fundamental shift of the Court's fourth amendment jurisprudence where it believes probable cause is an inappropriate standard by which to evaluate government conduct. Neither case supports the conclusion that the Court will strike down police activity based on a finding of legal pretext on a case-by-case basis.

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<sup>201</sup> *Bertine*, 479 U.S. at 381 (Marshall, J., dissenting). Professor Burkoff is critical of the fact that Justice Marshall "implicitly equates the use of the term 'pretext' *only* with a subjective analysis." Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 398 n.160 (emphasis in original). He contends that Marshall is in conflict with the majority on this point. But the majority in *Bertine* did not define the failure to follow standardized procedures as a pretext. Professor Burkoff labels such a failure a pretext in order to provide support for his case-by-case pretext doctrine. In fact, to the extent the requirement of standardized procedures reflects a concern for pretextual activity, it represents the adoption of the "hard choice" approach. The Court has restricted the authority of police to search an impounded car in every case, whether or not there is any suggestion of pretext.

<sup>202</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 398.

<sup>203</sup> *Id.* at 399.

<sup>204</sup> 480 U.S. 709 (1987).

<sup>205</sup> 482 U.S. 691 (1987).

In *O'Connor v Ortega*, the Supreme Court authorized work-related searches of public employees' offices by their employers on less than probable cause. The Court based its ruling on the conclusion that "special needs, beyond the normal need for law enforcement make the . . . probable cause requirement impracticable" for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct.<sup>206</sup> Professor Burkoff insists that *Ortega* is an endorsement of his case-by-case pretext search doctrine. To the contrary, the decision demonstrates the futility of attempting to invalidate a search by showing a legal pretext.

In *Ortega*, the parties disagreed whether the search of an employee's office was conducted as an inventory to secure state property or as part of an investigation to discover evidence of misconduct. Professor Burkoff agrees that the employee's argument "that the intrusion was an investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings" was a claim that the search should be found illegal as a pretext.<sup>207</sup> Burkoff fails to notice, however, that the argument failed.

The Court of Appeals in *Ortega* accepted the employee's "pretext" argument and granted summary judgment on the issue of the legality of the search.<sup>208</sup> According to the Supreme Court, the appellate court's ruling apparently was based on that court's finding of a violation of hospital policy regarding inventories of employee offices.<sup>209</sup> This is an objective pretext argument; the failure to follow policy suggested a motive to investigate, not inventory.<sup>210</sup> But the Supreme Court reversed the Court of Appeals' judgment for the employee because a violation of the hospital policy "did not necessarily make the search unlawful."<sup>211</sup> Moreover, the plurality explained that "[a] search to secure state property is valid as

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<sup>206</sup> *Ortega*, 480 U.S. at 725 (quoting *New Jersey*, 469 U.S. at 351).

<sup>207</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 404.

<sup>208</sup> *Ortega v. O'Connor*, 764 F.2d 703 (9th Cir. 1985).

<sup>209</sup> *Ortega*, 480 U.S. at 728. The hospital policy provided for a routine inventory of state property in a terminated employee's office. The policy was apparently violated because at the time of the search in question, the employee, Dr. Ortega, was not terminated; he was on administrative leave. *Id.* at 727.

<sup>210</sup> The employee also pointed out that no inventory of property was ever done. The seized property was simply put in boxes. *Id.* at 728. Professor Burkoff characterizes the dissent's discussion of this evidence as an application of an objective and subjective pretext doctrine. See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 405.

<sup>211</sup> *Ortega*, 480 U.S. at 728.

long as petitioners had a reasonable belief that there was government property in [the employee's] office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification."<sup>212</sup> The plurality did not suggest that if the employer also conducted the search to discover evidence relevant to the investigation of misconduct, the search would have been illegal. In fact, the employer admitted that one purpose of the search was to look for documents that related to the investigation of wrongdoing.<sup>213</sup> This evidence did not sway the plurality

In the plurality's view, the employer's motivation for conducting the search was irrelevant for two reasons. First, the plurality held that searches for work-related, noninvestigatory reasons and searches pursuant to an investigation of work-related employee misconduct were permissible on reasonable suspicion.<sup>214</sup> Second, the plurality was concerned only with the justification offered by the state and whether the circumstances, viewed objectively, supported that justification. Contrary to Professor Burkoff's contention,<sup>215</sup> the plurality did not remand to the lower court for a determination of the subjective motivation of the employer in making the search. The Court remanded the case to determine the *justification* for the search, a necessary finding in order to determine whether the facts supported the justification and whether the scope of the search was reasonable in light of this justification.<sup>216</sup> Professor Burkoff is wrong when he states that "if [the search] was undertaken for investigatory reasons, it was unconstitutional."<sup>217</sup> Even if the hospital undertook the search for investigatory reasons, it would be legal if the facts supported a reasonable belief that the evidence of misconduct would be found in the office and the scope of the search was properly limited.<sup>218</sup>

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* The dissent characterized the admission as indicating that the primary purpose of the search was investigatory. *Id.* at 736 (Blackmun, J., dissenting).

<sup>214</sup> *Id.* at 725-26.

<sup>215</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 405.

<sup>216</sup> *Ortega*, 480 U.S. at 729.

<sup>217</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 404. If the search was conducted solely for investigation of criminal activity, the search could have been unconstitutional because it would not be within the special needs exception and the work-related justification would be a fabricated pretext. But the employee was challenging the search as an investigatory one related to work-related administrative proceedings, not criminal proceedings. No criminal proceedings were at issue; the case was a civil suit under 42 U.S.C. § 1983. *Ortega*, 480 U.S. at 711.

<sup>218</sup> *Ortega*, 480 U.S. at 725-26.

If the plurality decision in *Ortega* is “classic pretext” as Professor Burkoff argues,<sup>219</sup> then his case-by-case pretext doctrine is in trouble. The Court’s decision in *New York v Burger*<sup>220</sup> confirms this.

In *New York v Burger*, the Court upheld the warrantless search of an automobile junkyard pursuant to a state regulatory scheme.<sup>221</sup> Again, the Court clearly stated that it was dealing with a case involving “special need” governed by the reasonableness standard rather than probable cause.<sup>222</sup> Thus, any discussion of the purposes of or justification for the search must be read in that context. The Court nevertheless addressed two pretext arguments raised by the defendant.

The defendant first argued that the statutory scheme itself was pretextual, an argument on which he prevailed at the state level. The New York Court of Appeals held that the statute was unconstitutional because it had “no truly administrative purpose but was ‘designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property,’”<sup>223</sup> and authorized “searches undertaken solely to uncover evidence of criminality . . .”<sup>224</sup> The state court relied, in part, on the fact that police officers conducted the search—objective evidence of pretext. The United States Supreme Court reversed the state court’s finding of pretext. The Court did not consider a scheme enacted both for administrative and criminal investigation purposes a pretext. It criticized the state court for failing to recognize that an administrative scheme can have both immediate regulatory goals<sup>225</sup> and an ultimate goal of reducing crime.<sup>226</sup> In the Court’s view, the fact that the regulatory scheme shared this ultimate goal with a penal scheme, and that criminal evidence likely would be discovered in the course of enforcing the immediate regulatory goals, did not make the scheme unconstitutional as a pretext. This was true even if the regulatory goals were subsidiary to the crime reduction goal.<sup>227</sup>

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<sup>219</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 404.

<sup>220</sup> 482 U.S. 691 (1987).

<sup>221</sup> *Id.* at 693, 718.

<sup>222</sup> *Id.* at 702.

<sup>223</sup> *Id.* at 712.

<sup>224</sup> *Id.*

<sup>225</sup> The regulatory goal was to “ensure that vehicle dismantlers are legitimate business persons and that stolen vehicles and vehicle parts passing through automobile junkyards can be identified.” *Id.* at 714.

<sup>226</sup> *Id.* at 712-16.

<sup>227</sup> *Id.* at 713.

Apparently, the Court will strike down a statutory scheme only if it is a fabricated pretext—a scheme in which the state fabricates a regulatory goal not supported by any interest in order to enforce criminal penalties. The New York statute was not a fabricated pretext because a proper purpose existed.<sup>228</sup> The dissenters agreed that a showing of fabricated pretext was required to strike down the legislative scheme, but they believed that such a showing had been made. The dissent characterized the scheme as authorizing “searches intended solely to uncover evidence of criminal acts”<sup>229</sup> that “had no possible administrative consequences.”<sup>230</sup>

The same rationale was decisive as to the second pretext claim, which asserted that the search itself was a pretext for a criminal investigation. The concern with searches “intended solely to uncover evidence of criminal acts,”<sup>231</sup> indicates that in cases where the state merely takes advantage of an administrative scheme to conduct an administrative search with the hope of discovering evidence of criminal activity, neither the dissent nor the majority would strike down the search as a pretext. This is abundantly clear from the majority’s citation to *Villamonte-Marquez* for the proposition that “[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect.”<sup>232</sup> The Court’s failure to require the state to explain its motivation for searching the defendant’s junkyard demonstrates that the subjective motivation of the officers does not make a search unconstitutional.<sup>233</sup> Once again, the Court was concerned with fabricated pretexts, not legal pretexts.<sup>234</sup>

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<sup>228</sup> *Id.* at 716 n.27.

<sup>229</sup> *Id.* at 724.

<sup>230</sup> *Id.* at 728.

<sup>231</sup> *Id.* at 724.

<sup>232</sup> *Id.* at 716 (citing *Villamonte-Marquez*, 462 U.S. 579, 583-84, and n.3 (1983)).

<sup>233</sup> *Id.* at 694 n.2 (“It was unclear from the record why [defendant’s] junkyard was selected for inspection. The junkyards designated for inspection apparently were selected from a list compiled by New York City police detectives.”) (citations omitted).

<sup>234</sup> Professor Burkoff’s assertion that the Court demonstrated its approval of a subjective, case-by-case pretext doctrine by citing *People v. Pace*, 65 N.Y.2d 684, 491 N.Y.S.2d 618, 481 N.E.2d 250 (1985), with “evident approval” is incorrect because it is not evident the Court approved of the result or the rationale in *Pace*. The Court merely explained that the Court in *Pace* was unable to reach the issue of the constitutionality of the statutory scheme because the *Pace* court did not view the search as one conducted under the statute. The Court may have been expressing its approval of the state court not reaching constitutional issues that the state court believed were not raised in the case before it. It is unlikely the Court was approving a conclusion by the *Pace* court that the search was illegal because

Finally, Professor Burkoff analyzes *Maryland v Garrison*<sup>235</sup> as a case in which the Court answers affirmatively the question “whether a law enforcement officer’s subjective intent to engage in unconstitutional activity could render otherwise objectively neutral activity unconstitutional.”<sup>236</sup> Professor Burkoff finally chooses a case that deals with police activity justified by the penal interest of the state. Unfortunately, *Garrison* has little to do with the pretext issue. Professor Burkoff again focuses on fabricated pretextual activity to support a doctrine that he contends invalidates legal pretextual activity.

In *Garrison*, police officers obtained a search warrant for “the person of Lawrence McWebb and the premises known as 2036 Park Avenue third floor apartment.”<sup>237</sup> The officers intended to search Mr. McWebb’s apartment and were unaware that there were two apartments on the third floor of 2036 Park Avenue. Before discovering this, the officers entered Garrison’s apartment and found narcotics there. The Supreme Court upheld the search,<sup>238</sup> because the warrant, when issued, validly authorized the search of the entire third floor. The Court made clear that although such authority disappeared when the officers discovered, or should have discovered, the existence of two apartments of the third floor,<sup>239</sup> the officers in this case discovered the narcotics in the defendant’s apartment *before* they realized there were two apartments. Thus,

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the subjective motivations of the officers demonstrated the search was not conducted pursuant to the administrative scheme. In fact, the *Pace* court reached the conclusion that the search was not conducted pursuant to the administrative scheme in part because it believed the administrative scheme did not authorize a search if the operator did not produce the “police book” required to be kept under the statute. This apparently was an erroneous conclusion in the Supreme Court’s view since the search upheld in *Burger* followed a failure to produce the police book. Even if the search in *Pace* can be said to have been declared illegal as a pretext, the facts of the case demonstrate a fabricated pretext. In *Pace*, officers on routine patrol observed what they believed to be stolen auto parts on the back of a flatbed truck. They stopped the truck, ordered the truck driver to return to the junkyard for which he worked, followed the truck, and conducted a warrantless search of the junkyard. The search was not an administrative search, not because of the subjective motivation of the officers, but because of the procedures followed. If the officers instead had requested the inspection team to conduct a warrantless search of the junkyard and the team did so according to procedures, the search likely would have been upheld. This would be true even if the original officers accompanied the inspection team during the search. That scenario would have been indistinguishable from *Villamonte-Marquez*.

<sup>235</sup> 480 U.S. 79 (1987).

<sup>236</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 399.

<sup>237</sup> *Garrison*, 480 U.S. at 80.

<sup>238</sup> *Id.* at 80-81, 88-89.

<sup>239</sup> *Id.* at 85-86.

their actions were legal because the objective facts demonstrated that the officers' mistaken reliance on the authority of the warrant was "objectively understandable and reasonable."<sup>240</sup>

Professor Burkoff correctly understands the rule of *Garrison* to permit the admission of evidence obtained during a search of premises that officers mistakenly, but honestly and reasonably, believe is authorized by a valid warrant.<sup>241</sup> Professor Burkoff goes astray when he attempts to apply the *Garrison* decision to pretexts. He considers a hypothetical case that "poses the *Garrison* case facts with everything unchanged except one critical fact: the executing officers *know* full well that they are in the wrong place, namely Garrison's apartment."<sup>242</sup> Professor Burkoff describes such conduct as a pretext and argues the Court would strike down the activity on a case-by-case basis. He is correct that the activity would be struck down on a case-by-case basis, but that is so only because the hypothetical case is a fabricated pretext. He mistakenly criticizes the approach to pretextual activity suggested by the dissenters in *State v Blair*<sup>243</sup> and by Professor Haddad because he believes they would be constrained to find the conduct in his hypothetical legal.<sup>244</sup> Once again, he is wrong.

In *State v Blair*,<sup>245</sup> police officers arrested a murder suspect and brought her to the station for questioning and to obtain a palm print for a possible match with a print found at the scene. When executing this arrest, however, the officers lacked probable cause to suspect the defendant of the murder.<sup>246</sup> Nevertheless, the officers were aware of an outstanding municipal parking violation warrant prior to arresting the defendant.<sup>247</sup> When the defendant moved to suppress the evidence obtained during the detention following the arrest, the government argued that the evidence should be admitted because the defendant was lawfully under arrest for the parking violation and therefore her palm print was lawfully acquired.<sup>248</sup> The Missouri Supreme Court rejected this argument.

<sup>240</sup> *Id.* at 88-89.

<sup>241</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 400.

<sup>242</sup> *Id.*

<sup>243</sup> 691 S.W.2d 259 (Mo. 1985).

<sup>244</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 401-02.

<sup>245</sup> 691 S.W.2d 259 (Mo. 1985) (en banc), *cert. granted sub nom. Missouri v. Blair*, 474 U.S. 1049, *cert. dismissed*, 480 U.S. 689 (1987).

<sup>246</sup> 691 S.W.2d at 260.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 260-61.

The Court held that “[a]ssuming an arrest for the parking violation, the arrest, in the circumstances of this case, was at best a pretext employed to gather evidence on an unrelated homicide

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Justice Blackmar of the Missouri Supreme Court dissented. He argued that “[t]he defendant could be lawfully arrested on the traffic warrant, and, having been arrested, was subject to search just as any other arrestee would be.”<sup>250</sup> Justice Blackmar saw no reason to suppress the evidence. Contrary to Professor Burkoff’s assertion, however, Justice Blackmar would not be constrained by his *Blair* opinion to uphold the police conduct in Burkoff’s hypothetical case. Professor Burkoff reads Blackmar’s rule to be that police activity that is based upon unconstitutional motives will be upheld if a set of facts can be imagined that would justify the activity.<sup>251</sup> This misses a crucial element of *Scott*’s command to view the facts objectively. The command is to make “an objective assessment . . . in light of the facts and circumstances *then known to [the officer]*”<sup>252</sup> In other words, the command is to consider the facts within the officer’s knowledge, but to ignore the motive of the officer when acting *on those facts*. Thus, the police conduct in *Blair* could be upheld only because, in Justice Blackmar’s view, “[u]ncontradicted evidence show[ed] that the police were fully aware of the traffic warrant at the time of the . . . arrest.”<sup>253</sup>

In Professor Burkoff’s hypothetical case, however, the very fact he supplies—the knowledge of two apartments—makes the search illegal. That fact cannot be ignored, as he suggests,<sup>254</sup> precisely because it is a fact *known to the officers*. The same fact, in the terminology of this article, makes the pretext a fabricated one. If the government were to attempt to justify the mistaken search of Garrison’s apartment during the authorized search of McWebb’s apartment, it must lie because, given the facts known to the officers, no mistake occurred.<sup>255</sup>

<sup>249</sup> *Id.* at 262.

<sup>250</sup> *Id.* at 264-65 (Blackmar, J., dissenting).

<sup>251</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 402-03.

<sup>252</sup> *Scott v. United States*, 436 U.S. 128, 137 (1978) (emphasis added); see also *Maryland v. Macon*, 472 U.S. 463, 470 (1985).

<sup>253</sup> *Blair*, 691 S.W.2d at 265.

<sup>254</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 400.

<sup>255</sup> Although using different terminology, Justice Blackmar drew the distinction between legal and fabricated pretexts. He emphasized that, contrary to the case before the court, the cases cited by the majority involved arrests where the justification offered would not

Professor Haddad also would likely find the activity in Professor Burkoff's hypothetical illegal, although he would not refer to it as a pretext. Because the facts within the officers' knowledge eliminate the only possible justification for the activity (honest mistake), Professor Haddad would argue that the court would find the activity illegal without reaching the pretext issue.<sup>256</sup> Only by distorting the pretext doctrines offered by others and again using a fabricated pretext to argue his case against legal pretexts is Professor Burkoff able to make the Supreme Court's opinion in *Garrison* support a case-by-case pretext doctrine based on a finding of legal pretext.

It should be clear by now that the Supreme Court deals with pretextual activity on a case-by-case basis only when confronted with a fabricated pretext. Professor Burkoff would like to believe that the four recent cases he analyzes answer "the fourth amendment pretext search doctrine questions that were before the Court in *Missouri v Blair*" by endorsing a case-by-case approach to legal pretexts.<sup>257</sup> The cases simply do not accomplish this, a fact made even more obvious by the Court's ruling in a fifth case, *Maryland v Macon*,<sup>258</sup> where the Court held that police conduct that constitutes a legal pretext is not unconstitutional.

In *Macon*, a plainclothes detective purchased two magazines from an adult bookstore using a marked \$50 bill. After consulting with other detectives and determining that the magazines were obscene, the detective arrested the clerk and retrieved the marked bill.<sup>259</sup> The defendant moved to suppress the magazines arguing that, because the officers retrieved the marked \$50 bill without returning the change they had received when they made the "purchase," the transaction was an illegal seizure rather than a bona

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authorize the activity even if it were the true reason for the activity or where the evidence suggested the justification was fabricated. *Blair*, 691 S.W.2d at 266. Justice Blackmar cites as one example *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961), where the officer swore out a warrant based on two minor traffic violations he claimed to have seen the defendant commit the day before. As Justice Blackmar notes, that is a very different situation from one where a warrant is already outstanding when the officers become suspicious of an individual for another crime. *Taglavore* presented a situation where the court may well have been suspicious about the officer's sudden recollection of past traffic violations and did not believe the traffic violations ever occurred. In other words, the court could easily have viewed the case as a fabricated pretext.

<sup>256</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 643; Haddad, *Claims of Sham*, *supra* note 1, at 205.

<sup>257</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 409-10.

<sup>258</sup> 472 U.S. 463 (1985).

<sup>259</sup> *Id.* at 465.

fide purchase by the undercover detectives. The defendant contended that “[w]hen the officer subjectively intends to retrieve the money while retaining the magazines, . . . the purchase is tantamount to a warrantless seizure.”<sup>260</sup> The Supreme Court responded:

This argument cannot withstand scrutiny. Whether a Fourth Amendment violation has occurred “turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time,” *Scott v. United States*, and not on the officer’s actual state of mind at the time the challenged action was taken. Objectively viewed, the transaction was a sale in the ordinary course of business.<sup>261</sup>

This is a direct holding that the subjective motivations of officers conducting a search or seizure are irrelevant. Professor Burkoff agrees: “[T]he *Scott* language was used by the *Macon* Court to render the true reasons why the conduct in question took place (criminal investigation not ordinary commercial purchase) irrelevant.”<sup>262</sup> Nevertheless, Professor Burkoff insists that *Macon* does not necessarily mean that the Court upholds pretextual activity because *Macon* does not involve a pretext.<sup>263</sup> His argument is that pretextual activity requires a subjective motivation that, if considered controlling, makes the conduct illegal. He points out that in *Macon*, the Court did not decide the legality of the officers’ conduct in light of the alleged true motivation—seizure as part of a criminal investigation.<sup>264</sup> If such conduct were legal, then there was no pretext under Burkoff’s definition. Therefore, Burkoff reasons, “*Macon* is not a case that deals with pretext issues,”<sup>265</sup> and “does no damage to the concern for the deterrence of pretextual fourth amendment activity . . .”<sup>266</sup> A simple hypothetical demonstrates that Burkoff’s conclusions are incorrect.

Assume that a warrantless seizure for criminal investigation purposes would be illegal if conducted in the fashion it was in *Macon*. This is Professor Burkoff’s pretext case. If the defendant raises a claim of pretext, however, it must fail under the holding in *Macon* because *Macon* rendered the true reason for the police

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<sup>260</sup> *Id.* at 470.

<sup>261</sup> *Id.* at 470-71 (citations omitted).

<sup>262</sup> Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 371-72.

<sup>263</sup> *Id.* at 370.

<sup>264</sup> *Id.* at 372.

<sup>265</sup> *Id.* at 370.

<sup>266</sup> *Id.* at 372.

conduct in question irrelevant. The hypothetical could be what actually occurred in *Macon* because the Court did not decide the legality of a warrantless seizure for criminal investigation purposes. The fact that the Court decided against *Macon* without considering the accuracy of this scenario conclusively demonstrates that the result in either case is the same. The officer's purchase of the magazines was constitutional regardless of his intent. This is true even if the seizure for criminal investigation purposes (absent a purchase) was illegal and, by Professor Burkoff's definition, the exchange was a pretext. If the possible illegality of a seizure for criminal investigation purposes changes the result, then the Court would have been required to decide the issue in order to rule against the defendant. Thus, *Macon* conclusively demonstrates the futility of raising a legal pretext claim.

By ignoring the pretext issue in *Macon*, Professor Burkoff dismisses the most relevant case in the search for the content of the Supreme Court's pretext doctrine. He must do so in order to plant the desired answer in the four recent cases he has analyzed. The answer he achieves, however, is distorted by the flawed analysis through which it is derived. Professor Burkoff's analysis fails to appreciate the distinction between legal and fabricated pretexts and misperceives a fundamental shift in the Supreme Court's fourth amendment jurisprudence, mistaking what the Court views as non-criminal cases for the application of a case-by-case pretext doctrine based on a finding of a legal pretext.<sup>267</sup> Under the Supreme Court's current pretext doctrine, citizens simply do not enjoy the protection Professor Burkoff would like to provide them. The question remaining for analysis asks whether they should.

## II. CHOOSING AN APPROACH TO PRETEXTUAL ACTIVITY

### A. *The Individual Motivation Approach to Legal Pretexts*

Although some lower courts have adopted the individual motivation approach to pretextual activity,<sup>268</sup> it has been subjected to

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<sup>267</sup> As a result, Professor Burkoff finds the Court creating a doctrine to provide additional protection of citizens' fourth amendment rights in cases that represent significant erosions of citizen rights by excluding a wide range of government activity from the requirement of probable cause or even individualized suspicion. See *Skinner*, 489 U.S. 602.

<sup>268</sup> *United States v. Guzman*, 864 F.2d 1512, 1517-18 (10th Cir. 1988) (rejecting subjective intent approach but adopting objective "reasonable officer test" for legal pretexts);

increased criticism from both courts<sup>269</sup> and commentators.<sup>270</sup> As Professor Haddad points out, however, much of this criticism is simplistic, based largely on the presumed difficulty of determining the subjective intent of officers engaged in fourth amendment activity.<sup>271</sup> Fears that the individual motivation approach will require “expeditions into the minds of police officers” that will often prove fruitless<sup>272</sup> are unpersuasive given the clear evidence of the motivation of the officer presented in many cases.<sup>273</sup> Moreover, objective standards can be utilized to identify pretextual activity. Finally, the utilization of subjective intent in other constitutional doctrines demonstrates that such analysis is practical and appropriate when necessary to protect an important interest.<sup>274</sup> An individual motivation approach to the pretext problem may be inappropriate, however, precisely because the underlying interest to be protected is not a compelling one.

A search for individual motivation makes sense only if it may lead to the discovery of an improper motivation. It is still unclear, however, whether the pretextual motivation that the proponents of this approach seek to uncover should be deemed improper.<sup>275</sup> The

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United States v. Smith, 799 F.2d 704, 710-11 (11th Cir. 1986) (same); United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) (dictum) (whether arrest pretextual turns on the motivation or primary purpose of the arresting officer).

<sup>269</sup> United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989) (legality of arrest depends solely on probable cause and statutory authority to arrest for the minor offense); United States v. Basey, 816 F.2d 980, 991 (5th Cir. 1987) (same); United States v. Causey, 834 F.2d 1179, 1182-85 (5th Cir. 1987) (legality of stop depends solely on existence of probable cause to arrest for the minor offense); Marbury v. United States, 540 A.2d 114, 115-16 (D.C. 1985) (validity of stop depends solely on reasonable suspicion as to the traffic offense); Frazier v. State, 537 So. 2d 662, 664-63 (Fla. 1989) (motive irrelevant to legality of search); People v. Arterberry, 429 N.W.2d 574, 575 (Mich. 1988) (legality of arrest depends solely on presence of facts establishing probable cause); Oregon v. Olaz, 786 P.2d 734 (Or. Ct. App. 1990) (same); Williams v. State, 726 S.W.2d 99, 101 (Tex. Crim. App. 1986) (intentions of officer irrelevant if probable cause exists for minor offense).

<sup>270</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 683-92; Haddad, *Claims of Sham*, *supra* note 1, at 210-12; Salken, *The General Warrant*, *supra* note 3, at 236-42; Amsterdam, *supra* note 172, at 436-37; Note, *Pretext Problem*, *supra* note 3, at 257-63; Note, *Abuses of Power*, *supra* note 1, at 1810-14; Note, *Two Reasons to Stop*, *supra* note 3, at 510-27.

<sup>271</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 682.

<sup>272</sup> Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting).

<sup>273</sup> See Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 375. The availability of evidence could diminish if officers believe either that testimony as to the true motive will invalidate a search or that testimony as to dual motives will save the search.

<sup>274</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 682-83.

<sup>275</sup> See *infra* notes 281-91 and accompanying text. Proponents of the individual motivation approach deem certain motives improper because they assume the motives do not

purpose of the fourth amendment is to protect the liberty and privacy of citizens.<sup>276</sup> If the liberty or privacy of an individual is restricted without sufficient cause or to an extent not justified by the governmental interest, then that citizen should be granted relief. But if the intrusion on the citizen's liberty or privacy is justified, and the intrusion is limited by the government's justification, then the citizen should not be permitted to complain that the intrusion was motivated by the officer's unsubstantiated belief that the citizen is also guilty of another offense.<sup>277</sup> A slight alteration of the facts of *Colorado v. Bannister*<sup>278</sup> illustrates the point.

In *Bannister*, an officer observed a car speeding but was unable to pursue the vehicle before it disappeared from sight. Later, he received a report of a theft and a description of the perpetrators of the theft. Shortly thereafter, the original vehicle reappeared, still speeding.<sup>279</sup> Suppose that a second vehicle appeared at the same time, also speeding. Suppose also that the officer had a hunch that the first vehicle was driven by the perpetrators of the theft that was reported. Assume the hunch was based solely on the fact that he originally saw the vehicle in the vicinity of the theft and did not amount to reasonable suspicion. If the officer stops the first vehicle, the stop would be illegal under the individual motivation approach, and any evidence of the theft discovered during the stop would be excluded.<sup>280</sup>

It is easy to see why such a result has been criticized.<sup>281</sup> The public certainly is critical when the perpetrator of the theft goes

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comport with the purposes underlying the grant of authority to undertake the activity. The difficulty of determining the true purpose or purposes of such grants alone may preclude such an approach. See Haddad, *Another Viewpoint*, *supra* note 1, at 685-87.

<sup>276</sup> *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("security of one's privacy against arbitrary intrusion by the police [is] at the core of the Fourth Amendment"); *United States v. Place*, 462 U.S. 696, 708 (1983) (recognizing liberty interest protected by fourth amendment).

<sup>277</sup> The citizen should be and is entitled to complain if the stop is based on invidious discrimination, i.e., race, but a pretext doctrine is not necessary to accomplish this result. See *infra* notes 288-91 and accompanying text.

<sup>278</sup> 449 U.S. 1 (1980).

<sup>279</sup> *Id.* at 2.

<sup>280</sup> The requirement under some approaches that the pretextual motive be the predominant motive would not save the officer in this case because the hunch of other criminal activity is the only thing distinguishing the two vehicles and therefore is the predominate reason for stopping the first vehicle.

<sup>281</sup> See *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1985) (describing such a result as "incongruous"); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1962) ("It is surely anomalous to say that the individual and his private property are fully protected

free because evidence is excluded, and the police officers will probably not understand what they did wrong by exercising their authority to stop speeding vehicles.<sup>282</sup> Excluding the evidence in such a case seems more anomalous if the offense that is offered to justify the police action is a more serious one. For instance, should evidence of a murder discovered in the course of an arrest for possession of marijuana be suppressed because the marijuana arrest was motivated by the hunch that the person observed possessing marijuana was also the perpetrator of an unsolved murder?<sup>283</sup> Of course, the exclusion of evidence seems more reasonable if the offense used to justify the police activity is a very minor one and the intrusion fairly severe. For instance, suppression of evidence of a murder would gain more support if the evidence was obtained when a citizen was arrested in her home, booked, printed, and interrogated about a murder, all based on an outstanding warrant for parking violations.<sup>284</sup> This conduct is unreasonable, however, not because the citizen is subjected to such treatment as a result of being a murder suspect, but because any citizen can be subjected to such treatment when they are *not* suspected of murder or any "crime" other than a mere failure to pay a parking ticket.<sup>285</sup> Application of a pretext doctrine in this case fails to cure the evil presented.

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by the Fourth Amendment only when the individual is suspected of criminal behavior."); *Abel v. United States*, 362 U.S. 215, 253-55 (1960) (Brennan, J., dissenting) (such a rule would "pervert the [Fourth] Amendment"); Haddad, *Another Viewpoint*, *supra* note 1, at 690-91; Haddad, *Claims of Sham*, *supra* note 1, at 211; Note, *Two Reasons to Stop*, *supra* note 3, at 522-23.

<sup>282</sup> See Haddad, *Another Viewpoint*, *supra* note 1, at 691-92; Haddad, *Claims of Sham*, *supra* note 1, at 214. Moreover, if the rule has its intended effect and the officer does not stop the first car and instead focuses on the second car, imagine the chagrin of that driver if she learns she was stopped because the officer had no reason to suspect her of additional criminal activity but did suspect the other driver of theft. If the victim learned the officer had not stopped the suspected perpetrators, she also would be chagrined.

<sup>283</sup> At some point, the seriousness of the offense used to justify the police action reaches a level where it becomes the predominant motive, thereby avoiding the label of pretextual, at least under some tests.

<sup>284</sup> These are the facts of *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc), *cert. granted sub nom. Missouri v. Blair*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 689 (1987).

<sup>285</sup> Not all commentators agree that citizens who commit minor offenses, but are otherwise free from suspicion, deserve the same protection from intrusions on their privacy and liberty as citizens who, in addition to committing a minor offense, are also suspected of committing another crime. See Note, *Abuses of Power*, *supra* note 1, at 1816 ("The intrusion resulting from service of the failure to appear warrant would not be troubling if it were served independently of a desire to investigate [a] greater crime. Use of traffic warrants for an investigation, however, is more troubling.").

Typical of the arguments articulated by proponents of a pretext search doctrine is Judge Rubin's impassioned warning against the virtually unlimited authority of officers in the field to arrest citizens:

In the kind of society in which we live, few persons have a life so blameless that some reason to arrest them cannot be found

Untold thousands of Americans are subject to arrest for failing to pay parking tickets, failure to respond to summonses for traffic violations, and similar minor offenses. Police who desire to arrest an individual without probable cause may merely leaf through the files or turn to the computer to determine whether they can find some reasons to arrest a suspect for whose arrest they otherwise lack probable cause. While I do not condone the possible law violations that led to the imposition of the earlier charges, I do not think such prior derelictions strip the alleged lawbreakers of fourth amendment protection if they should later be suspected of other offenses.<sup>286</sup>

There is great potential for abuse of citizens' constitutional protections as a result of the state's police power. Concurring in *Causey*, Judge Higginbotham analogized modern warrants to the general writs of assistance that led to the passage of the fourth amendment:

Serious questions abound in the use of otherwise valid warrants to pocket a one-time pass to the strictures of the fourth amendment rather than to prosecute for the offense for which probable cause was found. [T]here is a risk that with the storage and retrieval capacity of today's computers, warrants may function in a manner similar to the old general writs of assistance.<sup>287</sup>

Others have made the same analogy with regard to arrests for traffic violations and other minor offenses.<sup>288</sup> It is misguided to address these abuses by focusing on pretextual activity rather than on the underlying authority to arrest for minor offenses.<sup>289</sup> A

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<sup>286</sup> *Causey*, 834 F.2d at 1189-90 (Rubin, J., dissenting), quoted in Burkoff, *Pretext Doctrine Returns*, *supra* note 3, at 390-91.

<sup>287</sup> *Causey*, 834 F.2d at 1186 (Higginbottom, J., concurring).

<sup>288</sup> See Salken, *The General Warrant*, *supra* note 3, at 257-58, 273-74; Note, *Abuses of Power*, *supra* note 1, at 1817.

<sup>289</sup> Professor Haddad, by advocating making the hard choice of restricting or abolishing police authority in all cases, not just where the motives are pretextual, attempts to focus attention on "the most important issues: the existence and scope of fourth amendment limitations." Haddad, *Another Viewpoint*, *supra* note 1, at 681. Under Haddad's approach,

pretext doctrine is a particularly poor way to check the potential abuse of the authority to arrest for minor offenses. Among other problems, it results in the absurdity of providing protection from the abuse for suspected criminals, but not for otherwise law abiding citizens.

In his dissent in *Causey*, Judge Rubin expressed concern over the pretextual use of warrants for minor offenses because he did not believe minor violations should “strip the alleged lawbreakers of fourth amendment protection if they should later be suspected of other offenses.”<sup>290</sup> The flaw in Judge Rubin’s analysis is that the alleged lawbreakers were not stripped of fourth amendment protection when they later became suspected of other offenses, they were stripped of those protections when the warrant for the initial minor offense was issued. At that point they became subject to arrest. If, as Judge Rubin believes, citizens should be protected from being subjected to search and seizure merely because they commit a minor offense, the authority to arrest for such offenses must be abolished. Under the rule proposed by Judge Rubin in *Causey*, police retain the power to arrest citizens for minor offenses. These citizens regain their fourth amendment protection only by becoming suspects in another crime.

Rather than constructing a case-by-case pretext doctrine to address the evils of the virtually unlimited authority of police to arrest for minor offenses, courts should focus directly on the reasonableness of the power to arrest in these situations. The United States Supreme Court has suggested the merits of a limitation on the authority of police to act on minor offenses on at least two occasions. In his concurrence in *United States v Gustafson*,<sup>291</sup> Justice Stewart remarked, “It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made.”<sup>292</sup> Similarly, in *Welsch v Wisconsin*,<sup>293</sup> the Su-

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the possibility of pretext remains a factor in the decision to restrict or abolish police authority. *Id.* at 651-52. See also Haddad, *Claims of Sham*, *supra* note 1, at 209-10 (suggesting the motivation of advocates of the use exclusion approach to pretext may be to achieve limits on the underlying power of police); Note, *Two Reasons to Stop*, *supra* note 3, at 518-19.

<sup>290</sup> *Causey*, 834 F.2d at 1189 (Rubin, J., dissenting).

<sup>291</sup> 414 U.S. 260 (1973).

<sup>292</sup> *United States v. Gustafson*, 414 U.S. at 266-67 (Stewart, J., concurring); see also Salken, *The General Warrant*, *supra* note 3, at 253.

<sup>293</sup> 466 U.S. 740 (1983).

preme Court limited the authority of officers to enter a home without a warrant under the exigent circumstances exception. The Court refused to permit such entries to prevent destruction of evidence of a minor offense: “[A]pplication of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.”<sup>294</sup>

The Court’s concern in *Welsh* was not that the entry was a pretext, but simply that given the minor nature of the offense, a citizen should not forfeit the fourth amendment right to be free from warrantless searches. In her recent article, Professor Barbara Salken suggests that this approach should be applied to the authority to arrest for traffic offenses.<sup>295</sup> Professor Salken analogizes the power given to officers to arrest and search for minor traffic violations to the power officers of the Crown enjoyed under the writs of assistance and finds the power violative of the fourth amendment:

As with the power of the writs of assistance, the power to conduct the search [following a minor traffic violation] (which is derivative from the power to arrest) is the product of a grant of authority that permits indiscriminate and arbitrary exercise. The searcher under a writ of assistance could decide, from the entire population, whom he wanted to search. The officer may make that same decision from almost an identical pool—the population of licensed drivers. Such indiscriminate power to seize and thereby search seems, on its face, to be prohibited by the fourth amendment admonition against unjustified and arbitrary searches and seizures.<sup>296</sup>

Professor Salken calls this approach the “best and easiest solution to the pretext problem.”<sup>297</sup>

The real value of Professor Salken’s approach is that it attacks the true problem—the unreasonable authority of police officers to infringe citizens’ right to liberty based on a minor offense—rather than its effect on any perceived pretext problem. In fact, this approach should be expanded to reexamine police authority with regard to all minor offenses, not just traffic offenses. Again, the

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<sup>294</sup> *Id.* at 753.

<sup>295</sup> See Salken, *The General Warrant*, *supra* note 3.

<sup>296</sup> *Id.* at 274.

<sup>297</sup> *Id.* at 252. Professor Salken believes this approach is necessary because other suggested solutions to the pretext problem are impractical or ineffective. *Id.* at 274.

goal should be to abolish the authority to arrest when the government interests do not justify the intrusion on individual rights, not only to prevent pretexts. That the opportunity to engage in pretextual activity also will be restricted is merely coincidental, and is unnecessary to justify the abolition of the power.

Professor Salken's approach may be no more welcome in the courts than some of the other approaches she dismisses for that reason.<sup>298</sup> In addition to the fear of appearing to handcuff police by "legalizing" criminal behavior, or perhaps as a result of it, courts may view the solution to be a legislative prerogative.<sup>299</sup> As Judge Gee stated in *Causey*,

[T]he government need not authorize arrest for petty offenses and, if they do so, should not be startled if warrants issued pursuant to their authorizations are taken seriously and occasionally executed. It is possible to enforce the law without arresting petty offenders. Should the public become sufficiently exercised about what the dissent views as abuse of such arrest warrants, it can direct such a course of enforcement; it is not necessary for us to read another troublesome, unstated provision into the constitution to serve such an end.<sup>300</sup>

Nevertheless, recently some courts have been willing to place limits on the underlying authority of police to engage in searches

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<sup>298</sup> *Id.* at 274 (describing efforts to reduce the scope of the permissible search incident to a minor arrest as "not welcome."). See *Fisher v. Washington Metro. Area Transit Authority*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982) (refusing, despite intimations by members of Supreme Court, to place constitutional limits on officers' authority to arrest for minor offenses); *Commonwealth v. Williams*, 568 A.2d 1281, 1286 (Pa. Super. 1990) (same).

<sup>299</sup> See Note, *Two Reasons to Stop*, *supra* note 3, at 518-19. Legislatures have undertaken this task on some occasions. See *Vicknair v. State*, 751 S.W.2d 180 (Tex. Crim. App. 1988) (interpreting statute not to authorize arrest for infraction of criteria for inspection—cracked taillight). Many states do not authorize stops for infractions of mandatory seat belt laws. See, e.g., MINN. STAT. ANN. § 169.686 (West 1986 and Supp. 1990).

<sup>300</sup> *Causey*, 834 F.2d at 1185 n.11. Justice Brennan expressed similar sentiments in a different context. Arguing in favor of requiring the appointment of counsel in cases where imprisonment was authorized, even if not actually imposed, Justice Brennan stated, [i]t may well be that adoption by this Court of an authorized imprisonment standard would lead state and local governments to reexamine their criminal statutes. A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the constitution. In my view this reexamination is long overdue. In any event, the Court's actual imprisonment standard must inevitably lead the courts to make this re-examination, which plainly should more properly be a legislative responsibility.

*Scott v. Illinois*, 440 U.S. 367, 388 (1979).

and seizures.<sup>301</sup> Because the best solution to the problem of unbridled discretion to arrest citizens for minor offenses is a reexamination of that authority rather than a case-by-case pretext doctrine aimed at legal pretexts, the current Supreme Court approach to pretexts appears correct. A case-by-case pretext doctrine should be reserved for fabricated pretexts; the constitutionality of legal pretexts should be upheld.<sup>302</sup> The current Supreme Court approach, however, is not completely acceptable. First, the justification for finding legal pretexts constitutional requires that there be a reexamination of the underlying authority to arrest and search based on minor offenses.<sup>303</sup> If the Court is unwilling to reexamine that authority, an argument for striking down legal pretexts on a case-by-case basis has validity.<sup>304</sup> Even if reexamination occurs and legal pretexts remain constitutional, a change in the Court's approach to fabricated pretexts still may be necessary. The difficulty of proving a fabricated pretext on a case-by-case basis may necessitate the adoption of an objective test for such pretexts. Ironically, an appropriate test may be the "reasonable officer" test currently utilized by some courts to strike down legal pretexts.

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<sup>301</sup> See, e.g., *State v. Ruden*, 774 P.2d 972 (Kan. 1989) (entry into home on authority of bench warrant issued in limited action civil case violates fourth amendment and § 15 of Kansas Constitution Bill of Rights); *Simpler v. State*, 568 A.2d 22 (Md. 1990) (reasonable suspicion of civil offense with maximum fine of \$100 did not justify frisk); *State v. Bolte*, 560 A.2d 644 (N.J. 1989) (hot pursuit of person suspected of disorderly person offenses does not justify warrantless entry into home); *People v. Lewis*, 206 Cal. App. 3d 994, 254 Cal. Rptr. 118 (Cal. Ct. App. 1988) (police may not put arrestee who cannot be jailed through booking procedure).

<sup>302</sup> The Court should make clear it is treating fabricated and legal pretexts differently.

<sup>303</sup> This is particularly important in the new breed of pretext cases where officers stop individuals not based on a violation, but merely to carry out various "community caretaking functions." See *United States v. McFayden*, 865 F.2d 1306 (D.C. Cir. 1989) (roadblock established to address traffic congestion upheld); *United States v. Thompson*, 712 F.2d 1356 (11th Cir. 1983) (officer approached vehicle in airport parking ramp to warn driver to expect a large parking charge); *United States v. Dunbar*, 470 F. Supp. 704 (D. Conn. 1979) (officer stopped vehicle to assist motorist he suspected was lost; court finds violation of fourth amendment); *State v. Pinkham*, 565 A.2d 318 (Me. 1989) (safety concerns independent of criminal or civil violation justify stop of vehicle); *State v. Hill*, 557 A.2d 322 (N.J. 1989) (concern for owner-operator of unoccupied, parked vehicle did not permit search of bag on seat of vehicle under "community caretaking function"); *State v. Chisolm*, 696 P.2d 41 (Wash. Ct. App. 1985) (officer stopped pickup truck to warn driver of danger of hat blowing out of truckbed; remanded for determination of reasonableness).

<sup>304</sup> Such a doctrine still would be underinclusive in that otherwise law-abiding citizens remain without protection. However, it may be acceptable because it is the only way to obtain any protection and may result in a general reduction in the incidence of police arresting or searching based on minor offenses, because the incentive for such activity would be reduced.

### B. *The Objective Approach to Fabricated Pretexts*

In most fabricated pretext cases, the officer selects a violation that is easily concocted in order to provide the pretext for the officer's illegal activity. This fact, combined with a natural reluctance of courts to question the honesty of police officers, makes proving a fabricated pretext difficult.<sup>305</sup> One way to address the proof problem is to adopt an objective test for fabricated pretexts. Some courts have done so.

In *United States v. Smith*,<sup>306</sup> a Florida Highway Patrol officer stopped the defendant because he believed defendant fit a drug courier profile.<sup>307</sup> Because the court held that the facts observed by the officer did not provide reasonable suspicion of illegal narcotics activity, the government attempted to justify the stop based on alleged traffic violations.<sup>308</sup> The officer testified that the right wheels of defendant's vehicle had crossed the white line approximately six inches into the emergency lane and drifted over to, but did not cross, the center line when the car returned to its lane. The government argued that this "weaving" either itself constituted a traffic offense—reckless driving or failure to change lanes safely—or provided reasonable suspicion of drunk driving.<sup>309</sup>

The court rejected the argument that the observed traffic violation justified the stop because "[t]he district court expressly found that no traffic violation had occurred."<sup>310</sup> Thus, at least one of the justifications offered by the government was fabricated. The court also addressed the government's legal pretext argument. The court held that the fact that the officer *could* have stopped the vehicle based on the reasonable suspicion of driving under the influence was irrelevant. The court stated that "in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer *would* have made the seizure

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<sup>305</sup> See *Dunbar*, 470 F. Supp. at 708 (limiting authority of officer to stop "lost" motorist in part due to danger of officers fabricating suspicions about individuals being lost).

<sup>306</sup> 799 F.2d 704 (11th Cir. 1986).

<sup>307</sup> The trooper relied upon the facts that the car was travelling 50 m.p.h. (the speed limit was 55), the car was occupied by two individuals who were approximately thirty years of age, the car displayed out-of-state tags, the driver appeared to be driving overly cautiously and did not look in the officer's direction as he passed the officer, and it was 3:00 a.m. *Id.* at 706.

<sup>308</sup> *Id.* at 708.

<sup>309</sup> *Id.* at 708-09.

<sup>310</sup> *Id.* at 709.

in the absence of illegitimate motivation."<sup>311</sup> Because a reasonable officer would not have stopped the defendant based on the minor "weaving" within the lane, the court rejected the legal pretext offered by the government.<sup>312</sup>

Six months later, in *United States v Miller*,<sup>313</sup> the Eleventh Circuit faced another drug courier profile stop by the same officer effected on less than reasonable suspicion. The government again attempted to justify the stop based on the vehicle's right wheels crossing the white lane marker, this time by four inches for approximately 6.5 seconds.<sup>314</sup> Rather than decide whether the pretext was fabricated, the court applied the test for legal pretexts set out in *Smith*: "whether a reasonable officer *would* have made the seizure in the absence of illegitimate motivation."<sup>315</sup> The court struck down the stop as pretextual because the answer to this question was negative. The result was accomplished without having to determine whether a traffic offense had in fact occurred.

The *Miller* and *Smith* decisions viewed the reasonable officer test as an effective means to regulate pretexts. The *Smith* court utilized the test to strike down a legal pretext, but the *Miller* court utilized the test without determining whether the pretext before it was fabricated or legal. The *Smith* court explained that the test was required to maintain "the necessary connection between a seizure's justification and its scope" and thus prevent officers from making "the random, arbitrary stops denounced in *Terry*"<sup>316</sup> Without this limitation, police officers "[w]ith little more than an inarticulate 'hunch' of illegal activity could begin following a vehicle and then stop it for the slightest deviation from a completely steady course."<sup>317</sup> The Court quoted a thirty-year-old Florida Supreme Court case, *Collins v State*,<sup>318</sup> to explain the danger of a rule that permits this scenario:

A holding that such a feeble reason would justify a halting and searching would mean that all travelers on the highway could hazard such treatment, for who among them would not be guilty of crossing the center line so much as a foot from time to time.

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<sup>311</sup> *Id.* at 708.

<sup>312</sup> *Id.*

<sup>313</sup> 821 F.2d 546 (11th Cir. 1987).

<sup>314</sup> *Id.* at 547.

<sup>315</sup> *Id.* at 549.

<sup>316</sup> *Smith*, 799 F.2d at 711.

<sup>317</sup> *Id.*

<sup>318</sup> 65 So.2d 61 (Fla. 1953).

All could, therefore, be subjected to inconvenience, ignominy,  
and embarrassment <sup>319</sup>

The rule constructed by the *Smith* court does not adequately address the potential abuse with which both the *Smith* and *Collins* courts were concerned. The rule is underinclusive because officers still can use traffic offenses to stop citizens for whom they harbor inarticulate hunches of criminal activity. The officer need only utilize a traffic offense for which a court will find a reasonable officer would have stopped the vehicle even without illegitimate motives. Given the numbers of offenses that are likely to fall in this category, it is unlikely that the rule significantly reduces the class of citizens subject to being stopped. Moreover, citizens are still subject to being seized, arrested, and searched if an officer chooses to strictly enforce minor traffic laws. If the officer does not suspect a narcotics offense and, in fact, does not discover narcotics, the test for pretextual activity would be inapplicable; the activity would be upheld. But the fact that a reasonable officer would not make the seizure in question suggests that citizens should not be subject to such intrusions, regardless of the motive.

The reasonable officer test is also overinclusive because an officer who, without suspicion of other illegal activity, aggressively pursues traffic offenders will be unable to use evidence discovered in plain view during the traffic stop if the offense is one for which a reasonable officer would not have stopped the vehicle. Thus, while attempting to prevent pretexts, the test also results in non-pretextual activity being declared illegal.

The reasonable officer test inadequately addresses the problem of the officer's virtually unlimited authority to arrest for minor offenses, and it is an inappropriate mechanism for assessing legal pretexts. Nevertheless, it is a suitable test to regulate fabricated pretexts. It is often difficult to prove a fabricated pretext because the officer chooses a minor offense about which it is easy to lie.<sup>320</sup> Since everyone commits minor offenses, the court has little reason to doubt, or is hard pressed to explain why it doesn't believe, that the defendant committed the offense. As illustrated by the *Miller* case, the reasonable officer test permits the court to provide relief even absent an express finding that the offense did not occur. The overinclusiveness of the test is justified by the difficulty of proving

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<sup>319</sup> *Smith*, 799 F.2d at 711 (quoting *Collins v. State*, 65 So. 2d 61, 63 (Fla. 1953)).

<sup>320</sup> See *supra* note 87.

a fabricated pretext and, given the minor nature of the offense, the relative unimportance of enforcing the law that allegedly was violated.<sup>321</sup> Of course, officers can react to that rule by fabricating more serious offenses—those for which a reasonable officer would have made the stop or arrest. Arguably, officers will be deterred from fabricating more serious offenses either because it is more difficult to do so or because they are simply more reluctant to falsely accuse individuals of more serious offenses. In addition, a defendant will be entitled to relief, regardless of the nature of the offense, if she can prove that the pretext is actually fabricated.

Because the reasonable officer test is overinclusive, it also eliminates some legal pretexts, which is apparently why some courts have adopted it. Other courts may have mixed motives, adopting the test because they believe it necessary to regulate both legal and fabricated pretexts. Even the courts that have adopted the test for the singular purpose of addressing legal pretexts are unlikely to be concerned if it also eliminates fabricated pretexts. Similarly, although it is argued here that the test should be adopted solely because it is necessary to police fabricated pretexts, the overinclusive effect on legal pretexts is acceptable given the small government interest in enforcing the minor offense offered as a legal pretext. Thus, ironically, if the motivation of the courts adopting the test is ignored, advocates on both sides of the pretext doctrine debate can claim victory in the adoption of the reasonable officer test.

### CONCLUSION

The United States Supreme Court has never struck down police activity as unconstitutional based on the subjective intentions of the officer in the particular case and is unlikely to do so in the near future. The confusion surrounding the Supreme Court's response to the pretext issue results from a failure by commentators to understand that the Court's definition of pretext includes both legal and fabricated pretexts. Once the Court's definition is understood, careful analysis of Supreme Court cases reveals a consistent approach to the pretext issue.

Under the Supreme Court's current pretext doctrine, only fabricated pretexts are declared unlawful on a case-by-case basis. Legal pretexts are upheld as constitutional. Although the possibility of

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<sup>321</sup> See Note, *Pretext Problem*, *supra* note 3, at 268-69.

legal pretextual activity may lead the Court to make the “hard choice” to restrict or eliminate the underlying authority of the police in all cases, on a case-by-case basis the only relevant inquiry is whether the facts within the officer’s knowledge provided the level of suspicion required to justify the intrusion suffered by the defendant. The subjective intent of the officer, whether assessed by objective or subjective evidence, is irrelevant.<sup>322</sup>

The efforts of courts and commentators focusing on legal pretexts to address the problem of the virtually unlimited authority of officers to arrest and search citizens based on minor offenses are misguided. The focus should be on the underlying authority to arrest and search rather than the pretextual use of such authority. Persuasive arguments can be made that the Constitution should protect citizens from arrest and search based on a minor offense.<sup>323</sup> A focus on legal pretexts provides such protection only for individuals suspected of more serious offenses and leaves otherwise law-abiding citizens subject to the unfettered discretion of the police. The absurdity of such a result is a major flaw in the individual motivation approach to legal pretexts.

Conversely, there is virtual unanimous agreement that fabricated pretexts should be declared unlawful on a case-by-case basis. Moreover, the difficulty of proving fabricated pretexts justifies the adoption of an objective test to decide such cases. The reasonable officer test is an appropriate test for this purpose and, because it also has been adopted as a test for legal pretexts, it may prove a suitable compromise in the pretext doctrine debate. Regardless of the ultimate outcome of the pretext doctrine, courts must address the true evil lurking in the pretext cases—the virtually unlimited authority of police officers to arrest and search citizens based on minor offenses. This authority must be restricted or, in some cases, abolished by the courts or the legislatures. Unless that power is restricted or abolished, the analogy to the general warrants and

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<sup>322</sup> As expressed by the Seventh Circuit in dealing with an allegedly pretextual arrest for driving with a suspended license,

[T]he reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by a state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, that arrest is necessarily reasonable under the fourth amendment.

United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989).

<sup>323</sup> See Salken, *The General Warrant*, *supra* note 3.

writs of assistance will remain accurate, and United States citizens will be forced to tolerate the very evil against which the fourth amendment was designed to protect.<sup>324</sup>

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<sup>324</sup> See *United States v. Guzman*, 864 F.2d 1512, 1516 (10th Cir. 1988).