Vanderbilt Law Review

Volume 47
Issue 2 *Issue 2 - March 1994*

Article 4

3-1994

Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops

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NOTES

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I. INTRODUCTION

Police officers throughout the nation face the practical application of Fourth Amendment[1] protections in the automobile investiga-

1. U.S. Const., Amend. IV. The Fourth Amendment to the United States Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

tory stop context daily in a wide variety of settings.[2] Nevertheless, the Supreme Court has yet to articulate a functional analytical approach to automobile investigatory stops.[3] This lack of guidance is particularly troublesome when one considers that the Framers specifically designed the Fourth Amendment to prevent government officials from conducting investigations in an oppressive, unreasonable manner.[4] The problem is not simply theoretical but has manifested itself through confusion in the lower courts. The lack of response from the Court on this issue has left lower courts not only disagreeing over the appropriate approach courts should use to analyze the pretext issue but also questioning the existence and content of pretext doctrine.[5]

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2. The Supreme Court noted over a quarter of a century ago that "[s]treet encounters between citizens and police officers are incredibly rich in diversity . . . [and] are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime." *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (holding that a police officer's reasonable suspicion justifies a temporary detention). Although *Terry* involved the stopping of a pedestrian, the same variety and diversity is present in vehicle stops. See Wayne R. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment* § 9.3 at 423 n.3 (West, 2d ed. 1987) ("*Search and Seizure*"). Any police-initiated stop of an automobile, including a simple traffic stop, clearly constitutes a limited seizure under the Fourth Amendment and falls within the purview of *Terry*. See *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (holding that the police must have a reasonable suspicion of a traffic violation to justify a routine traffic stop); *United States v. Hensley*, 469 U.S. 221, 226 (1985); *Colorado v. Bannister*, 449 U.S. 1, 4 n.3 (1980); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

3. *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990) (stating that the Supreme Court has not decided this issue directly). Although the Supreme Court has stated clearly that the *Terry v. Ohio* reasonable suspicion standard applies to vehicle stops, see *Delaware v. Prouse*, 440 U.S. 648 (1979) (holding warrantless, random traffic stops unconstitutional), the Court never has addressed the issue of pretextual stops of motorists directly and has given conflicting signals as to whether pretextual activity is unconstitutional. See *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989) (commenting that the Court's response to the pretext problem is ambiguous). See also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 414 (1974) (stating that "the Supreme Court has never found . . . any legal mechanisms for controlling police activities" in the area of investigatory stops).

4. See *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950); *Carroll v. United States*, 267 U.S. 132, 147 (1925). See also Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 222 (1989); Ed Aro, Note, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 B.U. L. Rev. 111, 111 n.4 (1990). For thorough discussions of the background and development of the Fourth Amendment, see Salken, 62 Temple L. Rev. at 254-56; Lawrence A. Brenner and Michal R. Belknap, *Police Practices and the Bill of Rights*, in David J. Bodenhamer and James W. Ely, Jr., *The Bill of Rights in Modern America: After 200 Years* 122-30 (Indiana U., 1993).

5. Compare *United States v. Guzman*, 864 F.2d 1512, 1516-17 (10th Cir. 1988) (finding that numerous Supreme Court cases recognize that a pretextual use of police power is unreasonable within the meaning of the Fourth Amendment), with *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989) (stating that "the Court has not defined the contours of a pretextual arrest and has never excluded evidence as the product of a pretoxtual seizure"). See also notes 27-43 and accompanying text; Salken, 62 Temple L. Rev. at 240 (stating that "[i]t is not clear whether the Supreme Court views searches or seizures as illegal just because an officer's reasons for using a

Although commentators debate the breadth and scope of pretextual searches and seizures,[6] a fairly accepted definition is that a search or seizure is pretextual if it is performed by police officers at least partially for reasons different than the justifications later offered by the government.[7] Thus, pretextual activity is conduct by police that seems objectively reasonable and that prosecutors later seek to justify by a valid Fourth Amendment theory consistent with the objective appearance, but actually is done for constitutionally invalid reasons.[8] Pretextual investigatory stops lie at the very heart of the pretext issue. A pretextual investigatory stop occurs when police use a valid justification to stop a vehicle to search for evidence of an unrelated crime, for which the police do not have the reasonable suspicion necessary to permit the stop.[9] How the Supreme Court should resolve the pretextual activity issue has generated a great diversity of views.[10]

Commentators have failed to offer a comprehensive yet functional solution that fully incorporates the competing policies of Fourth Amendment protections and crime-fighting effectiveness with judicial and law enforcement realities. Therefore, this Note attempts

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specific fourth amendment power on a particular occasion are not the reasons advanced by courts for approving the doctrine which allows such fourth amendment activity").

This Note does not intend to analyze the commentary on the pretext doctrine; rather, it is an analysis of the federal circuit court cases interpreting the Supreme Court's guidance on this issue and a distillation of a functional approach to investigatory step cases. Thus, this Note does not focus on the presence or lack of a pretext doctrine. It discusses that doctrine from the standpoint of existing case law as it bears on the development of a cohesive approach to Fourth Amendment investigatery stop cases. Nevertheless, the pretext doctrine has generated much discussion recently. See, for example, David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 Harv. C.R.-C.L. L. Rev. 465 (1992); Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 Ky. L. J. 1, (1990-91); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442 (1990).

6. Compare James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. Mich. J. L. Ref. 639, 643 (1985) (stating that "a pretextual [seizure] is in issue only if the officer acts within the legal boundaries of a fourth amendment doctrine"), with Daniel S. Jonas, Comment, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. Pa. L. Rev. 1791, 1802-03 (1989) (implicitly defining situations involving legally sufficient and insufficient justifications for a seizure as pretexts).

7. Butterfoss, 79 Ky. L. J. at 1 (cited in note 5). Butterfoss noted that "[c]ommentators 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." Id. at 1 n.1.

8. See Haddad, 18 U. Mich. J. L. Ref. at 641-43 (cited in note 6). Indeed, one writer has noted that "investigatory activity is by far the most troubling aspect of the pretext problem." Aro, Note, 70 B.U. L. Rev. at 111 n.4 (cited in note 4).

9. *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988). For the definition of reasonable suspicion, see text accompanying note 126.

10. See notes 43-70 and accompanying text.

to offer a more functional approach that satisfies Fourth Amendment concerns while still providing police officers with a useful framework with which to gauge their conduct. Moreover, this Note urges the Supreme Court to determine the proper judicial inquiry to be made when reviewing the validity of an investigatory stop.[11]

While attempting to offer a resolution, this Note acknowledges the complexity of devising effective Fourth Amendment controls in this area. Fashioning legal mechanisms for guiding police activities, particularly constitutionally based legal mechanisms, has been difficult even for the Supreme Court.[12] One reason for this difficulty is the pervasiveness of discretion given to police regarding decisions they make on the job.[13] Because of this discretion, one commentator has implied that some people might relegate Fourth Amendment protections to a position of importance below law enforcement realities simply because of the futility of establishing legal requirements.[14] The need to give effect to the protections articulated in the Fourth Amendment, however, outweighs the difficult challenge to devise effective Fourth Amendment controls in this area.[15] This Note takes

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11. Indeed, one Supreme Court Justice has recognized the need to address this issue. Although the Court denied certiorari in three cases presenting this issue, *Cummins v. United States*, 112 S. Ct. 428 (1991), *Trigg v. United States*, 112 S. Ct. 428 (1991), and *Enriquez-Nevarez v. United States*, 112 S. Ct. 429 (1991), Justice White, dissenting from the denials of the petitions, remarked: "I would grant certiorari to address this recurring issue and to resolve the split in the Courts of Appeals." Id. at 429. The United States Courts of Appeals for the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia Circuits have faced this issue since 1987, with the District of Columbia Circuit addressing it in 1991 and the Fourth and Sixth Circuits addressing it in 1993. See Part IV of this Note. The split of authority on this issue is clear. Of the circuits that have addressed this issue, seven have adopted the purely objective test, see notes 28-31 and accompanying text; two courts have adopted the modified objective test, see notes 32-37 and accompanying text; and the Ninth Circuit has adopted a subjective intent standard. See *United States v. Huffhines*, 967 F.2d 314, 317 (9th Cir. 1992); *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986). Note that the Sixth Circuit, which had adopted (and consistently applied) the modified objective test, recently muddied the waters by rejecting both the modified objective and the purely objective tests and adopting a probable cause standard. See *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (en banc). Additionally, many federal courts have faced this issue since 1992 alone. See, for example, *Ferguson*, 8 F.3d 385; *United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993); *United States v. Horn*, 970 F.2d 728 (10th Cir. 1992); *United States v. Richards*, 967 F.2d 1189 (8th Cir. 1992); *United States v. Gutierrez-Mederos*, 965 F.2d 800 (9th Cir. 1992). Finally, commentators also argue that the Supreme Court must address this issue. See, for example, Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 479-80 (cited in note 5) (stating that "if deterring police misconduct is a principal purpose of the Court's Fourth Amendment doctrine, . . . pretextual arrests . . . should be classic candidates for strong remedial action" and that "[i]f the courts do not address deliberate [police] misconduct, it is unrealistic to believe that other institutions will respond").

12. Amsterdam, 58 Minn. L. Rev. at 414-15 (cited in note 3).

13. Id. at 415.

14. Id. (espousing administrative rulemaking an effective safeguard against arbitrariness in searches and seizures).

15. This Note does not imply that courts do not give effect to the Fourth Amendment. The Supreme Court and lower courts consistently have given effect to Fourth Amendment principles.

up that challenge and develops a test that cohesively joins Fourth Amendment protections with the realities of law enforcement, and that the courts can implement to provide a workable solution to this question.

Part II of this Note gives an overview of pretextual investigatory stops and, more importantly, why they pose a problem. This Part also explains the tests adopted by the federal circuit courts. Part III reviews the backdrop of Supreme Court guidance on this issue. Part IV then analyzes the reasoning of the circuit courts that have addressed this issue. Part V discusses the competing policies affecting judicial review options. Part VI then uses the analyses in Parts II through V—the tests of the circuit courts and their reasoning, the Supreme Court guidance, and the competing policies—to develop a functional framework that embodies the balancing approach inherently mandated by the Fourth Amendment.[16] In its conclusion, this Note urges the Supreme Court to take up this issue, offering that a functional approach, such as the multipart test recommended in Part VI, is not only possible but also desirable to promote reasonable police procedures while giving effect to Fourth Amendment principles.

II. THE PROBLEM

A. Framing the Issue

Suppose that a person anonymously tipped the police that the identity of a sought-after bank robber was *C*.[17] The police, knowing that they lack probable cause to arrest and interrogate *C*, search for a way to justify apprehending and interrogating him.[18] Then, they fortuitously discover an outstanding warrant for *C*'s arrest issued years earlier when *C* failed to appear in court to answer a petty theft

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See, for example, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy intorfered with at the unbridled discretion of police officers"). Rather, this Note argues that the standard selected by courts to judge the validity of investigatory stops directly affects the level of strength afforded those Fourth Amendment protections. Because circuit courts disagree on the proper standard to apply to automobile investigatory stops, similarly situatod defendants will receive varying degrees of Fourth Amendment protection based on the jurisdiction in which they are tried.

16. See Aro, Note, 70 B.U. L. Rev. at 123 n.76 (cited in note 4).

17. The facts of this hypothetical are taken from *United States v. Causey*, 834 F.2d 1179, 1180 (5th Cir. 1987) (en banc).

18. Id.

charge.[19] The police verify the warrant's continued validity with the judge who issued the warrant and then arrest *C*, who later confesses to robbing the bank.[20] At the hearing on *C*'s motion to suppress the confession due to the pretextual motive of the arrest, one of the involved police officers states that their only reason for arresting *C* on the warrant was to investigate the bank robbery.[21] On these facts, a panel of the Fifth Circuit ruled that the exclusive motive to question the defendant, Mr. Reginald Causey, about the robbery rendered the arrest for the misdemeanor pretextual and tainted his confession, making it inadmissible.[22] On rehearing, the Fifth Circuit, sitting en banc, disagreed with its own panel on both its reasoning and interpretation of authority, reversing the decision and permitting the admission of the confession.[23]

United States v. Causey exemplifies various aspects of the pretext problem. First, it illustrates that pretextual activity of police searching for a reason to justify an arrest or stop of is a reality of law enforcement.[24] Second, it shows the confusion and disagreement that

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19. Id.
20. Id.
21. Id.
22. *United States v. Causey*, 818 F.2d 354 (5th Cir. 1987).
23. *Causey*, 834 F.2d at 1180.
24. Police abuse of discretionary power is a reality. The highly publicized beating of Rodney King by Los Angeles police officers is perhaps the best illustration of the reality of police abuse of power. See Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 466-67 (cited in note 5). Judge Kozinski of the Ninth Circuit, reflecting on the King incident, stated that "for a lot of naive people, including me, [the King incident] puts a real doubt on the posture of prosecutors that police are disinterested civil servants just 'telling it as it is.' We should have known all along what this incident points out: that police get involved in what they do and that they are participants in the process just like anyone else. They are subject to bias and they do have a stake in the outcome." Darlene Ricker, *Behind the Silence*, 77 A.B.A. J. 45, 48 (July 1991).

Moreover, two relatively recent cases confirm that pretextual activity by police officers is occurring specifically in the context of automobile investigatery stops. See *United States v. Daniel*, 804 F. Supp. 1330 (D. Nev. 1992); *Garcia v. State*, 827 S.W.2d 937 (Tex. Crim. App. 1992). In *Daniel*, officers were engaged in "gang suppression" activities when they stopped the automobile in which the defendant was riding. *Daniel*, 804 F. Supp. at 1332. The officers had followed a known gang member, and one officer testified that the officers would have used any traffic infraction, however slight, as an excuse te stop the car. Id. at 1335. The district court held that the stop was not principally a routine traffic stop because the officers were engaged in "gang suppression" and not traffic control at the time of the stop. The court thus held that the traffic violation was no more than a pretext to stop the automobile and subject the defendant to a search and interrogation for which the officers had neither probable cause nor reasonable suspicion. Id. at 1336.

In *Garcia*, two officers observed the defendant's Cadillac in front of a suspected drug residence. *Garcia*, 827 S.W.2d at 938. The officers later observed the same Cadillac at an intersection and decided to follow the car. The officers saw the Cadillac pass through the next intersection without stopping at the posted step sign. They decided te stop the car for the traffic violation. Id. After the defendant attempted to flee, the officers discovered that the defendant possessed cocaine. Id. at 939. The defendant appealed the trial court's denial of his motion to suppress the evidence based on the pretextual motive of the officers. Id. at 938. In upholding the denial of the motion, the Texas Court of Criminal Appeals discarded the subjective intent test it

this doctrine has engendered, even between a circuit court sitting en banc and its own panel.[25] Third, the case raises the question of whether pretextual police activity is truly wrong considering the perspectives of both society and the defendant, and if wrong, why the law should regard it as so.[26]

B. The Confusion Manifested: A Substantial Split

A substantial split of authority among the federal circuit courts reflects the confusion surrounding the issue of pretextual investigatory stops.[27] At least seven federal circuit courts have adopted the purely objective test.[28] The *Causey* court enunciated this

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had adopted five years earlier, primarily because a majority of the federal circuit courts had adopted either an objective or modified objective test for pretext steps. Id. at 942. Indeed, one commentator has noted that "[r]arely will an officer be deterred from pretextual arrests or searches because of the remote chance that a court might find that activity illegal." Salken, 62 Temple L. Rev. at 241-42 (cited in note 4).

25. The members of the Fifth Circuit sitting for the rehearing of *Causey* included 13 of the 14 judges who were circuit judges at the time the court's panel initially heard the case. Compare Fifth Circuit, Circuit Judges, 818 F.2d XV (1987), and *Causey*, 834 F.2d at 1179-80. Interestingly, another circuit court siting en banc has disagreed with one of its own panels regarding this issue. See *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (arguably adopting the purely objective test), which overruled *United States v. Ferguson*, 989 F.2d 202 (6th Cir. 1993) (applying a modified objective test, which the circuit had previously adopted). See note 244.

26. See Part II.D.

27. *United States v. Rusher*, 966 F.2d 868, 887 (4th Cir. 1992) (Luttig, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that "[t]here is a substantial split in the circuits over whether a lawful investigatory step under *Terry v. Ohio* . . . can ever be uncenstitutional because of the subjective intentions of the investigating officer"). Indeed, one commentater, referring to the purely objective test and the modified objective test, has stated that federal appellate courts have developed "two *dramatically* different tests" and termed the purely objective test a "*radically different interpretation* [than the modified objective test] of the same Supreme Court precedents." Loren Keith Newman, Comment, Horton v. California: *Searching for a Good Cause*, 46 U. Miami L. Rev. 455, 467-68 (1991) (emphasis added). See also note 11.

28. *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993); *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991); *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990); *United States v. Trigg*, 878 F.2d 1037, 1040 (7th Cir. 1989); *United States v. Causey*, 834 F.2d 1179, 1182 (5th Cir. 1987) (en banc); *United States v. Nersesian*, 824 F.2d 1294, 1316 (2d Cir. 1987); *United States v. Hawkins*, 811 F.2d 210, 213 (3d Cir. 1987). Although the First Circuit clearly has rejected a subjective test, it has not clarified whether it will apply the purely objective test or the modified objective test. See *United States v. Hadfield*, 918 F.2d 987, 993 (1st Cir. 1990) (stating that "[i]t is a bedrock premise of fourth amendment jurisprudence that an officer's state of mind or subjective intent in conducting a search is inapposite as long as the circumstances, viewed objectively, justify the action taken"). Arguably, the First Circuit also has adopted the purely objective test. see *United States v. McCambridge*, 551 F.2d 865, 870 (1st Cir. 1977), but because *McCambridge* was decided before the Supreme Court's more recent relevant holdings on this issue, see notes 109-36 and accompanying text, precisely where the First Circuit actually would fall regarding this issue is unclear. Finally, note that the Sixth Circuit, which recently adopted what it called a "probable cause" investigatery stop standard, arguably also has adopted the purely objective test. *United States v. Ferguson*, 8 F.3d 385, 396 (6th Cir. 1993) (en banc) (Keith, J., dissenting).

test, stating that "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry."[29] This test is based on the view that if police officers have acted in ways the law objectively allows, their subjective motives are not relevant to the evidence suppression inquiry because the purpose of the exclusionary rule is to deter unlawful police actions; therefore, courts should not apply the exclusionary rule when the police have done nothing objectively unlawful.[30] The circuit courts that have adopted the purely objective test have found explicitly that this inquiry stems directly from Supreme Court decisions.[31]

Conversely, two circuit courts have adopted the modified objective test,[32] which originated in *United States v. Smith*.[33] In *Smith*, the Eleventh Circuit held that a state trooper's stop of the defendant's car to investigate possible drug activity was pretextual when the trooper: (1) determined the vehicle matched a drug courier profile merely because it was being driven cautiously, (2) thought it was suspicious that the defendant did not look at the trooper's police car as the defendant passed, and (3) proceeded to follow the vehicle before the defendant exhibited any suspicious activity.[34] In analyzing the validity of the trooper's action, the court formulated the test that the Tenth and Eleventh Circuits since have adopted, concluding that "in determining when an investigatory stop is unreasonably pretextual, the proper inquiry . . . is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose. . . ."[35] These courts readily

29. *Causey*, 834 F.2d at 1184.

30. Id. at 1185.

31. Id. at 1183-84 (stating that "the [Supreme] Court has told us that where police officers are objectively doing what they are legally authorized to do . . . the results of their investigations are not to be called in question on the basis of any subjective intent with which they acted") (citing *Scott v. United States*, 436 U.S. 128 (1978), *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), and *Maryland v. Macon*, 472 U.S 463 (1985)); *Trigg*, 878 F.2d at 1040 (stating that "[m]ost circuits . . . have interpreted [the Supreme Court's] language as dictating a purely objective inquiry in evaluating the reasonableness of a particular police activity") (citing the same Supreme Court cases).

32. *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988); *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986). See also *United States v. Valdez*, 931 F.2d 1448 (11th Cir. 1991). Some courts call this test the *Smith* test after the Eleventh Circuit case that originally formulated the test; however, to prevent confusion, this Note refers to this test as the "modified objective test."

33. 799 F.2d 704 (11th Cir. 1986).

34. Id. at 706-07.

35. Id. at 709-10 (emphasis in original) (reasoning, "[i]n its focus on objective reasonableness rather than on subjective intent or theoretical possibility, that this standard is fully consistent with Supreme Court precedent for determining the validity of a *Terry*-stop"). Interestingly, six

acknowledge that the appropriate analysis of the facts and circumstances of a pretextual stop is an objective one rather than an inquiry into an officer's subjective intent. They disagree with those courts following the purely objective test, however, regarding the objective elements that are dispositive in examining whether a pretextual seizure or search is unconstitutional.[36] The courts following the modified objective test reason that this test is proper because it provides useful judicial review of discretionary police actions while still preserving the requirement of an objective inquiry into Fourth Amendment activity.[37]

The confusion generated by this issue also reaches to the application of these standards. The Fourth Circuit recently decided a case in which the defendant argued for the adoption of the modified objective test.[38] The government argued that the court should follow the purely objective test instead. The majority, however, delayed deciding between the two tests because it found that the initial stop of the defendant's vehicle was constitutional under either approach.[39] Specifically, it found that the district court did not err in its determination that a reasonable officer would have stopped the defendant's vehicle.[40] Judge Luttig, however, argued that the two standards would yield different results on review because adopting the modified objective standard would require the court to remand the case for factual findings on whether a reasonable officer would have stopped the defendant's vehicle while the purely objective standard automatically would yield a valid investigatory stop.[41] He thus concluded that the court had to address the question of which standard to adopt and found that the purely objective standard was "all but dictated" by Supreme Court decisions.[42]

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months after *Smith*, the Eleventh Circuit decided that another drug courier profile stop, conducted by the same officer who conducted the stop in *Smith*, also was made on less than reasonable suspicion. *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987). The court applied the test adopted in *Smith* and struck down the stop as pretextual because the court determined that a reasonable officer would not have stopped the defendant for crossing the highway lane marker by four inches for approximately six seconds. Id. at 547, 549.

36. See, for example, *Guzman*, 864 F.2d at 1515.

37. See, for example, id. at 1517.

38. *United States v. Rusher*, 966 F.2d 868, 876 (4th Cir. 1992).

39. Id. The Fourth Circuit recently adopted the purely objective standard in *United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993). See notes 215-22 and accompanying text.

40. *Rusher*, 966 F.2d at 876.

41. Id. at 886-87 (Luttig, J., concurring in part and dissenting in part).

42. Id. at 887-88.

C. Alternative Analytical Frameworks: More Confusion

Contributing significantly to the problem regarding interpretation of the Supreme Court's pretext doctrine is the fact that the doctrine is very ambiguous and, therefore, very difficult for lower courts to follow.[43] In response, commentators have generated varied analytical frameworks that have attempted to paint a cohesive doctrinal picture from the views of the pretext doctrine that the Supreme Court has displayed. Perhaps the two most notable constructs are those of Professors Burkoff and Haddad.[44] Professors Butterfoss and LaFave also have set forth comprehensive explanations of how the Supreme Court's pretext doctrine cases mesh together.[45] An in-depth review and analysis of these constructs is well beyond the scope of this Note. To build a functional Fourth Amendment investigatory stop doctrine, however, requires an understanding of at least the basic concepts of these frameworks.

Professor Burkoff asserts that Supreme Court cases holding that any subjective proof of pretext is irrelevant and that only an objective analysis is necessary severely weaken individual Fourth Amendment protections available under the pretext search doctrine.[46] Burkoff nevertheless believes that the Court's objective analysis simply asks whether any evidence of pretextual activity existed and, if present, holds that the activity is per se unconstitutional.[47] Burkoff argues, however, that under the pretext doctrine, pretextual activity is plainly unconstitutional and courts must strike down this activity when presented with sufficient evidence, either objective or subjective, of an improper motive.[48] Burkoff believes that, since *Colorado v. Bertine*, the Court examines the individual subjective motivation of a police officer on a case-by-case basis and strikes down activity that it

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43. See *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989) (commenting that the Supreme Court's response to the pretext problem is ambiguous). See also note 5 and accompanying text. Indeed, one commentator has noted that "the Court's jurisprudence on pretext arrests provides incentives to the police to violate or avoid basic constitutional guarantees." Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 479 (cited in note 5).

44. See John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. Detroit L. Rev. 363 (1989); John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's "Hard Choices"*, 18 U. Mich. J. L. Ref. 695 (1985); Haddad, 18 U. Mich. J. L. Ref. at 641-43 (cited in note 6); John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. Mich. J. L. Ref. 523 (1984).

45. Butterfoss, 79 Ky. L. J. 1 (cited in note 5); LaFave, 89 Mich. L. Rev. at 442 (cited in note 5).

46. See Burkoff, 17 U. Mich. J. L. Ref. at 523-36 (cited in note 44).

47. See id.

48. See Burkoff, 18 U. Mich. J. L. Ref. at 699-703 (cited in note 44).

finds pretextual.[49] The problem with Burkoff's construct of the pretext doctrine, however, is that it does not comport with Supreme Court precedent,[50] nor does his "plainly unconstitutional" test take into account the underlying policy of the Fourth Amendment, which is to balance the governmental need to perform an investigatory stop with the privacy rights of the individual.[51]

Professor Haddad, however, comments that the Supreme Court considers the possibility that a certain act is vulnerable to use as a pretext by police officers as just one of the factors used in determining whether the police activity comports with the Fourth Amendment.[52] He suggests that the Court then upholds, strikes down, or restricts the police power based on all the facts.[53] The Court performs this analysis instead of examining the subjective intent of the officer because if the officer only does what the law allows him to do, then the officer's conduct is valid under the Fourth Amendment.[54] Haddad's position, however, cannot be reconciled with the proposition that the officer's motive may become relevant after a court determines that the Fourth Amendment was violated.[55] Moreover, the Supreme Court also has held that the exclusionary rule is inapplicable when an officer's good faith belief that a defective warrant was valid was objectively reasonable.[56] Finally, the Eighth Circuit has held that if a court finds

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49. See Burkoff, 66 U. Detroit L. Rev. at 395-408 (cited in note 44) (discussing *Colorado v. Bertine*, 479 U.S. 367 (1987)).

50. See notes 110-36 and accompanying text. See also Butterfoss, 79 Ky. L. J. at 7-11 (cited in note 5).

51. See *United States v. Hensley*, 469 U.S. 221; 228 (1985) (stating, "The proper way to identify the limits [on investigatery steps to investigate past criminal activity] is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test, which is grounded in the standard of reasonableness embodied in the Fourth Amendment, balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion."); *United States v. Villamonte-Marquez*, 462 U.S. 579, 591-93 (1983) (balancing the need to enforce sea-going vessel registration statutes by inspections against the intrusion engendered by the inspections); *Delaware v. Prouse*, 440 U.S. 648, 655-61 (1979) (balancing the intrusion imposed on the occupants of a vehicle by a random stop to check documents with the marginal contribution to roadway safety potentially resulting from the spot checks); *Scott v. United States*, 436 U.S. 128, 139-41 (1978) (balancing the amount of wiretapping necessary te provide law enforcement officials with means to combat crime against the infringement on individual privacy caused when the electronic surveillance is not minimized); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-64 (1976) (balancing the need to enforce immigration laws against the intrusion caused by brief vehicle steps at the nation's borders).

52. Haddad, 18 U. Mich. J. L. Ref. at 651-52 (cited in note 6).

53. Id. at 652.

54. Id. at 687.

55. See *Scott*, 436 U.S. at 139 n.13 (stating: "On occasion, the motive with which the officer conducts an illegal search may have some relevance in detormining the propriety of applying the exclusionary rule. . . . This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated.").

56. *United States v. Leon*, 468 U.S. 897, 905-25 (1984).

the Fourth Amendment was violated, then it may consider the officer's state of mind to decide if it should apply the exclusionary rule.[57] Haddad's construct, which analyzes the validity of the police power alone, thus does not fit cleanly within Supreme Court precedent or circuit court interpretations of that precedent.

To explain the Supreme Court's approach to the pretext issue, Professor Butterfoss distinguishes between legal pretexts and fabricated pretexts.[58] Legal pretextual stops are those in which a police officer has a pretextual motive for performing the investigatory stop but has a legal basis for performing the stop—such as a minor traffic offense.[59] Fabricated pretexts, however, involve pretextual stops in which the police officer lies about a violation by the automobile operator to provide the justification for the officer's illegal activity.[60] Professor Butterfoss states that the Court's current approach is to find legal pretexts constitutional but to perform a case-by-case analysis when the pretext is fabricated.[61] Although Professor Butterfoss views this construct as close to the correct approach, he nevertheless contends that the Court should re-examine the underlying authority to arrest based on minor offenses.[62] He also suggests that a new approach to fabricated pretexts still may be necessary because of the difficulty of proving fabrication of a pretext on a case-by-case basis.[63] He recommends that the modified objective test be applied to fabricated pretext cases.[64]

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57. *United States v. Cummins*, 920 F.2d 498, 501 n.3 (8th Cir. 1990) (citing *Scott*, 436 U.S. at 139 n.13).

58. Butterfoss, 79 Ky. L. J. at 5-6 (cited in note 5).

59. Id.

60. Id. at 6 (stating that "[i]n 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").

61. Id. at 54.

62. Id. at 7 (concluding that "an approach that . . . reexamines the underlying authority of police officers to arrest and search based on a minor offense, offers the better solution to the 'pretext problem'"). Professor Butterfoss is not alone in his recommendation that the Supreme Court reexamine the authority to arrest based on minor offenses. Professor LaFave has stated that "the proposition that the [F]ourth [A]mendment should be construed to bar custodial arrests for minor violations is an appealing one." LaFave, 89 Mich. L. Rev. at 487 (cited in note 5). See also Salken, 62 Temple L. Rev. at 252-73 (cited in note 4) (asserting that the Fourth Amendment limits the power to arrest for traffic violations). Finally, the State of Florida specifically has decriminalized traffic violations, prescribing civil penalties for them, thereby not permitting a search incident to arrest for minor traffic violations. See *Thomas v. State*, 614 S.2d 468 (Fla. 1993) (holding that a police officer should not have used an arrest of a bicyclist, based on his operation of the bicycle without a bell or gong in violation of a city ordinance, to conduct a full search incident to arrest).

63. Butterfoss, 79 Ky. L. J. at 54 (cited in note 5).

64. Id. at 57 (stating that the modified objective test "is a suitable test to regulate fabricated pretexts").

Professor Butterfoss's view of the pretext doctrine, although helpful in adding cohesiveness to the Court's holdings, is problematic. The approach requires a court to determine initially whether a pretextual stop was legal or fabricated; it then applies either a per se holding of validity if the pretext was legal or the modified objective test if it was fabricated. This differentiation, however, quickly could become innocuous because, as Butterfoss himself notes, courts have a natural reluctance to question the honesty of officers,[65] and thus, the courts rarely would find fabricated pretexts. It logically follows that Butterfoss's construct would yield a Fourth Amendment investigatory stop doctrine that would be doctrinally similar to the purely objective test because the courts simply would look to see if a valid reason to stop existed and, if so, would declare the stop valid as a legal pretext. Only in the rare instance of egregious facts clearly contrary to an officer's statements would a court consider applying the modified objective test. This construct draws the line between legal and fabricated pretextual stops so far toward the fabricated pretext side that courts would declare few pretextual stops fabricated. Thus, Professor Butterfoss's construct is no more helpful in resolving this issue than the confusion that already exists among the courts.

Finally, Professor LaFave propounds judicial review of police rules as a means to protect Fourth Amendment guarantees.[66] LaFave comments that the combination of tremendous complexity and discretion in the Fourth Amendment activities of police strongly suggests a need for guidelines regulating this type of police activity.[67] LaFave asserts that the Supreme Court should stimulate police rulemaking by reviewing challenged police rules. This judicial review, he contends, will encourage the police to produce written law enforcement policies and continuously subject these policies to a critical re-evaluation process.[68] The benefits gained by this judicial approach include: (1) the enhanced quality of police policy decisions, (2) the fair and equal treatment of citizens, (3) the increased visibility of police department decisions, and (4) the increased consistency of police in obeying and

65. Id. at 55. Indeed, American courts routinely give deference to police officers' determinations of reasonable suspicion. See, for example, *United States v. Johnson*, 862 F.2d 1135, 1136-37, 1140 (5th Cir. 1988) (holding that deferenco is appropriato when circumstances justify search and seizure of drug trafficking suspects).

66. See LaFave, 89 Mich. L. Rev. at 442 (cited in note 5).

67. Id. at 442-45. LaFave concludes that "[g]iven the complex and discretionary character of police search and seizure decisions, some limitations on this power are essential." Id. at 445.

68. Id. at 446 (quoting Wayne R. LaFave, *Arrest: The Decision to Take a Suspect into Custody* 513 (Little, Brown, 1967)).

enforcing constitutional norms.[69] Although these benefits certainly justify implementing judicial review of police guidelines, two criticisms of Professor LaFave's approach arise. First, even if the courts are better suited to review, rather than develop, police procedures,[70] the courts themselves still must have some standard by which to approve or disapprove the rules developed by the police. Therefore, the courts still must determine what minimum policy guidelines are necessary to protect Fourth Amendment guarantees. Second, judicial review of police guidelines may become the focus of a case to the extent that the police are "on trial" for the guidelines they have or have not developed, rather than the defendant's charge that the police activity violated his Fourth Amendment rights.

D. What's Wrong with Pretextual Stops Anyway?

Who is harmed by a pretextual investigatory stop? Society at large? The defendant? If so, how are they harmed? Do the benefits of permitting pretextual activity outweigh the costs of that activity? Does society require a check on the discretionary power of our police authorities or is the discretionary power to perform investigatory stops necessary in the sometimes overwhelming fight against crime? The answers to these questions go to the foundation of the issue of what test courts should apply to ensure that investigatory stops comport with Fourth Amendment requirements.

That the Fourth Amendment prohibits arbitrary searches and seizures as well as unjustified searches and seizures is well settled.[71] The Framers included the warrant requirement in that amendment to accomplish both purposes.[72] Some searches and seizures, however, including investigatory stops, qualify as exceptions to the warrant requirement and thus do not require a warrant to issue before the search or seizure is conducted.[73] Nevertheless, society considers indiscriminate searches and seizures harmful because they expose people and their possessions to intrusions by government officials who may act arbitrarily and capriciously in exercising their search and seizure powers.[74]

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69. LaFave, 89 Mich. L. Rev. at 451 (cited in note 5) (citing Amsterdam, 58 Minn. L. Rev. at 423-28 (cited in note 3)).

70. See LaFave, 89 Mich. L. Rev. at 449 (cited in note 5).

71. Amsterdam, 58 Minn. L. Rev. at 417 (cited in note 3).

72. Id.

73. Id. at 414. See *Terry v. Ohio*, 392 U.S. 1 (1968).

74. Amsterdam, 58 Minn. L. Rev. at 411 (cited in note 3). See also William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. Mich. J. L. Ref. 551, 561-63 (1984). Compare Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 467 (cited in note 5) (observing that "[i]n the

These purported harms may be damaging to the ideal of a free society. Modern police practices are almost entirely discretionary.[75] In his now well-known lecture, Professor Amsterdam remarked that whether a person is arrested and searched or sent on her way with a ticket after a minor traffic infraction depends on the mental, physical, or emotional state of any officer who stops the person or, more realistically, on the subjective dislikes of an officer, such as the price of the person's automobile or the color of the person's skin.[76] As a counterweight to the unbridled use of police power to which Professor Amsterdam referred, the Supreme Court consistently has interpreted the Fourth Amendment right against unreasonable searches and seizures to require the exclusion of evidence unlawfully obtained in criminal trials.[77]

Supreme Court rulings make it evident that arbitrary automobile investigatory stops may be unreasonable within the meaning of the Fourth Amendment,[78] and thus detrimental to the societal freedom the Framers intended to protect. The Court, concerned with the evil of standardless and unconstrained discretion, has held that the risk of arbitrary and abusive police conduct exceeds permissible limits when an investigatory stop is not based on objective criteria;[79] therefore, the discretion of the field official must be limited.[80] Indeed, the Tenth Circuit has observed that the need to restrict the arbitrary use of police discretion was the impetus for Supreme Court decisions

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United States there is both a fear of governmental abuse and a tolerance of repressive measures, the latter reflecting a belief that police excesses are necessary to combat crime").

75. Amsterdam, 58 Minn. L. Rev. at 415 (cited in note 3). See also Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 469 (cited in note 5) (stating that "the Supreme Court has drastically limited the substantive protections of the Fourth Amendment and has significantly narrowed the exclusionary rule, thus authorizing increasingly invasive police searches, seizures, and other investigative practices"); Salken, 62 Temple L. Rev. at 222 (cited in note 4) (observing that "police officers in most states may arrest and search virtually every adult almost at whim").

76. Amsterdam, 58 Minn. L. Rev. at 416 (cited in note 3).

77. The Court established the doctrine of excluding evidence obtained from an unreasonable search or seizure in federal criminal trials was in *Weeks v. United States*, 232 U.S. 383 (1914), in which the Supreme Court held that, as applied in federal criminal litigation, the Fourth Amendment imposes an exclusionary sanction for the purpose of enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures. See generally John William Strong, ed., *McCormick on Evidence* § 166 at 288 (West, 4th ed. 1992). One commentator even has stated that the exclusionary sanction "prevents the systom from functioning as an unmitigated inducement to policemen to violate the fourth amendment on every occasion when there is criminal evidence to be gained by doing so." Amsterdam, 58 Minn. L. Rev. at 431 (cited in note 3). But compare Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 469 (cited in note 5) (stating that the Supreme Court "has significantly narrowed the exclusionary rule").

78. *Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979).

79. *Brown*, 443 U.S. at 52. See also Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 479 (cited in note 5) (assuming that "deterring police misconduct is a principal purpose of the Court's Fourth Amendment doctrine").

80. *Prouse*, 440 U.S. at 661.

prohibiting police practices not subject to objective review.[81] Thus, the Court implicitly has recognized that society's interest in freedom from unreasonable intrusions by police officers would be harmed by allowing arbitrary or unjustified investigatory stops.[82]

The plight of the individual defendant who is denied a suppression motion because the stop of her vehicle was reasonable under the purely objective test but that may not have been constitutionally reasonable under the modified objective test perhaps is described best by Judge Rubin's dissent in *United States v. Causey*.[83] In *Causey*,[84] the police used an old arrest warrant and less than probable cause to arrest Causey and question him about a bank robbery.[85] Judge Rubin pointed out that neither the old arrest warrant nor the weak suspicion taken alone would have given the police the ability to arrest Causey for the bank robbery; but by using the two insufficient bases together, the police were able to arrest Causey and question him in order to develop the probable cause necessary to arrest him for the bank robbery.[86]

In terms of investigatory stops, the harm from the individual defendant's perspective is that the government can do indirectly through the use of a combination of Fourth Amendment exceptions what it cannot do directly. For example, a police officer can use a minor traffic offense to perform a valid Fourth Amendment stop,[87] arrest the driver for the infraction,[88] and then perform a search inci-

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81. *United States v. Guzman*, 864 F.2d 1512, 1516 (10th Cir. 1988).

82. See notes 251-54 and accompanying text. See also Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 467 (cited in note 5) (stating that "[t]he true test of our society's commitment to constitutional constraints is how government and the courts respond to . . . systemic deviations from constitutional norms").

83. 834 F.2d 1179 (5th Cir. 1987) (en banc).

84. See notes 17-21 and accompanying text.

85. *Causey*, 834 F.2d at 1180.

86. Id. at 1188-89 (Rubin, J., dissenting). Judge Rubin stated:

> By holding the arrest in *Causey* constitutional, the majority opinion establishes a new rule that makes the whole more than the sum of its parts: the police can take two bases for arrest, each constitutionally insufficient—an unreasonable and arbitrary execution of a warrant and a suspicion amounting to less than probable cause—and add them together as a basis for a constitutionally acceptable arrest. This result flies in the face of the purposes of the fourth amendment and of established Supreme Court precedent.

Id.

87. *United States v. Cummins*, 920 F.2d 498, 500 (8th Cir. 1990) (citing *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and ruling that "[w]hen an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle").

88. See *United States v. Robinson*, 414 U.S. 218, 222-23 n.2 (1973) (holding that every custodial arrest, even those for minor traffic violations, permits a full search of the arrestee's person); *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (stating, "It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody. . . . [T]he arguable absence of 'evidentiary' purpose for a search incident te a lawful arrest is not controlling."). But see Salken, 62 Temple L. Rev. at 254 (cited in note 4)

dent to arrest[89] to "bootstrap" the search onto the valid Fourth Amendment stop.[90] This combination of exceptions results in a Fourth Amendment warrant doctrine that an informed police force can use in tandem to construct a constitutionally valid pretextual search of an individual's vehicle based solely on a broken tail light or speeding violation. Thus, the whole *can* become greater than the sum of its individual parts.[91]

Finally, the more difficult questions are whether the benefits of permitting pretextual activity outweigh the costs associated with that activity because the power to perform purely objective investigatory stops is necessary to fight crime or whether society requires a check on the discretionary power of our police authorities. Professor Amsterdam asserts that the Fourth Amendment's fundamental character and substantive content require restraint on the police's power.[92] He argues that although the preservation of public order and the needs of the police to achieve that public order are extremely important, they do not outweigh the individual needs and rights that society values more highly.[93] Envisioning this requirement, the Framers drafted the Fourth Amendment as a constitutional limitation that deliberately subordinates police efficiency in preserving order to the protection of the people's right to be left alone absent a strong governmental need.[94] Moreover, the Supreme Court specifically has acknowledged the harm to society of unreasonable searches and

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(arguing that the power to arrest for a minor traffic offense is precisely the type of evil the Fourth Amendment was designed to prevent).

89. *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that in every instance in which "a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that autemobile") (footnoto omitted).

90. Although this conduct by a police officer arguably would be unconstitutional under *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) (holding that "[a]n arrest may not be used as a pretext to search for evidence"), in most jurisdictions police officors may arrest drivers for traffic infractions, *Robinson*, 414 U.S. at 222-23 n.2, and *Gustafson*, 414 U.S. at 265, allowing the police then to perform a search incident to arrest of the immediate passenger compartment area. *Belton*, 453 U.S. at 460. See also LaFave, 1 *Search and Seizure* § 1.4(e) at 93-94 (cited in note 2), and LaFave, 2 *Search and Seizure* § 5.2(e) at 457-58 (cited in note 2) (discussing the possibility that a police officer would use a traffic arrest as a pretoxt to conduct a search).

91. Officers may use the plain view doctrine along with a minor traffic infraction to construct a constitutionally valid pretextual stop and search of the contents of a person's vehicle in plain view even without the police officer having to arrest the person. See Robert Eyer, Comment, *The Plain View Doctrine After* Horten v. California*: Fourth Amendment Concerns and the Problem of Pretext*, 96 Dickinson L. Rov. 467, 469 n.14 (1992). In light of the search incident to arrest and plain view doctrines, defining and maintaining the pretext doctrine is necessary to prevent uncontrolled abuses of power by police officers.

92. See Amsterdam, 58 Minn. L. Rev. at 353-63 (cited in note 3).

93. See id. at 354.

94. See Aro, Note, 70 B.U. L. Rev. at 123-24 (cited in note 4).

seizures.[95] Thus, while recognizing that the Fourth Amendment does interfere with well-intentioned police efforts at times, the Court nevertheless has held that an increase in police efficiency alone cannot justify disregard of the Fourth Amendment's requirements[96] and that evidence obtained as a result of a pretextual stop is subject to suppression.[97] The Framers, therefore, envisioned a free society that requires a check on the discretionary power of its police authorities to prevent arbitrary pretextual activity.

To resolve the confusion and disagreement surrounding this issue, the Supreme Court should announce an appropriate automobile investigatory stop test. This Note develops a recommended investigatory stop test by analyzing rulings of the Supreme Court and the federal circuit courts, and by evaluating the competing policies presented by this issue. This Note argues that the appropriate investigatory stop test is a two-part test in which a court initially asks merely whether the stop was conducted within the bounds of a valid police procedure. If not, or if the court finds that the police procedure is invalid, a court must ask whether a reasonable officer would have performed the stop under the same circumstances. This investigatory stop test is meaningful because it comports with the strict requirements of the Fourth Amendment yet does not contain the drawbacks found in many circuit court holdings.

III. THE BACKDROP OF SUPREME COURT GUIDANCE

In *Terry v. Ohio*[98] the Supreme Court held that a brief investigatory stop made pursuant to an officer's reasonable suspicion does not violate the Fourth Amendment.[99] In *Terry*, a police officer stopped and frisked the defendant on a street in downtown Cleveland.[100] The

95. See *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (stating, "[I]t is simply fantastic to urge that [a bodily search] procedure performed in public by a policeman while the citizen stands helpless . . . is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.").

96. See, for example, *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (holding that a "murder scene exception" to the Fourth Amendment warrant requirement was inconsistent with that amendment and that a warrantless search of an apartment is not permissible merely because a homicide occurred there); *Berger v. New York*, 388 U.S. 41, 62 (1967) (holding that a statute permitting a court to order electronic eavesdropping violated the Fourth Amendment because the statute was too broad in its coverage).

97. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

98. 392 U.S. 1 (1968).

99. Id. at 21.

100. Id. at 1. The police officer patted down the outside of Terry's clothing and felt a pistol in the left breast pocket of Terry's overcoat. Id.

officer said he performed the stop and frisk because Terry and his companion looked suspicious.[101] In holding that the stop of the defendant was valid, the Court stated that the validity of investigatory stops must be judged against an objective standard, asking whether the facts available to the officer at the time of the search or seizure would justify a reasonably cautious person in believing that the action taken was appropriate.[102] In finding the officer's stop of the defendant was conducted reasonably in light of the dangers faced in that situation, the *Terry* Court further ruled that evidence discovered by a search or seizure not reasonably related in scope to the justification for the initiation of the search or seizure may not be introduced.[103] Thus, in what is known commonly as a *Terry* stop, the fundamental questions a court must ask are: (1) whether the officer possessed a reasonable suspicion to make the seizure based on an objective assessment of the facts available to him at the time the stop was made (that is, whether the officer's action was justified at its inception), and (2) whether the scope of the search was reasonably related to the facts and circumstances that initially justified the intrusion.[104]

Furthermore, because the Supreme Court has held that an ordinary traffic stop is a confined seizure more similar to an investigative detention than to a custodial arrest,[105] courts specifically apply the *Terry* investigative detention test to vehicle investigatory stops.[106]

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101. Id. at 6-7.

102. Id. at 21-22 (stating the question as follows: "[W]ould the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?"). The Court elaborated that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." Id. at 22.

103. Id. at 28-29. The strength required for the connection between the scope of the search and the circumstances prompting that search is somewhat confusing in *Terry* because the Court stated earlier in the opinion that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Id. at 19. Because this Note argues that the Second, Third, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits have not given appropriate consideration to a requirement that the scope of the search be *reasonably related* to the circumstances justifying the stop, it is not necessary to address the different justification levels other than to acknowledge that if the more demanding "strictly tied to and justified by" standard is used—as was used in *Chimel v. California*, 395 U.S. 752 (1969)—the arguments in this Note have even more weight because more than a mere reasonable relationship between the circumstances justifying the stop and the scope of the search would require a more extensive judicial review than the purely objective tost.

104. *Terry*, 392 U.S. at 19-20. See also LaFave, 3 *Search and Seizure* § 9.3 at 423 (cited in note 2).

105. See *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

106. See, for example, *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992). Circuit courts have not differed over the application of the *Terry* standard to investigatory stop cases;

Thus, although a police officer may conduct a brief investigative stop of a vehicle,[107] this stop must be justified by particular, articulable facts that are sufficient to arouse a reasonable suspicion of criminal conduct.[108] The pretext doctrine, which operates as a means to bar investigative stops not based on reasonable suspicion, logically flows from these holdings. The Court, however, simultaneously clarified and confused the content and structure of the pretext doctrine in six cases decided between 1978 and 1985.[109]

In *Scott v. United States*,[110] the defendant argued that the Court should suppress evidence of his illegal conduct involving the sale of narcotics because the agents, who obtained the evidence by wiretapping, did not make a good faith effort to comply with the minimization requirement of the Omnibus Crime Control and Safe Streets Act.[111] The Court rejected that argument, holding that subjective intent alone does not make otherwise lawful conduct unconstitutional.[112] It further stated that since *Terry*, the Court consistently has held that an officer's subjective state of mind will not invalidate his actions as long as the circumstances, viewed objectively, justify that activity.[113] Even if this holding in *Scott* requires courts to apply an objective test to pretextual Fourth Amendment activity, which is not clear,[114] it certainly does not mandate that courts apply a purely objective test to pretextual stop cases. Rather, it merely rejects a subjective test to examine an officer's underlying intent.[115]

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rather, the courts disagree about the proper interpretation of the *Terry* standard in these cases. See Part IV of this Note.

107. See *Prouse*, 440 U.S. at 653.

108. *Brignoni-Ponce*, 422 U.S. at 878-82.

109. See *Scott v. United States*, 436 U.S. 128 (1978); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Brown v. Texas*, 443 U.S. 47 (1979); *United States v. Cortez*, 449 U.S. 411 (1981); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Maryland v. Macon*, 472 U.S. 463 (1985).

110. 436 U.S. 128 (1978).

111. Id. at 135.

112. Id. at 135-37.

113. Id. at 138. The Court stated that since *Terry* it has

> held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.

Id.

114. LaFave, 89 Mich. L. Rev. at 489 (cited in note 5). See also note 147 and accompanying text.

115. Indeed, one circuit court specifically distinguished *Scott* by stating that the decision, although "often cited in the pretext context, did not emphasize the arbitrariness problem because it was not before the Court" because the officer in *Scott* had a warrant to conduct the search; thus, police discretion was not involved. *United States v. Guzman*, 864 F.2d 1512, 1516 n.3 (1988).

Since *Scott*, the Court has refined the investigatory stop doctrine somewhat. In *Delaware v. Prouse*,[116] the Court addressed the constitutionality of officers conducting routine stops of vehicles to check the operator's driver's license and automobile registration without a reasonable suspicion that the driver was operating the car in violation of law.[117] The state argued that its interest in achieving roadway safety outweighed the intrusion on the privacy of the detained drivers.[118] The Court rejected this argument, holding that individual stops are permissible only on individualized reasonable suspicion, which requires an articulable and reasonable suspicion that an individual in the automobile has violated the law; therefore, a stop of a vehicle merely to check the driver's license and automobile registration is unreasonable under the Fourth Amendment.[119]

Although the Court invalidated a stop of a pedestrian on Fourth Amendment grounds in *Brown v. Texas*[120], the case nonetheless added to the investigatory stop doctrine. In *Brown*, two policemen saw the defendant, Brown, walking away from another man in an alley in an area known to have a high incidence of drug traffic. After stopping the defendant and asking his identity, the police frisked him.[121] Brown argued that the stop was unreasonable because the police did not have a reasonable suspicion that he was involved in criminal conduct.[122] The Court found that the Fourth Amendment requires that (1) a seizure be based on specific, objective facts indicating that society's interests demand the seizure of the individual, or (2) the seizure be carried out according to a plan that embodies explicit limitations on police conduct.[123] Because the police did not have a reasonable suspicion to stop and ask Brown to identify himself and the police department did not have a plan that met the stated requirements, the Court reversed Brown's conviction.[124]

Furthermore, two years after *Brown*, the Court attempted to clarify the law on this issue by holding that courts must consider the totality of the circumstances when determining if an investigatory stop of a vehicle is justified, and based on these circumstances the

116. 440 U.S. 648 (1979).
117. Id. at 650.
118. Id. at 655.
119. Id. at 663.
120. 443 U.S. 47 (1979).
121. Id. at 48-49. Brown refused to give his identity to the police, who then arrested him for violating a Texas statute that made it a criminal act for a person to refuse to give the police his name and address when the police lawfully stopped the person.
122. Id. at 51.
123. Id.
124. Id. at 53.

detaining officer must particularly and objectively suspect the detained person detained of criminal activity.[125] The *Cortez* Court held that constitutionally sufficient reasonable suspicion must contain two elements: (1) an analysis based on all of the circumstances that (2) must raise a suspicion of wrongful activity.[126] Although attempting to clarify the doctrine, this refinement still left the test of reasonable suspicion in the investigatory stop area vague.[127]

The next time the Court substantially ventured into the investigatory stop doctrine was in *United States v. Villamonte-Marquez*,[128] in which the Court actually addressed, although only briefly, a pretext question. In *Villamonte-Marquez*, the Court upheld the respondents' drug convictions that had resulted from the boarding of a sailboat by customs officers to inspect the ship's documents, as authorized by a federal statute, despite the respondents' argument that the customs officers had a pretextual motive for the search because they were acting on an informant's tip that drugs were aboard.[129] The Court summarily dismissed this argument in a footnote.[130]

Although some commentators suggest that *Villamonte-Marquez* weakens arguments that the pretext doctrine is still valid,[131] a close analysis of the respondents' argument and the Court's response to that argument shows that the respondents were making a subjective intent argument, urging the Court to look beyond the officers' objective basis for performing the stop and consider their

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125. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (holding that objective facts and circumstances justified the officers' investigative stop based on suspicion that the defendants were using a pickup truck to transport illegal aliens).

126. Id. at 418.

127. See LaFave, 3 *Search and Seizure* § 9.3(a) at 424 (cited in note 2). Indeed, at least one writor has commented that "*Cortez* calls for an all-encompassing review, which takes both objective and subjective factors into account in assessing a *Terry* stop's reasonableness." Aro, Note, 70 B.U. L. Rev. at 128 (cited in note 4). However, the lower courts have not interpreted *Cortez* in that manner. In fact, most courts interpret cases such as *Villamonte-Marquez* and *Macon* as barring a court's inquiry into an officer's subjective state of mind. See Part IV of this Note. But see *United States v. Gutierrez-Mederos*, 965 F.2d 800, 802 (9th Cir. 1992) (holding that "[t]o evaluate the validity of appellant's [pretext] claim, we must review . . . the motivation or primary purpose of the arresting officer," and noting that if an officer's "conduct satisfies this subjective standard, it also will meet the objective test outlined by the United States Supreme Court in *Maryland v. Macon*").

128. 462 U.S. 579 (1983).

129. The Court mentions the respondents' pretext claim in *Villamonte-Marquez* only in a footnote, which states: "Respondents . . . contend . . . that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation." Id. at 584 n.3.

130. Id. (stating that "[t]his line of reasoning was rejected in *Scott* . . . and we again reject it").

131. See, for example, Burkoff, 17 U. Mich. J. L. Ref. at 538-44 (cited in note 44); Aro, Note, 70 B.U. L. Rev. at 161 (cited in noto 4).

underlying motive. The Court's summary rejection of this argument does not necessarily reject a modified objective test because the Court did not address whether a reasonable officer would have stopped the boat in the same circumstances. Thus, the *Villamonte-Marquez* Court left open the question of which objective test is appropriate.

Finally, in *Maryland v. Macon*[132] the respondent, convicted of distribution of obscene material, argued that an officer's actions in purchasing and keeping two magazines but then retrieving the money paid after arresting the defendant constituted an unlawful seizure under the Fourth Amendment because the officer subjectively intended to retrieve the money while keeping the magazines.[133] The Court rejected this argument, ruling that whether an officer violates the Fourth Amendment turns on an objective examination of the officer's conduct considering the facts and circumstances confronting the officer and not on the officer's state of mind when performing the challenged action.[134] The Court then held that the sale of the magazines was not a warrantless seizure simply because of the officer's subjective intent to retrieve the purchase money.[135] Although the Court once again rejected the subjective intent test as a means to show a pretext,[136] it did not address whether a modified objective inquiry is required. Thus, the circuit courts were left without guidance from the Court as to which objective test they should apply. This Note now turns to the reasoning these courts have used to select the test for their jurisdictions.

IV. AN ANALYSIS OF THE REASONING OF THE COURTS OF APPEALS

This Part analyzes the reasoning of the circuit courts that have addressed which test is appropriate in determining the reasonableness

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132. 472 U.S. 463 (1985).

133. Id. at 470.

134. Id. at 470-71 (citing *Scott v. United States*, 436 U.S. 128, 136-38 (1978)).

135. *Macon*, 472 U.S. at 471.

136. Id. at 470-71. Some writers nonetheless argue that *Brown v. Texas*, *United States v. Cortez*, and *United States v. Brignoni-Ponce* have "mandated a partially subjective inquiry." See, for example, Aro, Note, 70 B.U. L. Rev. at 151 (cited in note 4). As discussed in Part III of this Note, however, the more recent Supreme Court cases specifically have rejected a subjective test, and all circuit courts except the Ninth Circuit have rejected a subjective test for automobile investigatory stops. See Part IV of this Note.

The Ninth Circuit has held that an arresting officer's motivation is relevant when an arrest is alleged to have been a mere pretext in order to conduct an unauthorized search. *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986) (citing *Williams v. United States*, 418 F.2d 159, 161 (9th Cir. 1969), aff'd, 401 U.S. 646 (1971)). The Ninth Circuit continues to adhere to a subjective test in analyzing alleged pretextual police conduct. See *United States v. Huffhines*, 967 F.2d 314, 317 (9th Cir. 1992); *United States v. Gutierrez-Mederos*, 965 F.2d 800, 802 (9th Cir. 1992).

of an alleged pretextual investigatory stop. It first examines the reasoning of those courts adopting the purely objective test[137] and then analyzes the reasoning of the courts adopting the modified objective standard.[138]

A. Courts Adopting the Purely Objective Test

In *United States v. Hawkins*,[139] the Third Circuit, citing *Scott*, *Macon*, and *Villamonte-Marquez*, adopted an investigatory stop test similar to the purely objective test. The court initially cited *Scott* and *Macon* for authority that Fourth Amendment inquiries focus on the objective facts available to the officer rather than the seizing officer's state of mind, and thus a seizure that is valid based on the stated justification cannot be questioned on the basis that the seizing officer's

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137. See the courts' holding in *United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993); *United States v. Mitchell*, 951 F.2d 1291 (D.C. Cir. 1991); *United States v. Cummins*, 920 F.2d 498 (8th Cir. 1990); *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989); *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc); *United States v. Nersesian*, 824 F.2d 1294 (2d Cir. 1987); *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987).

138. See the courts' holding in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988); *United States v. Pino*, 855 F.2d 357 (6th Cir. 1988), amended to add concurrence, 866 F.2d 147 (6th Cir. 1989); *United States v. Crotinger*, 928 F.2d 203 (6th Cir. 1991); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986). Note, however, the the Sixth Circuit, in *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993), rejected the modified objective test and arguably adopted the purely objective test. See note 244.

139. 811 F.2d 210 (3d Cir. 1987). In *Hawkins*, two Philadelphia police officers were performing undercover observation of a house for suspected narcotics activity. At 11:30 p.m., the officers saw a car with a driver and a passenger pull up to the house, the passenger walk into the house, return to the car to talk to the driver, and then walk back into the house. The passenger then exited the house with two men and all three men got into the car. The car drove away and the officers, who were in an unmarked van, followed for several miles, during which time the driver crossed over the solid double yellow lines on the road and ran a red light before parking. The officers parked behind the car, turned on the van's high beam lights, approached the car on foot, and identified themselves to the occupants of the car. One of the officers observed Hawkins, who was sitting behind the driver, attempting to tuck something into the rear seat of the car. At that time, the officers ordered the occupants out of the car. As Hawkins exited the car, one officer saw him drop a gun on the seat and cover it with a pillow. The officer then retrieved the gun and placed Hawkins under arrest. A frisk of all four of the car's occupants revealed narcotics on Hawkins and the front-seat passenger. Id. at 212.

After Hawkins was charged with possession of a firearm by a convicted felon, he moved to suppress the gun as unlawfully obtained on the basis that the officers' stop of the car was an illegal stop under the Fourth Amendment. Even though the officers testified at the suppression hearing that they stopped the car to investigate the traffic violations, the district court held that no evidence supported a stop based on the reasons given by the officers. The district court nevertheless found that the events observed by the officers during their surveillance created reasonable suspicion to believe that the automobile's occupants were engaged in a narcotics violation. The court thus concluded that the stop was legal, and the gun was admissible evidence. Hawkins appealed his subsequent conviction, arguing that the district court erred in holding (1) that the facts available to the officers were sufficient to create a reasonable suspicion that the car's occupants were engaged in narcotics violations, and (2) that a stop could be justified on grounds different from those stated by the officers. Id. at 212-13.

subjective motivation was improper.[140] This test is similar in effect to the purely objective test, which holds that a stop is valid if the officer *could* have made a valid stop based on any infraction, despite the actual reason for the stop.[141] In *Hawkins*, however, the district court had found no evidence supporting the stated purpose for the investigatory stop—to investigate based on the traffic violations; therefore, the purely objective test logically required the circuit court to hear Hawkins's challenge that the stop was not valid based on its stated purpose. The circuit court, however, failed to hear Hawkins' challenge. Rather, it altered its version of the test to find that stops based on objective reasonable suspicion are valid even though officers attempt to justify the stop on pretextual grounds.[142] The circuit court thus essentially held that a district court may disregard the justification advanced by the investigating officers and conduct a review of the officers' actions based on the facts presented at trial to determine if a reasonable basis existed for the stop.[143]

In a well-reasoned dissent, Judge Rosenn identified various weaknesses in the majority's reasoning. First, he noted that the majority believed that even if police lack reasonable suspicion at the time of the investigatory stop, reasonable suspicion found in hindsight will allow admission of the evidence.[144] The flaw in the majority's belief is that Fourth Amendment violations occur at the moment of the police intrusion, not later, when the police finally discover something that only then creates a reasonable suspicion.[145] He argued that the majority had extended the objective probable cause standard that applies to a full arrest to the reasonable suspicion requirement for an investigatery stop without necessity or authority.[146] He also argued that although the Supreme Court has held that a court may supply grounds on which the officer did not in fact rely to support the

140. Id. at 214.

141. See notes 29-31 and accompanying text.

142. *Hawkins*, 811 F.2d at 214-15. The *Hawkins* court thus concluded that the observations by the officers at the house gave the officers reasonable suspicion of narcotics activity, and hence, the court upheld the stop as supported by reasonable suspicion, thereby affirming the cenviction of Hawkins. Id. at 215.

143. See id. The court did note, however, that it generally disapproves of pretextual behavior by police, even though it offered no means by which it would hold law enforcement personnel accountable for this conduct. Id. The circuit court also stated that the exclusionary rule was designed te deter unconstitutional conduct, but not te deter perjury, when addressing Hawkins's argument that the police should not be permitted to give false reasons for investigatory stops to make the stops appear valid. Id. Finally, the circuit court distingnished *Smith* by stating that the instant case was different from "those cases where the police, having no valid basis for a stop or arrest, relied on a pretext to justify their actions." Id.

144. Id at 221 (Rosenn, J., dissenting).

145. Id.

146. Id. at 221-22.

probable cause necessary for a full arrest, the Court has not held that the standard for reasonable suspicion is similarly purely objective. Rosenn then observed that the cases cited by the majority that set forth the objective reasonable suspicion standard do not dictate an entirely objective analysis but suggest that reasonable suspicion "must be *both* objectively reasonable *and* subjectively *actual*."[147] Finally, he noted that *Terry's* language itself suggests only that a police officer's subjective suspicions must be objectively reasonable, not that the court may supply these suspicions, as the district court did in *Hawkins*.[148] Judge Rosenn concluded that the action of courts in supplying the basis ex post for what police believe to be an impermissible stop at the time of the stop destroys the rationale for the constitutional validity of warrantless searches and seizures.[149]

The Second Circuit arguably addressed this issue in *United States v. Nersesian*.[150] In *Nersesian*, the Second Circuit adopted the purely objective test as the appropriate test to apply to pretextual challenges to temporary detentions.[151] The court interpreted *Terry*[152] and *Cortez*[153] as requiring a "totally objective" standard for analyzing the constitutionality of a seizure or search.[154] The court then held that if any valid basis for a detention exists at the time of its inception, police reliance on a pretext to perform or continue the detention will not render that detention and the following search unconstitutional.[155] The court failed, however, to address whether a pretextual stop purportedly performed because a person committed a minor infraction would constitute a valid basis for an investigatory search, even though the officer actually stopped the individual solely to perform the search despite the lack of any infraction.[156] The court thus failed to institute

147. Id. at 222 (emphasis in original).

148. Id.

149. Id. at 223.

150. 824 F.2d 1294 (2d Cir. 1987). One of the defendants in *Nersesian*, Elias Abdouch, was convicted on one count of conspiring to distribute heroin in violation of 21 U.S.C. § 846 (1982) after police investigators stopped Abdouch at the Newark Airport and conducted a pat-down search, finding that he was carrying a stack of bills consisting primarily of fifty and hundred dollar bills. *Nersesian*, 824 F.2d at 1315. On appeal, Abdouch argued that because the police did not conduct the pat-down search immediately after stopping him, the officers did not conduct the search for their safety but based on a pretext for discovering criminal activity. Id. at 1316.

151. Id.

152. See notes 98-104 and accompanying text.

153. See notes 125-26 and accompanying text.

154. *Nersesian*, 824 F.2d at 1316 (quoting *United States v. Smith*, 643 F.2d 942, 944 (2d Cir. 1981)).

155. *Nersesian*, 824 F.2d at 1316. The court held that a law enforcement officer's reliance "upon a pretextual basis to carry out a search[ ] does not alter the validity of the initial detention or the sequence of events following in its wake" as long as a valid basis for the detention and search exists. Id.

156. See id.

or adopt any mechanism for ferreting out and striking down pretextual activity.

The next circuit to address this issue was the Fifth Circuit in *United States v. Causey*,[157] the facts of which were given at the beginning of Part II.[158] Adopting the purely objective test, the Fifth Circuit reversed the holding of its own panel, affirming the trial court's decision to convict Causey on bank robbery charges.[159] The court intorpreted the Supreme Court holdings in *Scott*, *Villamonte-Marquez*, and *Macon* to dictate the rule that when police officers' actions are objectively lawful, the courts may not question the results of their investigations based on any subjective intent with which they may have acted.[160] The court thus held that because the police arrested Causey on the basis of a valid warrant and interrogated him only after giving him repeated *Miranda* warnings, the subjective intent of the officers did not render the arrest unconstitutional.[161] The court concluded that despite objectively reasonable good faith by police officers, which usually will redeem honest errors and prevent the exclusion of evidence, the subjective motives of officers who have done only what the law objectively allows are irrelevant because the exclusionary rule is meant to deter unlawful actions by police; if the police have done nothing objectively unlawful, the exclusionary rule should not apply.[162]

In dissent, Judge Rubin advocated adoption of the modified objective test. He agreed with the Eleventh Circuit's characterization of *Scott*'s requirement of an inquiry into objective reasonableness not as a requirement to evaluate what an officer legally and objectively could do, but as a requirement to evaluate what a reasonable officer would do under the same circumstances.[163] He then criticized the majority's rule as making a whole more than the sum of its parts, meaning that the police could combine individually insufficient

157. 834 F.2d 1179 (5th Cir. 1987) (en banc).

158. See notes 17-21 and accompanying text. On appeal to the Fifth Circuit, Causey argued that the district court erred in holding that the arrest was valid. Causey rested his argument on the testimony of an officer that the only reason they arrested Causey on the old petty theft warrant was to question him about the recent robbery of a Baton Rouge bank. *Causey*, 834 F.2d at 1180. The Fifth Circuit panel held that police conduct otherwise lawful was rendered unconstitutional by their subjective intent alone. Id. The Fifth Circuit, finding a possible inconsistency between the panel holding and the Supreme Court's decision in *Scott*, agreed to hear the case en banc. Id. at 1180.

159. *Causey*, 834 F.2d at 1184-85.

160. Id. at 1182-84.

161. Id. at 1184.

162. Id. at 1184-85.

163. Id. at 1187 (Rubin, J., dissenting) (citing *United States v. Smith*, 799 F.2d 704, 709, 711 (11th Cir. 1986)).

constitutional bases to produce a constitutionally acceptable arrest, such as an arbitrary execution of a warrant added to a suspicion that does not amount to probable cause.[164] The dissent's most viable criticism of the *Causey* majority, however, is also its most logical one. The dissent argued that by placing heavy emphasis on the underlying purpose of the exclusionary rule, as noted above,[165] the majority failed to give adequate consideration and weight to the Fourth Amendment's underlying purposes.[166] The *Causey* majority thus permitted the purposes of a judicial rule created to effectuate the Amendment to outweigh the purposes of the Amendment itself.

The Seventh Circuit addressed the issue in *United States v. Trigg*,[167] a decision that is internally inconsistent. After interpreting *Scott*, *Villamonte-Marquez*, and *Macon* as mandating a purely objective inquiry when examining the reasonableness of challenged

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164. *Causey*, 834 F.2d at 1188-89 (Rubin, J., dissenting).

165. See text accompanying note 162.

166. *Causey*, 834 F.2d at 1189 (Rubin, J., dissenting). Judge Rubin noted that the Fourth Amendment was meant te prevent unreasonable and arbitrary seizures. See id. at 1188. Notwithstanding Judge Rubin's dissent, the Fifth Circuit continues te adhere to the purely objective test. See *United States v. Kelley*, 981 F.2d 1464, 1467 (5th Cir. 1993); *United States v. Gallo*, 927 F.2d 815, 818-19 (5th Cir. 1991); *United States v. Hernandez*, 901 F.2d 1217, 1219 (5th Cir. 1990). Interestingly, in *Kelley* the court stated that "under appropriate circumstances, extensive questioning about matters wholly unrelated te the purpose of a routine traffic stop may violate the Fourth Amendment." *Kelley*, 981 F.2d at 1470. Thus, although the court continues to apply the purely objective test to the initial stop of automobiles by police, it has left open the possibility that the second prong of the *Terry* temporary detention test regarding the permissible scope of a stop may be violated by a police officer's pretextual motive. See note 104 and accompanying toxt.

167. 878 F.2d 1037 (7th Cir. 1989). In early February 1988, Officers Bird and Edenfield arrested Trigg on an outstanding body attachment that had issued due to Trigg's failure te appear in court several tinies. While Trigg was detained, Officer Bird ran a computor check, which showed that Trigg's driver's license was suspended. Trigg was not told about the problem with the license. Rather, the officers returned his license without any notice about the suspension when he was released from detention. Approximately a month and a half later, after Officer Bird had been assigned te the narcotics unit, Bird was investigating some of the known crack houses in the area when he drove by Trigg's house and noticed a maroon Cadillac in the driveway that he had seen in front of a known crack house the previous week. Bird set up surveillance of the automobile and soon thereafter, Trigg got into the Cadillac and drove away. Bird followed Trigg and, after remembering the events of early February, had police headquarters confirm that Trigg's license was still suspended. The police then stepped and arrested Trigg for driving on a suspended license. The arresting officer, Officer Royse, testified that in the Allen County Police Department the decision te arrest a person for driving with a suspended license versus simply issuing a traffic citation was left te the discretion of the individual officer and that he arrested Trigg because he knew Trigg's history of not appearing in court and that Trigg had tried to flee from Royse after Royse stepped him. While conducting a full pat-down search incident to arrest, the officer found 53 grams of cocaine in Trigg's coat pocket. Id. at 1038.

After indictment for possession of cocaine with intent te distribute under 21 U.S.C. § 841(a)(1) (1988), Trigg moved to exclude all evidence obtained on the basis that the police had used the suspended license as a pretext to search for evidence of narcotics. The district court granted Trigg's motion, ruling that the arrest for a suspended driver's license was a pretext to search for narcotics. The government appealed this decision. *Trigg*, 878 F.2d at 1038.

police activity,[168] the court noted that this approach would diminish the possibility of discovering pretextual seizures substantially.[169] The court thus found that Supreme Court precedent required adoption of the purely objective standard even though the court also found that the standard required relevant objective facts to be determined, including a review of whether the police were engaged in activities in which they normally would not be engaged.[170] Moreover, after citing *United States v. Guzman* with approval for the proposition that an arrest is unreasonable if the usual police practice is not to arrest a person for a certain offense,[171] the court formulated a two-part reasonable arrest test that considers: (1) whether the officer had probable cause to believe that a crime had been or was being committed by the suspect, and (2) whether state or local law authorized the officer to perform a custodial arrest for the particular offense.[172] The court ruled that if both factors are satisfied, then the arrest is necessarily reasonable.[173] The court, however, then stated that this two-part test could be restated simply: if a police officer is doing no more than he or she is legally and objectively authorized to do, a seizure is constitutional.[174] This statement is an articulation of the purely objective test.

The opinion of the *Trigg* majority strains logic. The court initially leaned toward adopting the modified objective standard based on its concern that the adoption of a purely objective standard would reduce the court's chances of discovering unconstitutional pretextual arrests.[175] In the latter part of its analysis, however, the court completely changed its opinion and embraced the purely objective test based on clear misinterpretations of Supreme Court precedent.[176] The court gave no explanation for its disregard of the pretextual activity

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168. *Trigg*, 878 F.2d at 1040.

169. Id. (citing *United States v. Keller*, 499 F. Supp. 415, 417 (N.D. Ill. 1980)).

170. *Trigg*, 878 F.2d at 1040 (stating that "[o]ne such factor might be the participation of police officers in activities they would ordinarily not be engaged in").

171. Id. at 1041. The court also acknowledged that the Supreme Court had held in *Delaware v. Prouse*, 440 U.S. 648 (1979) that "the discretionary exercise of police power may be unconstitutional in certain circumstances." *Trigg*, 878 F.2d at 1041.

172. *Trigg*, 878 F.2d at 1041. In a lator case, the court explained its test as follows: "To determine the reasonableness of an arrest, we only consider two objective factors: (1) did the arresting officer have probable cause to believe the defendant had committed or was committing an offense; and (2) was the arresting officer authorized by state and/or municipal law to effect a custedial arrest for the particular offense." *United States v. Somers*, 950 F.2d 1279, 1284 n.1 (7th Cir. 1991). The *Somers* court even stated, "In [*Trigg*], we indicated that the concept of 'pretextual arrest' may no longer be a viable theory in this circuit." Id.

173. *Trigg*, 878 F.2d at 1041.

174. Id. (citing *Causey*, 834 F.2d at 1182).

175. See notes 168-73 and accompanying text.

176. *Trigg*, 878 F.2d at 1042. See notes 168-70, 174 and accompanying text.

concern. It then remanded the case to the district court to apply its newly adopted purely objective standard.[177] On remand, the district court applied the purely objective standard and entered an order denying the defendant's motion to suppress the evidence.[178]

In an insightful concurring opinion, Judge Ripple recognized that the real issue before the court was the determination of which objective elements the court must use to determine whether a pretextual seizure is unconstitutional.[179] After outlining both of the approaches adopted by other circuit courts, he praised the modified objective test for promoting the underlying values of the Fourth Amendment by allowing a court to review the reasonableness of an officer's actions while not requiring an examination of an officer's subjective intent.[180] Then, after noting that the Supreme Court has not adopted the purely objective test,[181] he suggested that the majority's opinion did not foreclose judicial review of gross abuse of authority by police officers.[182] His reasoning, however, contains two flaws. First, the test adopted by the majority actually would uphold the gross abuses that Judge Ripple described in his concurrence.[183] The purely objective test that the Seventh Circuit adopted simply would consider whether the officer could perform the stop or arrest legally, and, if the jurisdiction gives the police the authority to arrest, the activity would be constitutional. Second, he appears to forget that the circuit's lower courts must apply the majority's test. Thus, even though the circuit court may refuse to countenance a gross abuse by broadening the scope of the purely objective test, its district courts are bound to apply the purely objective test strictly, as the district court

177. Id.

178. *United States v. Trigg*, 925 F.2d 1064, 1064 (7th Cir. 1991). The district court did not publish an opinion, but merely entered an order denying Trigg's motion to suppress. See id.

179. *Trigg*, 878 F.2d at 1042 (Ripple, J., concurring). Judge Ripple recognized that Supreme Court cases clearly have mandated that "[a] court is not to inquire into the officer's subjective intent." Id.

180. Id.

181. Id. at 1043 (stating that "the Supreme Court has *not* articulated the rigid position, suggested by the panel majority, that the existence of legal authority to undertake an action precludes *all* judicial inquiry into the reasonableness—in the constitutional sense—of the action") (emphasis in original).

182. Id. (stating that "I have no doubt that, when faced with such an abuse, the court would not countenance it").

183. Judge Ripple cited Judge Higginbotham's concurrence in *Causey*, in which Judge Higginbotham expressed his concern that police would stockpile arrest warrants for traffic offenses to allow them to arrest a particular citizen whenever they desire. Id. The stop upheld in *Causey*, although arguably not involving a stockpiled arrest warrant, is indistinguishable in result from even the "stockpiled arrest warrant" situation when the purely objective test is applied.

did on remand, denying Trigg's motion to suppress the evidence without opinion.[184]

Trigg, however, had not finished defending his case. He appealed the district court's holding on remand, challenging the correctness of the new standard and the district court's application of that standard.[185] Specifically, he argued that courts should consider an officer's conformance to usual police practices as part of their objective examination of the reasonableness of an arrest.[186] On appeal, the Seventh Circuit initially cited *Villamonte-Marquez*[187] and *Gustafson v. Florida*[188] for the proposition that the Supreme Court has rejected the use of usual police practices as a factor that may be considered in an objective analysis.[189] Those two cases, however, do not reject the use of usual police practices in the objective investigatory stop analysis. They simply state that (1) a lack of police regulations or policy requiring a seizure is not determinative of the Fourth Amendment unlawful seizure issue,[190] and (2) the subjective intent and underlying motive of the police officer is not a proper inquiry under the objective test.[191] Also, the court apparently forgot its own language in the first *Trigg* appeal, it stated that conformance to activities in which police ordinarily engage is a factor that might be relevant to the objective determination of the reasonableness of the seizure.[192] Nevertheless, based on this misinterpretation of *Villamonte-Marquez* and *Gustafson*, the Seventh Circuit found that it could not consider the officer's conformance to usual police practices when deciding the reasonableness of the defendant's arrest. Therefore, it affirmed the district court's denial of the motion to suppress.[193]

The Seventh Circuit expressly recognized the weakness of its ruling by finding that the approach it adopted virtually eliminated the chance that a court would discover pretextual seizures but felt that the approach was consistent with *Gustafson* and *Villamonte-Marquez*.[194] Thus, it explicitly rejected the opportunity to supply a constitutional tool for its district courts to use in addressing pretextual

184. See note 178 and accompanying text.
185. *Trigg*, 925 F.2d at 1065.
186. Id.
187. 462 U.S. 579 (1983). See notes 128-30 and accompanying text.
188. 414 U.S. 260 (1973).
189. *Trigg*, 925 F.2d at 1065.
190. *Gustafson*, 414 U.S. at 265.
191. *Villamonte-Marquez*, 462 U.S. at 584 n.3.
192. *Trigg*, 878 F.2d at 1040. See also notes 170-71 and accompanying text.
193. *Trigg*, 925 F.2d at 1065-66.
194. Id. at 1065.

investigatory stops and arrests, despite the fact that the court openly recognized the need for these tools and seemed to permit their use in its prior ruling in this case.[195] Even worse, the court distorted Supreme Court precedent to arrive at this ruling.[196]

The Eighth Circuit addressed the issue of which test to apply to pretextual challenges in *United States v. Cummins*.[197] The Eighth Circuit panel expressly rejected the modified objective test, declining to join the Tenth and Eleventh Circuits.[198] In its reasoning, the court initially found that an otherwise valid stop is not invalidated simply because an officer has intuitive suspicions that automobile occupants are engaged in criminal activity.[199] The *Cummins* court stated that the Supreme Court, although not directly deciding this issue, has held that courts faced with a seizure challenged as pretextual activity should make an objective inquiry into the officer's actions.[200] The *Cummins* court also noted that the Supreme Court has ruled that the

195. See notes 168-73 and accompanying text.

196. See notes 187-91 and accompanying text. Indeed, in *Brown v. Texas* and *Delaware v. Prouse*, both decided six years before *Villamonte-Marquez*, the Supreme Court specifically held that a seizure performed pursuant to a plan that embodies specific, neutral limitations on the actions of individual police officers would satisfy the Fourth Amendment's reasonableness requirement. *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). The *Trigg* court thus appeared to be searching for a reason to exclude the use of usual police practices in its objective analysis of the reasonableness of arrests.

197. 920 F.2d 498 (8th Cir. 1990). Just before midnight on November 10, 1988, Officer Bernal observed suspicious behavior by Cummins and a passenger, Akins, in a green Volkswagen at an intersection traffic light in Little Rock, Arkansas. Cummins, who was the driver of the car, and his passenger, Akins, kept glancing at Officer Bernal instead of proceeding when the light was green in favor of the Volkswagen. After following the green Volkswagen for several blocks, Officer Bernal stopped the car by turning on his blue lights after Cummins, the driver of the car, made a right turn without giving the required signal. The surveillance of the Volkswagen included observation of the car when it made a momentary stop at a closed car wash where the occupants of the car continued te watch Officer Bernal. Officer Bernal asked Cummins to explain his unusual behavior. Cummins replied that his passenger, whom Cummins called Tim, had distracted him. However, when Bernal asked the passenger his name, Akins identified himself as Michael Mayfield. Id. at 500. Based on this inconsistency, and on Akins's suspicious behavior, Bernal placed Akins in the back seat of the patrol car. Id. After placing Akins in the police car, Bernal looked inside the Volkswagen and discovered a bag containing marijuana on the floor of the car behind the passenger seat. As a result of this discovery, Officer Bernal arrested Cummins and Akins.

Cummins and Akins moved to suppress the evidence obtained in the stop, arguing that the officer's pretextual motive for conducting the step rendered it unlawful. The magistrate, however, found the stop valid because the decision to stop the car was made on a reasonable and objective basis. Id. On appeal, Cummins and Akins argued that Officer Bernal's stop of the car was pretextual because the officer's actual reason for making the stop was his suspicion about the defendants' conduct rather than Cummins's minor traffic violation; thus, the stop was an unreasonable seizure under the Fourth Amendment because a reasonable officer would not have made the stop for the right turn without signaling in the absence of the invalid purpose. Id. at 500-01. Cummins and Akins cited *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986), and argued that the appropriate test was the modified objective test. *Cummins*, 920 F.2d at 501.

198. *Cummins*, 920 F.2d at 501.

199. Id.

200. Id..

officer's state of mind at the time of the challenged seizure is irrelevant in deciding whether the police violated the Fourth Amendment.[201] The court, applying the purely objective standard, found that the stop of Cummins was not pretextual because the officer believed that the defendant had committed a traffic violation.[202]

The court's test would deem blatantly pretextual stops if an officer does no more than she legally is authorized to do.[203] In a footnote, the court noted that an officer's motive would become relevant if the court determined that a Fourth Amendment violation actually had occurred.[204] The fallacy of this logic is that under the purely objective test, a finding of a pretextual stop would be all but nonexistent because police have broad discretion and authority to stop individuals.[205] Also, the court did not explain exactly how it or a lower court would determine when a pretextual Fourth Amendment violation had occurred. Hence, even though the court noted that the Eighth Circuit has ruled specifically that pretextual stops are unconstitutional under the Fourth Amendment,[206] the court rejected any standard that substantially would enhance the chances of discovering pretextual stops.

The District of Columbia Circuit addressed this issue in 1991. In *United States v. Mitchell*[207] an officer stopped the defendant after observing him driving at a high rate of speed, stopping suddenly, and then turning sharply.[208] After the stop, other officers discovered that both the defendant and his passenger were carrying weapons, as well as about fifty-five grams of cocaine in a locked tool compartment in

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201. Id. (citing *Scott v. United States*, 436 U.S. 128, 136 (1978) and *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)).

202. *Cummins*, 920 F.2d at 501.

203. Id. (quoting *Trigg*, 878 F.2d at 1041 (relying on *Causey*, 834 F.2d at 1184)). Indeed, Judge Bowman even stated, "It is also our view that the stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions." *Cummins*, 920 F.2d at 501.

204. *Cummins*, 920 F.2d at 501 n.3 (stating that "[w]hen this threshold issue is resolved in the affirmative, the officer's state of mind may be relevant in determining whether the exclusionary rule should be applied").

205. If an investigatery stop "remains valid even if the officer would have ignored the traffic violation but for his other suspicions," id. at 501, then an officer has free reign to step and investigate any motorist he pleases based on any minor traffic infractions, no matter how arbitrary the decision to stop the motorist may be.

206. Id. (citing *United States v. Portwood*, 857 F.2d 1221, 1223 (8th Cir. 1988)). See also *United States v. Woodall*, 938 F.2d 834 (8th Cir. 1991). Even though the Eighth Circuit continues to hold that "pretextual stops are unreasonable under the fourth amendment," *Woodall*, 938 F.2d at 836, it also centinues to adhere to its adoption of the purely objective standard. See *United States v. Richards*, 967 F.2d 1189, 1192 (8th Cir. 1992); *United States v. Maejia*, 928 F.2d 810, 814 (8th Cir. 1991).

207. 951 F.2d 1291 (D.C. Cir. 1991).

208. Id. at 1293.

the vehicle.[209] The defendant argued that the officer stopped the car not because of the traffic violations, but because he suspected that the vehicle was stolen, thereby making the stop unlawful under the Fourth Amendment.[210] The court rejected this argument, holding that even if the stop was a mere pretext for the officers to conduct a search of the vehicle, that fact would not cause the stop to be a violation of the defendant's Fourth Amendment rights.[211] The court, citing *Cummins*,[212] stated that a stop that has a valid basis at its inception will not violate the Fourth Amendment simply because the officer intuitively suspects that the vehicle's occupants are engaged in a crime.[213] The court thus adopted the purely objective test for its analysis of pretextual challenges to investigatory stops. In applying that test, the court held that the objective circumstances here—the speeding, the sudden stop, and the turn—justified the officer's stop of the defendant's car despite any pretextual motive the officer may have had.[214]

Finally, the Fourth Circuit confronted this issue in *United States v. Hassan El*.[215] In *Hassan El*, the defendant urged the Fourth Circuit to adopt the modified objective test as the appropriate rule to evaluate pretextual investigatory stop claims.[216] The Fourth Circuit initially reviewed the modified objective test,[217] but rejected it,

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209. Id. at 1293-94.
210. Id. at 1295.
211. Id.
212. See notes 197-206 and accompanying text.
213. *Mitchell*, 951 F.2d at 1295.
214. Id.
215. 5 F.3d 726 (4th Cir. 1993). In *Hassan El*, four Baltimore police officers who were assigned to investigato narcotics and firearm offenses stopped the Volkswagen Jetta in which Hassan El was riding because the Jetta's driver, Cole, failed to stop at a stop sign. Id. at 728. One of the officers, Rood, testified that he did not intend to issue Cole a ticket, but merely stopped the vehicle to warn Cole of his violation. Indeed, Rood testified that he did not even have a traffic-ticket book with him. Id. After stopping the Jetta, the officers searched Hassan El because he appeared very nervous and discovered that he was carrying a weapon in violation of 18 U.S.C. § 922(g) (1988). *Hassan El*, 5 F.3d at 728. Hassan El was convicted of violating this statute. Id. On appeal, Hassan El argued that the district court erred in not finding that the stop of the vehicle violated the Fourth Amendment because the police officers used the minor traffic violation as a pretext to stop the Jetta to search for more serious criminal activity. Id. at 729.
216. *Hassan El*, 5 F.3d at 729.
217. Id. at 730. The court also noted that it recently had declined to determine the appropriate test for analyzing pretextual stop claims in *United States v. Rusher*, 966 F.2d 868 (4th Cir. 1992). In *Rusher*, the defendants, who were convicted of possession of controlled substances with intent to distribute them under 21 U.S.C. § 841(a)(1) & (b)(1)(B) (1988) (methamphetamine) and 21 U.S.C. § 841(a)(1) & (b)(1)(C) (1988) (psilocin), argued that the seizure of the truck in which they were riding was unconstitutional. *Rusher*, 966 F.2d at 875. The defendants contended that the police officer who performed the stop did not have reasonable suspicion to stop the truck to investigate for drugs and that the stop was pretextual because the officer's stated reasons for the stop—seat belt violations and an improper license plate—were not the officer's actual motivation for performing the stop. Id. One of the defendants, Flannery, urged the Fourth

Circuit to adopt the modified objective test adopted by the Tenth and Eleventh Circuits and find that a reasonable officer would not have stopped the truck for the minor infractions. Id. at 876. The court, however, while acknowledging both the purely objective test and the modified objective test, specifically deferred addressing which objective test to adopt because it found that the stop would be constitutional under either tost. Id. Specifically, the court applied both tosts and held that, on the one hand, the district court properly found that a reasonable officer would have stopped Flannery based on the infractions while, on the other hand, the officer did nothing more than he was authorized to do. Id. The court thus concluded that the stop of the truck was constitutional. Id.

Judge Luttig disagreed with the majority that the result would be the same under both of the tests, reasoning that the court was compelled to address the question of which standard was constitutionally mandated. Id. at 885 (Luttig, J., concurring in part, concurring in the judgment in part, and dissenting in part). Specifically, Judge Luttig asserted that the evidenco in the record was insufficient for the majority to justify its conclusion that a reasonable officor would have stopped the truck. Id. at 886. Thus, because the court could not affirm the district court's ruling under the modified objective test, Judge Luttig felt that the court was required to decide between that standard and the purely objective standard. Id. at 887. Because Judge Luttig found severe flaws associated with the modified objective test, id. at 887-88, he felt that the purely objective test was appropriate. Id. at 887-89. Nevertheless, while criticizing the majority for flawed reasoning, Judge Luttig erred in his analysis as well.

Judge Luttig stated that only in cases of the most objectionable offenses by motorists would an officer be able to prove that her fellow officers would have performed the stop. Id. at 888. Based on this concern, Judge Luttig felt that the difficulty of meeting the reasonable officer standard as set forth in the modified objective rule would waste judicial and legal resources and have a deleterious effect on law enforcement in general. Id. Judge Luttig's rejection of the reasonable officer standard cannot be reconciled, however, with the Supreme Court's statements that: (1) a court must review the reasonableness of the facts and circumstances of a seizure considering established Fourth Amendment principles, and (2) an increase in police efficiency alone does not justify an investigatory stop. See *Chimel v. California*, 395 U.S. 752, 765 (1969) (holding that the reasonableness of a search incident to arrest depends on the facts and circumstancos, which must be viewed in the perspective of established Fourth Amendment principles, and that a warrantless search of an arrestee's entire house as a search incident to the lawful arrest of the arrestee in one room of the house was not justified). Judge Luttig appears to argue that a requirement that law enforcement officials show that a reasonable officer would have performed the stop would be "devastating for law enforcement" because of the burden it would place upon law enforcement officers. However, Judge Luttig's concern reduces te an efficiency argument because police officers are already required to show that a purely objective basis—for example, a minor traffic offense—existed for the stop to be performed anyway. Thus, the requirement that police show that a reasonable officer would have performed the stop simply adds a level of proof to the government's case that is, of course, more burdensome and less efficient for the government, but that alone, as the Supreme Court has indicated, cannot justify the use of a purely objective test. See also note 96 and accompanying text.

Furthermore, in a footnote, Judge Luttig criticized the *Smith* and *Guzman* courts for not reconciling their decisions with the *Villamonte-Marquez* case. *Rusher*, 966 F.2d at 889 n.8 (Luttig, J., concurring in part, concurring in the judgment in part, and dissenting in part). In *Villamonte-Marquez*, the Supreme Court rejected the argument that police officers' boarding of a boat, as provided for statutorily to examine documents, violated the Fourth Amendment because the boarding actually was performed to search for drugs. See text accompanying notes 128-30. However, Judge Luttig failed to classify the modified objective test accurately and did not compare the modified objective test to the *Villamonte-Marquez* holding adequately. Judge Luttig mistakenly classified the modified objective test as a subjective test and stated that the modified objective test looks to the subjective intent of the officers. Id. at 888 (stating that "the standard is at least a stalkinghorse for precisely the kind of subjective intent inquiry forbidden by *Scott*, *Macon*, and *Villamonte-Marquez*"). Moreover, Judge Luttig falsely assumed that *Villamonte-Marquez* foreclosed the modified objective test as an option a circuit court could adopt. See id. One of this Note's major premises is that both tests—the modified objective test and the purely objective test—are objective tests; the difference is what objective analysis is performed under each test. Thus, although correct in reasoning that the majority should have addressed which

adopting the purely objective test instead.[218] Relying heavily on *Cummins*[219] and *Trigg*,[220] the court held that an officer is justified in stopping a vehicle when he observes a traffic offense, however minor, or other unlawful conduct, even though the officer would not have stopped the vehicle in the absence of a hunch or inarticulable suspicion that an occupant in the vehicle was involved in some criminal activity.[221] The court concluded that the stop of the vehicle and the subsequent search of the defendant were constitutional because the driver failed to stop at a stop sign.[222]

B. Courts Adopting the Modified Objective Test

The Tenth Circuit was called on to determine the appropriate investigatory stop test in *United States v. Guzman*.[223] Although in-

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investigatory stop test to adopt, Judge Luttig's rejection of the modified objective test and criticism of the *Smith* and *Guzman* cases is critically flawed.

218. *Hassan El*, 5 F.3d at 730.

219. See notes 197-206 and accompanying text.

220. See notes 167-96 and accompanying text.

221. *Hassan El*, 5 F.3d at 730-31. The *Hassan El* court stated:

> Although we share the concerns, expressed by the Tenth and Eleventh Circuits, of the arbitrary exercise of police powers, we conclude that the objective test presents the most principled basis upon which to analyze the validity of investigative stops. We further conclude that the test is the most in keeping with the repeated admonitions of the Supreme Court that Fourth Amendment violations turn "on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken."

Id. (quoting *Maryland v. Macon*, 472 U.S. 463, 470 (1985)).

222. *Hassan El*, 5 F.3d at 731 (stating that "[t]he objective circumstances . . . provided a reasonable basis for stopping the Jetta").

223. 864 F.2d 1512 (10th Cir. 1988). While Guzman and his wife, Sonia Cruz-Lazo, were driving at a lawful speed through New Mexico in early August, 1987, New Mexico State Police Officer Keene began following the car because he noticed that Guzman was not wearing his seat belt, a violation of the state's traffic regulations. After confirming that Guzman was not wearing his seat belt, Keene pulled the car over and asked Guzman for his license and registration. Guzman then replied that the car was rented. After reviewing the rental agreement, Keene asked Guzman why a name different than Guzman's was on the rental agreement, and Guzman responded that the named person was his wife's uncle, who had helped them rent the car because they did not have a major credit card. Officer Keene then informed Guzman that he had stopped Guzman for the seat belt violation. Id. at 1513-14.

Officer Keene, instead of issuing a warning or citation, decided to further investigato whether Guzman and the uncle were transporting contraband in the rented automobile. Officer Keene then asked Cruz-Lazo a series of questions, at the cenclusion of which his suspicions were aroused based on Cruz-Lazo's behavior. He testified that Cruz-Lazo, who was noticeably pregnant, was "perspiring and breathing heavily, while Guzman was not" and that she "seemed nervous and avoided eye contact with him." Id. at 1514. He then continued his interrogation of Guzman in the rear seat of the defendant's vehicle while he wrote a warning for the seat belt violation. After giving him the warning, Keene asked Guzman if he was carrying any weapons or contraband. Guzman replied negatively and told Keene he was "free to look." Id. After Guzman executed a consent to search form, Officer Keene searched the defendant's car and found a package of cocaine behind the rear seat. The court explained in a footnote that approximately five kilograms of cocaine and $40,000 in cash were discovered in subsequent searches of the area behind the rear

itially recognizing that most courts agree that the appropriate inquiry regarding a pretextual stop challenge is an objective analysis of the facts and circumstances rather than an analysis of the officer's subjective intent, the Tenth Circuit also recognized the controversy surrounding this issue by finding that courts disagree over what objective elements are dispositive in determining the constitutionality of pretextual interferences.[224] After reviewing the opposing tests adopted by other circuits[225] and discussing the competing policies implicated by the pretextual investigatory stop doctrine,[226] the Tenth Circuit found that Supreme Court precedent clearly implied that pretextual police activity can violate the Fourth Amendment.[227] The court thus concluded that the modified objective test, as articulated in *United States v. Smith*,[228] is the proper test for determining the constitutionality of an investigatory stop because that test maintains the Court's requirement of an objective evaluation of alleged Fourth Amendment violations yet provides meaningful judicial review of discretionary police conduct.[229] After rejecting the government's argument that the adopted test would limit severely the ability of police to enforce traffic laws, the court found that it did not have sufficient information to apply the appropriate test. Hence, the court remanded the case for further proceedings consistent with its opinion.[230]

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seat and the dashboard. Keene then arrested Guzman and Cruz-Lazo and charged them with possessing cocaine with intent to distribute. The defendants were indicted under 21 U.S.C. § 841(a)(1) (1982). The district court granted the defendant's motion to suppress all evidence discovered in the search of the car, finding that the seat belt violation was a pretextual justification for an unconstitutional investigatory stop. The government appealed. *Guzman*, 864 F.2d at 1514-15.

224. Id. at 1515.

225. Id. at 1515-16. The court briefly reviewed the adoption of the modified objective test in *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986), and the adoption of the purely objective test in *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc).

226. *Guzman*, 864 F.2d at 1516.

227. Id. at 1517.

228. See notes 33-35 and accompanying text.

229. *Guzman*, 864 F.2d at 1517 (citing *Maryland v. Macon*, 472 U.S. 463, 470-71, (1985) and *Scott v. United States*, 436 U.S. 128, 137-38 (1978)).

230. *Guzman*, 864 F.2d at 1518, 1521. There were no dissenting or concurring opinions. The Tenth Circuit recently reaffirmed its adoption of the modified objective test in *United States v. Horn*, 970 F.2d 728, 731 (10th Cir. 1992) (holding that because there was no evidence that a state trooper made a stop for any reason other than the defendant's violation of Utah's license plate rule and a seat belt violation, the stop could not be pretextual). See also *United States v. Walker*, 933 F.2d 812, 816 (10th Cir. 1991); *United States v. Deases*, 918 F.2d 118, 121-22 (10th Cir. 1990); *United States v. Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990); *United States v. Arango*, 912 F.2d 441, 446-47 (10th Cir. 1990); *United States v. Corral*, 899 F.2d 991, 994 (10th Cir. 1990); *United States v. Erwin*, 875 F.2d 268, 272 (10th Cir. 1989). Note though that in *Werking*, the court appeared to add the requirement that "[i]n a pretextual stop, the law enforcement officer must deviate from his usual practice." *Werking*, 915 F.2d at 1408. The court, however, has not applied this requirement consistently to pretextual step analyses. See, for example, *Horn*, 970 F.2d at 731.

The Sixth Circuit addressed this issue in *United States v. Pino*[231] and *United States v. Crotinger*.[232] In *Pino*, the defendant argued that a state trooper's initial stop of the rental car he was driving violated the Fourth Amendment as a pretextual stop because a reasonable officer would not have stopped him for the minor traffic offenses.[233] Interestingly, both the defendant and the prosecution relied heavily on *United States v. Smith*,[234] the Eleventh Circuit case that adopted the modified objective test,[235] in their analyses of the validity of the stop.[236] The court relied on *Smith*'s reasoning as well, holding that the trooper's observations of the traffic offenses gave him a sufficient basis to stop the defendant.[237] The *Pino* court, however, did not adopt the modified objective test expressly or address the pretextual motive issue.[238]

In *Crotinger*, however, the Sixth Circuit squarely addressed the pretextual stop issue and clearly adopted the modified objective test.[239] The defendant challenged the stop of the vehicle in which he was riding as pretextual because the officer used the fact that the car was speeding by eleven miles per hour to stop the car to search it for

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231. 855 F.2d 357 (6th Cir. 1988), amended to add concurrence, 866 F.2d 147 (6th Cir. 1989). In *Pino*, Tennessee Highway Patrolman Terry Thomas, overtook a station wagon driven by Pino and in which Llera was a passenger. Id at 358. Trooper Thomas, who recently had attended a seminar conducted by the Drug Enforcement Administration, noticed that the car fit characteristics for a drug courier. Id. When Trooper Thomas pulled alongside the car to observe the persons in the car, Pino immediately braked, swerved onto the shoulder of the interstate, then swerved back onto the road, partially entering the left lane. Id. at 358-59. Pino did not signal his re-entry onto the interstate. Id. at 359. After waiting for Pino to pass him, Trooper Thomas then stopped Pino's vehicle. Id. Thomas decided to arrest Pino for the illegal lane change instead of citing him for it because he suspected that Pino would not pay the fine associated with the lane change. Id. After arresting Pino and placing him in the police car, Thomas again approached the vehicle and noticed Llera throw a pillow into the back portion of the car. Id. at 359-60. Thomas eventually retrieved the pillow and found that it contained cocaine. Id. at 360. Pino and Llera were convicted for possession of cocaine. Id.

232. 928 F.2d 203 (6th Cir. 1991).

233. *Pino*, 855 F.2d at 361.

234. 799 F.2d 704 (11th Cir. 1986).

235. See notes 33-35 and accompanying text.

236. *Pino*, 855 F.2d at 361.

237. Id.

238. Id. Indeed, the court specifically stated that because the trooper's "observations gave him probable cause to believe that Pino had committed a traffic offense and that this was the reason for the stop . . . we need not decide the question whether, if there is adequate reason for a stop based on a traffic violation, it is necessary that it also be shown that this was in fact the reason for the stop." Id.

239. *Crotinger*, 928 F.2d at 206. In *Crotinger*, a police officer who was using a stationary radar to catch speeding motorists pulled over a car driven by Guevara and in which Crotinger and Riley were passengers. Id. at 204. After seeing white pills in the car and receiving inconsistent answers te questions the officer asked the occupants of the vehicle, the officer obtained Riley's consent to search the vehicle. Id. at 204-05. The officer discovered 122 pounds of marijuana in two suitcases in the trunk of the car. Id. at 205. Crotinger was convicted of possession with intent to distribute marijuana under 21 U.S.C. § 841(a)(1) (1988). *Crotinger*, 928 F.2d at 204.

drugs.[240] The court based its reasoning and analysis primarily on *Pino*'s reliance on the *Smith* court's reasoning.[241] Applying that reasoning, the *Crotinger* court found that the officer did not perform the traffic stop for a pretextual reason when it was objectively reasonable for a police officer operating a speed trap to stop and ticket vehicles going eleven miles per hour over the speed limit.[242] Moreover, the court found no evidence suggesting that the officer stopped the car in which the defendant was riding for any reason other than because it was speeding.[243] The court, therefore, found the stop constitutional.[244]

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240. *Crotinger*, 928 F.2d at 206.

241. Id.

242. Id.

243. Id. (stating that "[o]bjectively, it is reasonable for a police officer operating a speed trap to stop and ticket vehicles going 66 mph in a 55 mph zone").

244. Id. Until recently, the Sixth Circuit continued to adhere to and apply the modified objective test. See *United States v. Ferguson*, 989 F.2d 202, 204 (6th Cir. 1993), vacated by 8 F.3d 325 (6th Cir. 1993); *United States v. French*, 974 F.2d 687, 691-92 (6th Cir. 1992); *United States v. Dunson*, 940 F.2d 989, 993 (6th Cir. 1991). In late 1993, however, the Sixth Circuit, sitting en banc, reheard the *Ferguson* case and in that rehearing rejected the modified objective test in favor of a probable cause standard. *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993). The court stated, "We hold that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not lawful and does not violate the Fourth Amendment." Id. at 391 (citing *United States v. Trigg*, 925 F.2d 1064, 1065 (7th Cir. 1991)). Unfortunately, the *Ferguson* majority opinion added tremendous confusion regarding which investigatory stop test courts in the Sixth Circuit should apply because it (1) failed to follow Supreme Court precedent, (2) used confusing language, and (3) failed to recegnize that it actually adopted the purely objective test.

First, the court failed to follow Supreme Court precedent in that the court, without authority, extonded the probable cause standard to investigatory stops, even though the Supreme Court has dictated that the *Terry* reasonable suspicion test applies to automobile investigatory stops. See *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (holding that the police must have a reasonable suspicion of a traffic violation te justify a routine traffic stop); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Second, the court statod that its probable cause standard focuses "on whether this particular officer in fact had probable cause *to believe* that a traffic offense had occurred, regardless of whether this was the only basis for the stop." *Ferguson*, 8 F.3d at 391 (emphasis added) (stating further that "this probable cause determination . . . will turn on what the officer knew *at the time he made the stop*" (emphasis in original)). This language is confusing because the test apparently requires a determination of a police officer's subjective intent for making the stop. Finally, because a police officer has probable cause to stop the drive of a vehicle when she observes a traffic offense, however minor, see *United States v. Cummins*, 920 F.2d 498, 500 (8th Cir. 1990), the *Ferguson* holding actually is the purely objective test because of the following simple syllogism: A police officer needs probable cause to stop a vehicle to investigate (*Ferguson*); a traffice offense, however minor, creates probable cause (*Cummins*); thus, a police officer may stop a vehicle and investigate based on any traffic offense no matter how minor. This cenclusion is the purely objective test. In fact, Judge Keith recognized in his dissenting opinion that the majority merely adopted the purely objective test. *Ferguson*, 8 F.3d at 396 (Keith, J., dissenting). For these reasons, *Ferguson* has muddied the waters surrounding this issue.

In *United States v. Valdez*,[245] the Eleventh Circuit revisited this issue and affirmed its adoption of the modified objective test.[246] The court held that when a defendant charges pretextual investigatory seizure activity by the police, the appropriate test is an objective assessment of whether a reasonable officer, confronting the same facts and circumstances that the officer did at the time of the seizure, would have made the stop in the absence of any illegal motivation.[247] Based on its finding that the officers involved would not have pursued a right-of-way violation by the defendant absent their illegitimate motivation to discover evidence of narcotics laws violations, the *Valdez* court held that the stop was pretextual and therefore unconstitutional.[248]

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245. 931 F.2d 1448 (11th Cir. 1991).

246. The Eleventh Circuit formulated and adopted the modified objective test in *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986). See notes 33-35 and accompanying text. In *Valdez*, officers were conducting surveillance of a Miami, Florida residence in May, 1989 when they observed Valdez arrive at the house in a Honda Accord and then drive away from the house after two men had loaded the car's trunk with plastic garbage bags. The lead investigator of the narcotics team, Detective Trujillo, advised a uniformed patrol officer, Officer Almaguer, that Almaguer should follow Valdez's vehicle and if the vehicle committed a traffic infraction for which Almaguer normally issues a citation, Almaguer should step the vehicle and request consent to search the vehicle. *Valdez*, 931 F.2d at 1449.

Both Trujillo and Almaguer positioned themselves at an intersection to observe Valdez as he approached the intersection. Valdez made a right turn at the intersection against a red light signal and violated the right-of-way of another autemobile, causing the other vehicle to slow down. Neither police officer, however, testified that they observed the speed of the other vehicle before it slowed down, nor did they testify that they heard the other vehicle's tires screech. Trujillo then informed Almagner that Valdez's automobile was the subject of a narcotics investigation, after which Almaguer followed Valdez for eighteen blocks from the intersection and then stopped him. After Valdez produced his driver's license, Almaguer obtained Valdez's consent to search the vehicle. After a search of the car's interior, Almaguer found the plastic trash bags in the trunk and asked Valdez what the bags contained. Valdez responded that they contained cocaine. Almaguer placed Valdez under arrest, putting him in the patrol car until Trujillo arrived on the scene, at which time Almaguer issued Valdez a citation for violation of the other car's right-of-way. Id. at 1449-50.

Valdez moved that court suppress the evidence obtained from the search of the vehicle because it was based on a pretextual stop. At the suppression hearing, Almaguer testified that he did not recall Detective Trujillo's direction to Almaguer that he should stop the Honda only for a traffic offense for which Almaguer normally would stop a driver. Almaguer also testified that he would not have stopped the car or issued the right-of-way citation but for Trujillo's instructions that the narcotics unit wanted the car stopped. Finally, Almagner testified that he normally did not search or request to search a vehicle for a right-of-way violation. The district court ruled that the stop was justified objectively and, therefore, was not a pretextual step. Valdez appealed. Id. at 1450.

247. *Valdez*, 931 F.2d at 1450 (citing *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)).

248. *Valdez*, 931 F.2d at 1451. Although it reversed the decision of the district court, the Eleventh Circuit remanded the case "for the district court to decide whether there was or was not probable cause for one of the police officers involved in the narcotics investigation to stop Valdez for violation of the narcotics laws in connection with what [the officers observing the house] observed during their surveillance of the residence." Id. at 1452.

V. THE COMPETING POLICIES

Despite the confusion caused by the disagreement among the circuits regarding pretextual investigatory stops, this Note now attempts to give some structure and order to their opinions and develop a new, meaningful investigatory stop test. In developing a functional test by which courts may analyze pretextual investigatory stops, this Note evaluates the underlying policies implicated by this issue. Two competing policies drive the development of a functional pretextual investigatory stop test—individual privacy interests and police crime-fighting efficiency.[249] This Part first examines the concerns regarding the arbitrary governmental abuse of power and then addresses the concerns about judicial and law enforcement resources.

The pretextual search doctrine lies between two distinct and important considerations: (1) unfettered police discretion leading to arbitrary intrusions into the privacy rights of everyday citizens and (2) unproductive inquiries into a police officer's subjective intent.[250] Addressing concerns about the privacy rights of individuals, the Framers drafted the Fourth Amendment to protect citizens from unreasonable government interference by imposing the requirement that officials have sufficient grounds to intrude on a person's privacy.[251] The Supreme Court specifically recognized this purpose of the Fourth Amendment in *Brown v. Texas,* in which it stated that a key

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249. See *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

250. See *United States v. Guzman*, 864 F.2d 1512, 1516 (10th Cir. 1988). Actually, the competing considerations regarding abuses of discretionary power by police are broader than those stated. One commentator explained the broad societal considerations surrounding police abuse of discretion as follows:

> An essential question . . . is whether the institutions, programs and principles we have developed to empower the police are also adequate to the task of controlling the police. We must also ask whether in our society, which relies substantially on the courts to regulate and control governmental behavior, the legal response to police abuse is sufficiently sensitive to the institutional nature of the problem.
>
> Enforcing the proper restraints on police power is a difficult problem in any society. In the United States there is both a fear of governmental abuse and a tolerance of repressive measures, the latter reflecting a belief that police excesses are necessary to combat crime. . . .
>
> Acceptance of a certain level of police abuse is a predictable majoritarian response to crime, upheaval and threats to the status quo. The true test of our society's commitment to constitutional constraints is how government and the courts respond to these systemic deviations from constitutional norms.

Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 466-67 (cited in note 5) (concluding that "the response of government and the courts [to current police conduct] has been insufficient").

251. See Salken, 62 Temple L. Rev. at 254 (cited in note 4); Amsterdam, 58 Minn. L. Rev. at 417 (cited in note 3); Aro, Note, 70 B.U. L. Rev. at 119 (cited in note 4). As one leading commentator has stated, "[a] paramount purpose of the Fourth Amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures." Amsterdam, 58 Minn. L. Rev. at 417.

concern in balancing the competing considerations that are inherent in the Fourth Amendment is to ensure that a police officer may not intrude arbitrarily on a person's reasonable expectation of privacy solely at the officer's discretion.[252] The Framers intended that the government respect an individual's privacy interests unless the government can express some "quantum of individualized suspicion" that the person is involved in criminal conduct.[253] Thus, the Fourth Amendment acts as a restraint on police discretion to protect the security and privacy of individuals against arbitrary intrusions.[254]

The problem courts and police face in attempting to use this concern for the arbitrary abuse of discretion by police officers as a guideline is that the standard is too vague for courts to apply and, to a greater extent, for police to use for the myriad of discretionary decisions they make daily.[255] The Supreme Court has failed to devise effective Fourth Amendment review standards regarding exceptions to the warrant requirement, including investigatory stops.[256] Nevertheless, the Court has indicated that an increase in police efficiency alone cannot justify disregard of the Fourth Amendment's requirements.[257] The Court also has held that courts cannot excuse

252. *Brown*, 443 U.S. at 51 (stating that "[a] central concern has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field").

253. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (stating that before police officials may invade an individual's privacy, they must have some quantum of individualized suspicion).

254. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (stating that "except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment").

255. Amsterdam, 58 Minn. L. Rev. at 414-15 (cited in note 3).

256. Id. at 414. See *Guzman*, 864 F.2d at 1517 (noting that "the Court has never explicitly defined the contours of the pretext doctrine"). See also Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 467 (cited in note 5) (stating, "The true test of our society's commitment to constitutional constraints is how government and the courts respond to these systemic deviations from constitutional norms. If we examine current police conduct in light of this test, it is clear the response of government and the courts has been insufficient."); Salken, 62 Temple L. Rev. at 240 (cited in note 4) (stating that "[i]t is not clear whether the Supreme Court views searches or seizures as illegal just because an officer's reasons for using a specific fourth amendment power on a particular occasion are not the reasons advanced by courts for approving the doctrine which allows such fourth amendment activity").

257. See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (holding that a "murder scene exception" to the Fourth Amendment warrant requirement was inconsistent with that amendment and that a warrantless search of an apartment is not permissible merely because a homicide occurred there).

Fourth Amendment demands in the name of law enforcement.[258] Therefore, although the Court has not defined the contours of the pretext doctrine clearly, it has clarified that a justification greater than crime-fighting efficiency alone is necessary to support an investigatory stop.[259] This requirement is consistent with the Court's holding that at least a quantum of individualized suspicion—or reasonable suspicion—is necessary to effectuate a valid investigatory stop.[260]

Conversely, an inquiry by courts into a police officer's subjective intent and motivation in each case would be unproductive because of the taxing effect it would have on judicial and law enforcement resources and, arguably, because of the debilitating effect this inquiry also may have on law enforcement activities.[261] First, a test that requires courts to analyze an officer's subjective intent logically would require an examination of the officer in court and evaluation of any other evidence that would tend to show the officer's state of mind at the time in question. That requirement alone would make the subjective test burdensome even if courts could determine the actual subjective intent of officers. As Professor LaFave has noted, however, courts cannot determine consistently situations in which the police had an ulterior motive.[262] Furthermore, Professor Amsterdam has indicated that police officers easily and undetectably can fabricate a legitimate subjective purpose to do something that is objectively lawful.[263] Second, even if courts could determine a police officer's subjective intent and if the police officer did not fabricate a subjective purpose that comports with the legal rules, some courts find that it makes no sense to perform this subjective inquiry to deter bad intentions of an officer when officers ultimately do not manifest these intentions in any objectively ascertainable Fourth Amendment

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258. See *Berger v. New York*, 388 U.S. 41, 62 (1967) (holding that a statute that permitted a court to order electronic eavesdropping violated the Fourth Amendment because the statute was too broad in its coverage).

259. See note 96 and accompanying text.

260. *Prouse*, 440 U.S. at 663; *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975); *Martinez-Fuerte*, 428 U.S. at 560.

261. As Justice White succinctly stated, "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting). See also *Rusher*, 966 F.2d at 888 (Luttig, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that "[a]part from the substantial systemic costs in terms of judicial and law enforcement resources that would be exacted by [a subjective] test, the ultimate effect of the rule would be devastating for law enforcement").

262. LaFave, 1 *Search and Seizure* § 1.4(e) at 96 (cited in note 2).

263. Amsterdam, 58 Minn. L. Rev. at 436-37 (cited in note 3). Unfortunately, police do fabricate reasons for taking actions. See Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 466 n.8 (cited in note 5).

violations.[264] For reasons such as these, the Supreme Court set forth the rule in *Scott* disregarding the underlying intent or motivation of officers.[265] However, the Court has not rejected, as some courts contend,[266] the modified objective test.[267]

VI. A RECOMMENDED RESOLUTION OF THE SPLIT

Both the purely objective test and the modified objective test have significant flaws.[268] Notwithstanding the flaws of these tests, however, this Note contends that the answer to this split of authority among the circuits lies somewhere between the two tests. This Part analyzes the proper criteria of a functional investigatory stop test and then formulates the appropriate test to meet these criteria. Specifically, this Part first identifies the primary flaws in the two proffered tests while articulating the criteria that the appropriate test should meet. Then, it lays the foundation for the test based on those criteria and the Supreme Court's precedents. Next, it modifies the foundation to create the test itself. Finally, it gives a brief overview of the expected benefits and effects of that test.

A. The Criteria for a Meaningful Investigatory Stop Test

With the Fourth Amendment principles, competing policies, existing case law, and relevant commentary in mind, this Note now develops the foundational criteria that a meaningful investigatory

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264. See, for example, *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992).

265. *Scott v. United States*, 436 U.S. 128, 138 (1978). See notes 110-13 and accompanying text.

266. See text accompanying notes 142, 160, 168, 193. See also Salken, 62 Temple L. Rev. at 241 (cited in note 4) (stating that "*Scott* may . . . have closed the door on the pretext approach").

267. See notes 125-36 and accompanying text. Indeed, several recent cases suggest that the Supreme Court has not abandoned the pretext doctrine. In *Colorado v. Bertine*, 479 U.S. 367 (1987), the Court stated that "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." Id. at 372 (holding that a search of a van that was impounded after arrest of the driver for driving under the influence of alcohol was valid). The Court's language suggests that a possibility remains for a defendant to argue that a seizure or search is illegal if it is conducted in bad faith or for investigatory purposes. Moreover, in *New York v. Burger*, 482 U.S. 691 (1987), the Court stated 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." Id. at 716 (holding that no Fourth Amendment violation occurred when police officers found several stolen vehicles during an inspection of a New York City junkyard when this inspection was performed pursuant to a statute that allowed them to do so without a warrant). The Court's statement again suggests that if it had found pretextual conduct on the part of the police officers, a different conclusion might have resulted.

268. See notes 274-78 and 285-87 and accompanying text.

stop test must satisfy. The general criteria desired can be summarized as: (1) Fourth Amendment principles, (2) free society goals (that is, the reasonableness and predictability of law enforcement procedures), (3) judicial resource limitations, (4) law enforcement resource limitations, and (5) crime-fighting effectiveness. A brief examination of these criteria is necessary to understand how and why the criteria support the development and use of the test recommended in this Part.

The first criterion to consider is the Fourth Amendment itself and the values that underlie it. The *Terry* Court established that a proper Fourth Amendment inquiry into whether an investigative detention is valid will begin by asking whether the officer's actions were justified when he first approached the defendant, and whether the scope of the detention was reasonably related to the circumstances that initially justified the interference.[269] Thus, the first specific substantive criterion is that the test should determine if the officer's actions in performing the stop and any subsequent searches were justified by the facts available to the officer at the time he made the stop.[270] Moreover, the Court also has indicated that tests to determine the validity of police conduct should balance the government's interest in law enforcement against society's interests in being free from unreasonable searches and seizures.[271] Thus, the desired test also must balance the government's interest in performing the stop against society's interest in being free from the intrusion.[272] Further, regarding pretextual conduct, Professor LaFave has noted that the "specter of the pretext arrest" with regard to minor traffic infractions is a potential problem of such magnitude that a rule governing the pervasive practice of police performing searches incident to arrest for traffic violations must take the possibility of pretextual conduct into account.[273] Hence, the adopted test consistently and accurately should be able to identify pretextual or ulterior motives of police officers.

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269. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). See notes 98-104 and accompanying text.

270. This analysis is inherent in the modified objective test because the question of whether a reasonable officer would have performed the stop absent an invalid purpose looks at the facts and circumstances available to the officer at the time he or she made the stop. See notes 35-37 and accompanying text.

271. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979) (stating, "The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' . . . Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree te which the seizure advances the public interest, and the severity of the interference with individual liberty.") (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)).

272. See note 51 and accompanying text.

273. See LaFave, 2 *Search and Seizure* § 5.2(e) at 458 (cited in note 2).

Therefore, the Fourth Amendment alone requires that an appropriate investigatory stop test embody (1) an analysis of the facts available to the officer, (2) a balancing of the present interests, and (3) a mechanism to discover pretextual activity. Notably, under this first criterion, the purely objective test fails to qualify as a meaningful investigatory stop test.

The purely objective test, as noted by various circuit courts (including those adopting that test), substantially decreases the chances that a court ever would discover a pretextual seizure.[274] The Supreme Court clearly has held that the discretionary exercise of police power may be unconstitutional in certain circumstances.[275] Because the discretionary exercise of police power may be unconstitutional at times, courts are responsible for adopting a test that permits finding these instances of unconstitutional conduct. The purely objective test, however, which analyzes no more than whether some available set of facts justifies a stop, would allow arbitrary intrusions in thousands of everyday traffic stops because police officers would have unfettered discretion as to whom they may stop.[276] The real hazard of the purely objective test is that officers may perform intrusive stops at their discretion, even though they actually do not have a valid reason to make a stop; that is, they may fabricate a reason such as a traffic violation to justify their actions. Moreover, the decided cases in this area clearly indicate that many circuits will uphold a search incident to a traffic infraction arrest based on an investigatory stop even in the face of clear evidence of an ulterior motive.[277] Hence, the purely objective test actually provides no Fourth Amendment protection or regulation at all but merely creates an easily attainable standard that police must meet to justify investigatory stops. Thus, just as the Court has held that the constitutional guarantee against unlawful searches and seizures could be reduced to meaningless words if evidence gained during investigatory arrests made without warrant or probable cause was admissible based solely on *Miranda* warnings,[278] so too the Fourth Amendment would be re-

274. See, for example, *United States v. Trigg*, 878 F.2d 1037, 1040 (7th Cir. 1989) (adopting the purely objective standard); *United States v. Guzman*, 864 F.2d 1512, 1516 (10th Cir. 1988) (adopting the modified objective standard).

275. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

276. *Guzman*, 864 F.2d at 1516.

277. See, for example, *United States v. Cummins*, 920 F.2d 498 (8th Cir. 1990); *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989); *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc).

278. See *Brown v. Illinois*, 422 U.S. 590, 602-03 (1975).

duced to meaningless words if courts allow police to make investigatory stops without reasonable suspicion.

The second general criterion that an adequate investigatory stop test must meet is that it must be capable of protecting society's needs and preferences for predictable law enforcement procedures. One writer has commented that at the heart of the balancing test the Supreme Court often applies in Fourth Amendment cases is the notion that the Fourth Amendment serves societal needs and preferences.[279] Citizens in a free society desire predictability regarding the discretionary choices of police in performing searches and seizures.[280] Controlling police discretion to prevent arbitrary investigatory stops, however, necessarily requires a court to make a judicial determination that police action taken against persons in one investigatory stop corresponds to police action taken with respect to other individuals similarly situated but in different investigatory stops.[281] Thus, the investigatory stop test also should look at an officer's actions with respect to standard police behavior, including whether that behavior is influenced by written guidelines or usual police practices.[282]

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279. Aro, Note, 70 B.U. L. Rev. at 122 n.70 (cited in note 4).

280. See LaFave, 89 Mich. L. Rev. at 449 (cited in note 5). See also Rudovsky, 27 Harv. C.R.-C.L. L. Rev. at 467 (cited in note 5) (stating, "Enforcing the proper restraints on police power is a difficult problem in any society. In the United States there is both a fear of governmental abuse and a tolerance of repressive measures, the latter reflecting a belief that police excesses are necessary to combat crime. . . . The true test of our society's commitment to constitutional constraints is how . . . the courts respond te . . . systemic deviations from constitutional norms.").

281. See LaFave, 89 Mich. L. Rev. at 449 (cited in note 5). Professor LaFave is a proponent of a Fourth Amendment judicial review standard that would promote the development and use of police procedures. For a general discussion of police procedures and the effects of judicially requiring these procedures, see generally id. at 442. In that article, LaFave implies that police organizations or other agencies should initiate and develop the procedures but the courts should promote this development by judicially reviewing these procedures as cases and controversies arise that require their review. See id. at 449-51. Professor LaFave states that rulemaking by police departments would improve police performance by:

> (1) "enhanc[ing] the quality of police decisions" . . . [by focusing] attention on the fact that policy is being made . . . [;] (2) . . . "ensur[ing] the fair and equal treatment of citizens" . . . [by reducing] the influence of bias, [providing] uniform standards . . . and [serving] . . . te guide and to control police behavior[;] (3) . . . "increas[ing] the visibility of police policy decisions" [by] requir[ing] the departmental command structure to learn what officers in the field are doing . . ." [; and] (4) . . . "getting policemen censistontly to obey and enforce constitutional norms that guarantee the liberty of the citizen" because rules made by the police are most likely to be obeyed by the police. . . .

Id. at 451 (quoting Amstordam, 58 Minn. L. Rev. at 423-28 (cited in noto 3)).

282. The "usual practices" approach holds that "the 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 constitutes the Fourth Amendment violation." LaFave, 1 *Search and Seizure* § 1.4(e) at 94 (cited in note 2). The Supreme Court emphatically endorsed a "standardized procedures" approach to automobile inventory searches in *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (stating that "[i]n the present

The remaining criteria that the test must embrace are more functions of logic and reality than legal propositions to be analyzed in depth. It is no secret that judicial and law enforcement resources are limited. Neither courts nor police departments have the luxury of dedicating a great deal of time or effort to a detailed investigation of each investigatory stop case.[283] Thus, the test should not be overburdensome for the police to use in performing their everyday duties or for the courts to use in reviewing the actions of the police.[284] Finally, society, the courts, and the law enforcement agencies clearly all desire effectiveness in the crime-fighting efforts of the police. Hence, the test also should aid police in the performance of their duties instead of impeding that performance.

The modified objective test is inherently flawed and does not meet all these criteria necessary for a viable investigatory stop test. Under the modified objective test, the government must prove that a reasonable officer would have made the stop absent any invalid purpose.[285] This test requires a court to hold the stop unconstitutional if a reasonable officer would not have performed the stop without the improper motive.[286] Thus, when an officer makes a lawful traffic violation stop that yields evidence of a crime, but the stop was an investigatory stop that a reasonable officer would not have made, it is unconstitutional; therefore, the court must suppress the evidence despite the lawfulness of the actual stop. Pushed to its limits, then, the modified objective test could require suppression of evidence even

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case, . . . there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation").

Nevertheless, the *Trigg* court criticized the usual practices approach for not truly responding to the pretextual seizure problem: "Under a 'usual practices' standard an arrest made for an improper reason will be valid so long as the decision to arrest for a particular offense is not a departure from the norm while an arrest made for proper reasons will be invalid if the decision to arrest for the particular offense is a departure from the norm." *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989). The *Trigg* court failed to understand the application of the usual practices approach. Like written procedures, the fact that usual practices exist simply should create a presumption of validity that the officer's actions were appropriate because the reasonable officer would have taken the usual practices or followed the written guidelines. The usual practices approach does not rule out the possibility that a court still may find that an improper seizure was arbitrary even though conducted in accordance with usual practices. Likewise, a court still could find a seizure proper even though not conducted in accordance with usual practices if the seizure was not arbitrary. See LaFave, 1 *Search and Seizure* § 1.4(e) at 94 (cited in note 2).

283. See note 261 and accompanying text.

284. Indeed, the Supreme Court has stated that a goal of judicial review is to provide "'[a] single familiar standard'" to guide police officers in their practices implicating the Fourth Amendment. *Colorado v. Bertine*, 479 U.S. 367, 375 (1987) (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)) (brackets in original).

285. See text accompanying notes 35 and 107-08.

286. See *United States v. Rusher*, 966 F.2d 868, 887 (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part).

in situations in which a police officer had no pretextual motive.[287] Thus, the modified objective test also fails to produce a desirable result. With the criteria an investigatory stop test should meet, as well as the flaws of both the modified objective and purely objective tests, in mind, the next subpart lays the foundation for a recommended investigatory stop test.

B. The Scott *Foundation*

Fortunately, the Supreme Court has laid a foundation that incorporates many of the necessary criteria. In *Scott v. United States*,[288] the Court held that simply because an officer's state of mind does not provide the legal justification for the officer's action, the law should not invalidate the action as long as the objectively viewed circumstances justify that action.[289] The Court, while adopting this standard, nevertheless tempered its holding by finding that because of the ad hoc nature of a determination of reasonableness, no inflexible rule of law can exist that will apply to every case.[290] This standard, with the Court's caveat, incorporates a number of the desired test's criteria.

The *Scott* standard necessarily includes an evaluation of the officer's action with regard to the facts and circumstances facing the officer at the time of the stop. That requirement limits the time frame and information that a court must review and also limits the amount of information police officers must consider when making a stop.[291] Moreover, that standard incorporates the requirement that the test should determine if the officer's action was justified by the facts available to the officer at the time of the stop.[292] Further, this standard embraces the criterion that the test should view an officer's actions

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287. See id. Judge Luttig uses the following example to illustrate this point:

> [I]f after stopping a vehicle for exceeding the authorized speed limit by five miles per hour or for driving with license plates that expired the previous day, an officer discovers a kilogram of cocaine and an assault weapon used in a heinous murder, both the drugs and the weapon would be suppressed as the fruits of an unconstitutional stop unless the officer who effected the stop establishes *by affirmative evidence* that a 'reasonable officer' also would have stopped the vehicle.

Id. (emphasis in original).

288. 436 U.S. 128 (1978). See also notes 110-13 and accompanying text.

289. *Scott*, 436 U.S. at 138.

290. Id. at 139 (emphasis added).

291. Even with these limiting effects, courts are also free to consider an officer's experience and expertise in determining the reasonableness of a stop. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (stating that "in determining whether the officer acted reasonably in such circumstances, due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience").

292. See notes 269-70 and accompanying toxt.

with regard to standard police behavior, including whether that behavior is influenced by written guidelines or usual police practices, because an evaluation of the officer's action at the time of the stop also would include an analysis of the customary practices of the police or written guidance available to the officer.[293] Finally, a requirement that the court should evaluate the officer's actions with respect to the facts and circumstances then available to him does not hinder that officer's crime-fighting effectiveness because no burdensome demand is placed on him; the requirement affects the procedures of the reviewing court, not the officer's actions.

Even though the *Scott* language is a useful foundation on which to build, it does not address a few of the key concerns of the pretextual stop issue; therefore, forming a test requires refinements of the *Scott* standard. Specifically, one key omission in the *Scott* standard is that it does not promote the values underlying the Fourth Amendment because it fails to balance the government's interests against society's interests as the Fourth Amendment inherently directs.[294] Another key omission in the *Scott* standard is that it does not differentiate between those objective elements that are dispositive in determining whether a pretextual investigatory stop is unconstitutional.[295] Finally, the *Scott* standard does not compare similar investigatory stops to ensure that treatment of one person corresponds to the treatment of all individuals similarly situated.[296] These omissions require a modification of the *Scott* standard that will incorporate all necessary criteria into the test.

C. The Test

The appropriate investigatory stop test is actually a combination, to a limited extent, of the purely objective test, the modified objective test, and the police rule-making approach espoused by Professor LaFave.[297] The test essentially is composed of two primary inquiries, but a court will address the second inquiry only if the government fails to carry its burden in the first inquiry. Additionally, courts can apply the test consistent with the good faith doctrine.[298]

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293. See notes 273 and 281-82 and accompanying text.
294. See notes 51 and 271 and accompanying text.
295. *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988).
296. See text accompanying notes 281-82.
297. See notes 66-69 and accompanying text.
298. Under the good faith doctrine, the exclusionary rule does not apply when an officer's good faith belief that a defective warrant was valid was objectively reasonable. See *Scott*, 436 U.S. at 139 n.13; *United States v. Leon*, 468 U.S. 897 (1984).

For ease of understanding and discussion, this Note divides the test into its component parts.

Part One. A court must ask whether the officer conducted the stop within the bounds of a valid police procedure.[299] If so, the stop is presumptively valid but the defendant may rebut the presumption. Balancing the government's interest against society's interest is inherent in this question because this balance sets the bounds of a valid police procedure. If the police organization has developed and implemented written guidelines or usual practices regarding investigatory stops, and those guidelines reasonably reflect society's interests in both effective crime fighting and freedom from unreasonable seizures, then courts should give a presumption of constitutionality to those guidelines or practices. Although this part of the test is similar to the purely objective test, it differs distinctly from that test because this analysis considers whether the officer conducted the stop within the jurisdiction's statutory, regulatory, or ordinance requirements or the police department's written guidelines or usual practices. This distinction is important because the test then compares the facts of the actual stop with the requirements, guidelines, or practices and does not analyze whether the officer could have made the stop for *any* valid reason. If (1) the government does not have a valid police procedure, (2) the defendant overcomes the presumption of validity of the investigatory stop by showing that society's interests outweigh the government's, or (3) the court finds that the stop was actually arbitrary or improper notwithstanding an officer's use of a valid procedure; only then does the test require the court to address the second part of the test.

Part Two. If no valid police procedure is in place, and the court finds the police procedure invalid because society's interest in freedom from unreasonable seizure outweighs the government's interest in the scope of the procedure, or the court finds that the stop was arbitrary or improper even though conducted in accordance with a valid procedure, then the court should apply the second part of the test—the modified objective test. Under this part, the court analyzes whether a

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299. The definition of a "valid police procedure" is intended to be broad. The term would include any written procedures, guidelines, policy statements, or principles of a law enforcement organization, as well as any law that grants the officer the authority to perform the stop. See, for example, 19 U.S.C. § 1581(a), the statute authorizing vessel stops in *United States v. Villamonte-Marquez*, 462 U.S. 579, 585 (1983) (authorizing customs officers to board any vessel at any time and any place in the United States or its territorial waters to examine the vessel's manifest and other documents). Moreover, valid police procedures also would include the usual practices of a police organization that are well established within the police unit such that the practice is common knowledge. See note 282.

reasonable officer would have performed the investigatory stop under the same circumstances in the absence of any invalid pretextual purpose.[300] This analysis requires the court to examine the decision a reasonable officer would have made based on all information known by the officers who made the stop, excluding any information that formed the pretextual motive to stop the automobile. If the court finds the reasonable officer would have made the stop as well, then the stop was reasonable and is constitutional. If a reasonable officer would not have made the stop, however, then the court should find the stop invalid unless the good faith doctrine applies.

If the stop fails both the valid police procedure portion of the test and the modified objective portion of the test, then it would be unconstitutional on Fourth Amendment grounds unless the good faith doctrine[301] saves the officer's action. A court applying the good faith doctrine may decide whether to exclude the evidence obtained from the unlawful seizure if it finds that the officer had a good faith belief that a defective warrant was valid and this belief was objectively reasonable.[302] Note though that if a reasonable officer would not have made the stop in the absence of an invalid purpose, it is unlikely that a magistrate would have issued even a defective warrant.

D. Benefits and Effects of the Test

This subpart outlines the benefits that flow from the recommended test and analyzes a number of the factual situations presented in circuit court cases. It first lists the benefits expected from the test and then analyzes the expected effects.

Benefit Number One: The primary benefit of this test is that it preserves the necessary pretext doctrine, thereby permitting an inquiry into the reasonableness of an officer's action without requiring analysis of the officer's subjective intent. Real Fourth Amendment protections are available to society through this test. It embraces the balancing inherent in the Fourth Amendment because in the first part of the test, the court balances the government's interests against society's interests. Also, a court then may determine if the action was reasonable under the reasonable officer standard. Together, the two parts of the test preserve the pretext doctrine.

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300. *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986).
301. See note 298.
302. See *Scott*, 436 U.S. at 139 n.13; *Leon*, 468 U.S. at 897.

Benefit Number Two: The test permits a court to differentiate between legal and fabricated pretexts[303] because the court simply may apply the test to a legal pretext and, if warranted, find the stop valid. Yet, if a court finds that the officer fabricated the purpose to stop, then the stop would fail both the first and second parts of the test, rendering it unconstitutional. The stop would fail the first part of the test because a finding of a fabricated purpose necessarily would mean that the officer followed no valid police procedure when she made the stop.[304] Likewise, the stop would fail the second part of the test because no reasonable officer would fabricate a reason to perform an investigatory stop.

Benefit Number Three: Application of the test requires only limited judicial resources because in a large number of cases, only the first part of the test will be necessary because of the broad definition of valid police procedures.[305] Even if the second part is necessary, however, an evaluation of what a reasonable officer would do is not overly taxing on a court as proven by the Tenth and Eleventh Circuits in their application of the modified objective test.[306]

Benefit Number Four: Police departments can easily understand and apply the test. Therefore, vast numbers of law enforcement resources are not required, and crime-fighting effectiveness is aided because the police will have a clear indication of when courts will uphold their conduct in performing investigatory stops. Specifically, the test is capable of becoming a single, familiar standard to guide police officers.[307] Moreover, the test promotes initiation and production of police procedures because police departments may ensure the presumption of constitutionality of their stops only if they have established written guidelines or adhere to usual practices.

Benefit Number Five: Finally, even if a police department fails the first and second parts of the test, the government still may admit evidence if the good faith doctrine is applicable. That is, the test does not penalize officers who rely, in good faith, on a defective warrant.

Applying the test to a few of the factual situations present in some of the circuit court cases discussed in Part IV of this Note and to the hypothetical situations presented by both Judge Luttig in

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303. See notes 58-64 and accompanying text.
304. See notes 60 and 299.
305. See note 299.
306. See, for example, *United States v. Horn*, 970 F.2d 728 (10th Cir. 1992); *United States v. Valdez*, 931 F.2d 1448 (11th Cir. 1991); *United States v. Corral*, 899 F.2d 991 (10th Cir. 1990).
307. See note 284 and accompanying text.

Rusher[308] and Judge Higginbotham in *Causey*[309] demonstrates the effects of the recommended test. These analyses show that the test embodies all the requirements mandated by the Supreme Court yet embraces the desired criteria. Finally, for purposes of this analysis, this Note refers to the developed test as the "functional test."

Application of the functional test to *Cummins* likely would yield the same result. In *Cummins*, the officer stopped the defendant because of suspicious behavior exhibited by the defendant and his passenger.[310] The reason given for the stop was the defendant's failure to signal before making a right turn. Applying the functional test, the government likely would pass the first part of the test because giving a signal to make a turn probably is required by statute or ordinance; therefore, the stop was made within the bounds of the statute or ordinance that most likely permits officers to stop vehicles violating this law. Because the first part of the test would be satisfied, a presumption of constitutionality would attach to the officer's action. The defendant could rebut this presumption only with clear and convincing evidence that the stop was unreasonable, which is unlikely based on these facts. Thus, the practical result of the test is that if a police department takes action in accordance with statutes, regulations, ordinances, or police procedures in making an investigatory stop, a court likely would not apply the second part of the functional test because the first part was met.

The test applies to Judge Luttig's hypothetical as well. He was concerned that if a reasonable officer would not have performed an investigatory stop of an automobile exceeding the speed limit by five miles per hour or of an automobile whose license plate was one day overdue for renewal, then the modified objective test would require suppression of evidence obtained in the investigatory stops of those vehicles.[311] Under the functional test, however, the stop likely will pass the first part of the test because statutes or ordinances usually regulate speed limits or driving with expired license plates. Thus, a presumption of validity would attach to the officer's action. If, however, the facts were so egregious that a defendant could show that the actions of the police officer were unreasonable, then the defendant could rebut the presumption. Only then must the court perform the second part of the test, asking if a reasonable officer would have

308. *United States v. Rusher*, 966 F.2d 868, 887 (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part). See also note 217.

309. *United States v. Causey*, 834 F.2d 1179, 1185-86 (5th Cir. 1987) (en banc) (Higginbotham, J., concurring).

310. See note 197.

311. *Rusher*, 966 F.2d at 887 (Luttig, J., concurring in part and dissenting in part).

stopped the slightly speeding automobile or the automobile with recently expired license plates.

In *Rusher*, the defendant argued that the officer's stop of his truck was unconstitutional because the stated reasons for the stop—seat belt violations and a homemade license plate—were not the true reasons the officer made the stop; the true reason, the defendant argued, was to investigate for drugs.[312] Under the functional test, once again, the government would receive a presumption of validity because both the seat belt violations and the license plate violation generally are regulated by statute, ordinance, or regulation. Any suspicions the officer developed after the stop, leading him to search the vehicle, may be vulnerable to attack by the defendant, but the stop itself would be presumed valid. The court, therefore, likely would find the officer's conduct in performing the stop to be a reasonable Fourth Amendment seizure unless the defendant could rebut the presumption; thus, the court would have no need to perform the second part of the test.

In some instances, however, a court must proceed to the second part of the test. For example, under the functional test, the *Trigg* court probably would have come to a different conclusion. In *Trigg*, an officer arrested the defendant, rather than issuing him a citation, for the minor traffic violation of driving on a suspended license.[313] The officer's testimony that the local police department left to the individual officer's discretion the decision to arrest an individual or to issue a traffic citation for driving on a suspended license would be damaging to the government under the first part of the functional test.[314] The government would fail the first part of the test because the officer would not have performed the arrest in accordance with a valid police procedure.[315] Hence, the presumption of validity would not attach to the officer's conduct, and the burden would then shift to the government to show that a reasonable officer who did not know that the defendant may have been involved in drug activity would have arrested the defendant under the same circumstances.[316] If the court found that a reasonable officer simply would have issued a citation for driving with a suspended license, then the seizure would fail the functional test and violate the Fourth Amendment.[317] Thus, this test

312. See note 217 and accompanying text.
313. See note 167.
314. See id.
315. See note 299 and accompanying text.
316. See text accompanying note 300.
317. The seizure would be unconstitutional unless the good faith doctrine saves the officer's action from violation of the Fourth Amendment. Under the good faith doctrine, the exclusionary

requires no subjective inquiry into the officer's intent, yet does not diminish the chances of discovering pretextual activity, as feared by the *Trigg* majority.[318] If the court were to find that a reasonable officer would have arrested the defendant, however, the arrest would pass the second part of the test and would be a valid Fourth Amendment seizure.

The final situation analyzed is Judge Higginbotham's hypothetical situation in which a police department stockpiles traffic violation warrants, allowing officers later to arrest an individual whom it desires to interrogate by retrieving an arrest warrant from the stockpile.[319] Under the functional test, even though a statute or ordinance giving the police department the authority to arrest individuals on outstanding arrest warrants likely would be in effect, the first part of the test allows the court to balance society's interests against the government's interests. Judge Higginbotham's hypothetical situation provides a classic example of when a court should balance those interests. A court performing this balancing to determine whether a worthy governmental interest or policy supports the statute or ordinance should find that society's interests outweigh the government's interests in this situation, invalidating the police practice of stockpiling arrest warrants as an unconstitutional abuse of their authority. Thus, the balancing inherent in Fourth Amendment analysis carries over into both the first and second parts of the test, permitting the court first to balance the reasonableness of a statute, regulation, procedure, or usual practice against society's interests when applying the first part of the test and then to balance the reasonableness of an officer's action against society's interests if it reaches the second part of the test.

VII. CONCLUSION

This Note demonstrates that the pretext doctrine is neither incompatible with existing Fourth Amendment doctrine nor an empty doctrine, as some suggest. Rather, because of the confusion among the circuit courts, the Supreme Court must reaffirm and clarify the doctrine, particularly in the area of investigatory seizures, which include investigatory stops. Specifically, this Note offers a resolution

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rule does not apply when an officer's good faith belief that a defective warrant was valid is objectively reasonable. See *Scott*, 436 U.S. at 139 n.13; *Leon*, 468 U.S. at 897; notes 298 and 302 and accompanying text.

318. See *Trigg*, 878 F.2d at 1040. See also text accompanying note 169.

319. See *Causey*, 834 F.2d at 1185-86 (Higginbotham, J., concurring).

to the deep and disturbing division among the circuits regarding the standard for determining if an investigatory seizure was pretextual. This Note has addressed the confusion surrounding the investigatory stop doctrine by outlining the state of the current law and recommending a solution that not only incorporates the concerns the Framers drafted into the Fourth Amendment but also comports with the realities of law enforcement and judicial review. This Note, therefore, recommends that courts, including the Supreme Court, recognize the detrimental divisiveness among the circuit courts and develop an appropriate investigatory stop test that preserves the meaningful interests the Fourth Amendment was designed to protect.

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