PRETEXT SEARCHES AND THE FOURTH AMENDMENT: UNCONSTITUTIONAL ABUSES OF POWER

DANIEL S. JONAS†

INTRODUCTION

Within the fourth amendment1 resides a tension between the privacy rights of individuals and the ability of the police to enforce the law.2 Individual liberty and the right to be free from government intrusion must be weighed against the government's ability to ferret out criminals and to prevent crime. The Supreme Court has not yet established a clear balance for the competing social policies which animate the fourth amendment. As Justice Frankfurter said, "[t]he course of true law pertaining to searches and seizures . . . has not . . . run smooth."3 In particular, the Supreme Court has not yet spoken on the issue of pretext searches.4

† B.A. 1986, Brown University; J.D. Candidate 1989, University of Pennsylvania.

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

U.S. CONST. amend. IV.


4 The Court appeared prepared to address the issue when it granted certiorari in a pretext case, see Missouri v. Blair, 474 U.S. 1049 (1985); however, the Court later dismissed certiorari as improvidently granted. See Missouri v. Blair, 480 U.S. 698 (1987). One of the questions presented was:

Does the fact that a police department has an ulterior motive in making an arrest on a valid municipal warrant make the arrest pretextual so as to invalidate the arrest, the fingerprinting of the arrestee and a confession to a felony subsequently made by the arrestee-suspect as a matter of law?

Petition for Writ of Certiorari at i, State v. Blair, 691 S.W.2d 259 (Mo. 1985), cert. dismissed, 480 U.S. 698 (1987). The Court possibly dismissed certiorari because the Missouri trial court made a factual finding that the defendant was not arrested for the traffic violation, but was illegally detained as part of a homicide investigation. See State v. Blair, 691 S.W.2d 259, 261-62 (Mo. 1985) (en banc), cert. dismissed, 480 U.S. 698 (1987). Thus, without an arrest, the Court could not reach the pretext issue.

One scholar has argued that the Court has "on a number of occasions" held pre-
The conflict between liberty and law enforcement is particularly sharp in the area of pretextual police conduct. Police would have a powerful investigative tool if it were constitutional, for example, to arrest a felony suspect on the basis of a parking ticket that had not been paid, when the facts relating to the felony did not provide probable cause. Precisely because its investigative potential is so great, pretextual police conduct poses an alarming threat to individual freedom from government intrusion.

This Comment seeks to clarify the purposes of the fourth amendment in the context of pretextual searches. Part I surveys the historical purposes of the fourth amendment in an attempt to demonstrate that the fourth amendment is meant to be read broadly as a restriction both on when the state may invade individual liberty and also on the extent of any authorized intrusion. It then traces the development of fourth amendment jurisprudence and argues that the limits on some warrantless searches and seizures are conceptually identical to what this Comment argues to be the correct approach to the pretext search issue. Part II reviews the way courts have tackled the pretext problem, surveys other approaches to pretext searches, and evaluates their shortcomings. Part III proposes that all pretextual searches are unconstitutional. This analysis compares pretext arrests to selective prosecution and due process claims, notes the similarity to the abuses of the search and seizure text searches to be unconstitutional. See Burkoff, Pretext Searches, 9 SEARCH & SEIZURE L. REP. 25, 25 (1982). Those cases, however, mostly contain dicta concerning fabricated, as opposed to legal, pretexts. See infra text preceding note 66.

For purposes of this Comment, a pretext search is the use of some minor offense, typically a traffic violation, as a tool for obtaining evidence or statements relating to a greater offense for which the police lack the required probable cause or reasonable suspicion otherwise to obtain. The difficulty in labelling police conduct as pretextual is that the search may be no more intrusive than a legitimate non-pretextual search, and indeed, often the only distinction between pretextual and non-pretextual conduct is the subjective intent of the police officers who engage in the activity.

This Comment concerns itself solely with federal law in federal courts. Obviously state courts are free to construe state constitutions to give greater protections than those of the fourth amendment. See, e.g., Commonwealth v. Grossman, 555 A.2d 896 (Pa. 1989) (holding that history and language of Pennsylvania constitution demonstrate that its framers intended greater protections than those provided by the fourth amendment); Note, Washington Survey: Terry Stop or Arrest? The Washington Court Attempts a Distinction—State v. Williams, 60 WASH. L. REV. 523, 526 (1985) (stating that the Washington State Supreme Court “has specifically held that . . . the state constitution grants more protection” than the fourth amendment of the United States Constitution in a number of areas). Further, this Comment is interested only in the use of evidence obtained pretextually in a subsequent criminal prosecution. Cf. Note, Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence, 51 FORDHAM L. REV. 1019, 1022 (1983) (examining the proper approach to determining the admissibility of evidence in a civil case that would be excluded in a criminal case).
power at which the fourth amendment was historically aimed, and concludes that all pretexts are unconstitutional.

I. PLACING THE PRETEXT PROBLEM IN CONTEXT

A. Historical Purposes of the Fourth Amendment

The end of every scholarly inquiry into the fourth amendment depends in large part on where the historical inquiry begins. Although before its adoption some may have considered the fourth amendment unnecessary, in fact its inclusion was critical to the adoption of the Constitution. The origins of the fourth amendment in both English and colonial history demonstrate that the fourth amendment represents an attempt not only to limit when the police may intrude on individual liberty, but also to restrict the scope of the ensuing search power.

In eighteenth century England, warrants had taken on a broad scope and were often used to harass political suspects. Entick v. Carrington, a landmark case, held "illegal and void" a warrant authorizing the seizure of all papers in the house of a man suspected of libel whereas previous warrants had restricted the seizure to only those papers which were criminal. The court objected to the warrant as over broad: "if a man is punishable for having a libel in his private custody,

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6 See G. Wood, The Creation of the American Republic, 1776-1787, at 536 (1969) (arguing that the Framers considered a bill of rights only as an afterthought). At the Philadelphia Convention every state voted against a bill of rights. See J. Landynski, Search and Seizure and the Supreme Court 39 (1966). Federalists argued that a bill of rights was unnecessary because the people reserved all powers not expressly granted to the government. The people therefore retained all other liberties, such as the right to trial by jury, free speech, and security from arbitrary searches. See The Federalist No. 84 (A. Hamilton); G. Wood, supra, at 539-40. Other Federalists argued that a mere piece of paper would provide a false sense of security, and that only the values and habits of the people could safeguard popular liberty. See R. Rollins, The Long Journey of Noah Webster 57 (1980); G. Wood, supra, at 377.


8 See Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 361-63 (1921).

as many cases say he is, half the kingdom would be guilty in the case of a favourable libel, if libels may be searched for and seized by whomsoever and wheresoever the Secretary of State thinks fit.'" The fatal flaw in the warrants was their authorization of indiscriminate searches not confined by the justification for the initial intrusion.\(^\text{10}\)

Another leading case, *Money v. Leach*,\(^\text{12}\) also invalidated a general warrant to search private papers in order to find libelous material. Lord Mansfield, speaking for the court, found the law authorizing such warrants had expired, thus invalidating the warrant. Although granting that the common law allows arrest without warrant "in many cases," Lord Mansfield stated "that it is not fit, either upon reasons of policy or sound construction of law, that, where a man's being confined depends on an information given, it should be left to the officer to ascertain the person. The magistrate alone should be judge of the ground of suspicion."\(^\text{13}\)

In the colonies, government abuse took the form of customs officers forcibly entering private homes and rummaging indiscriminately under the unrestricted authority of writs of assistance.\(^\text{14}\) The colonists had a history of strong opposition to the searches conducted by colonial customs officers.\(^\text{15}\) Many colonies refused to issue the writs, some because they believed them illegal, others because the writs were unenforceable.\(^\text{16}\) Local juries were especially reluctant to return verdicts for the Crown and customs officer against the local smuggler, a well-to-do merchant. After years of neglect, Britain sought to revive tariff enforce-

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\(^\text{10}\) Id. at 818. The court stressed that papers are property and that people created society in order to secure property. See id. at 817-18; see also J. Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* 63 (J. Gough rev. ed. 1976) (stating that society is formed for the mutual preservation of property).

\(^\text{11}\) Indeed, to some extent the use of non-specific warrants was pretextual, because the warrant could in reality grant the authority to harass political opponents on the grounds of suspected libel.


\(^\text{13}\) Id. at 323.

\(^\text{14}\) See M.H. Smith, *The Writs of Assistance Case 1-2* (1978); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 398 (1974); Fraenkel, supra note 8, at 364. The customs officer received one third of seized goods that the subsequent condemnation proceeding deemed smuggled. See M.H. Smith, supra, at 13.


\(^\text{16}\) See M.H. Smith, supra note 14, at 2, 4, 5, 13.
ment. By vesting the admiralty courts with jurisdiction in condemnation proceedings, smugglers were no longer able to take refuge in the institution of a partisan jury. Those most affected by the new policy were the merchants. When they attacked the writs in language that stirred other colonists, so was started the tide of events that would lead to a revolt against Britain, a revolt at home, and a new theory of politics.

Although the Supreme Court has repeatedly recognized the historical significance of the fourth amendment, to be fully understood the fourth amendment must be viewed in the context of the rhetoric of the revolutionary era. According to Whig political theory, Order was in a constant struggle against Liberty; each end of the political spectrum threatened either anarchy or despotism. Governmental power guarded against licentiousness or anarchy, but that same power corrupted, and led to tyranny. Differences between British and colonial societies created different views about authority. In the colonies, political power

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18 See M.H. Smith, supra note 14, at 13-14, 96, 125.
19 James Otis resigned from his position as attorney general of Massachusetts to fight the writs, see Fraenkel, supra note 8, at 364, and argued in the celebrated Paxton's Case that the writs were illegal in England and void in the colonies. See Paxton's Case of the Writ of Assistance, Quincy Mass. Rep. 51, 55-56 (Super. Ct. 1761), reprinted in Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772 (rep. 1865). Otis decried the writs of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law . . ." See Boyd v. United States, 116 U.S. 616, 625 (1886) (citations omitted) (quoting Otis). The debate in which Otis's speech took place was "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." Id. John Adams wrote, "[t]hen and there the child Independence was born." Id.
21 See Stanford v. Texas, 379 U.S. 476, 481-82 (1965) (citing the writs of assistance as a driving force behind the inclusion of the fourth amendment); United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (providing a "safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution"); Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (stating that "one's views regarding circumstances like those here presented ultimately depend on one's understanding of the history and function of the Fourth Amendment"), overruled on other grounds, Chimel v. California, 395 U.S. 752, 768 (1969); Boyd v. United States, 116 U.S. 616, 625 (1886). Justice Frankfurter's fourth amendment jurisprudence can be traced to that of Justice Brandeis. See Olmstead v. United States, 277 U.S. 438, 476-78 (1928) (Brandeis, J., dissenting); B. Murphy, The Brandeis/Frankfurter Connection 88 (1983).
22 Although the rhetoric offers an incomplete reflection of reality, it nonetheless provides great insights because it was the merchants' rhetoric that stirred the rest of the colonists.
24 See E. Morgan & H. Morgan, supra note 6, at 20-36.
and authority were comparatively decentralized and dispersed. Thus, when the Crown sought to enforce the tariffs on the colonists without obtaining prior consent, the colonists viewed the assertion of authority as arbitrary power. The colonists viewed the use of general warrants in this context as a threat to more than personal privacy. The general warrant was merely another symptom of a home government corrupted by power, and therefore a threat to liberty. Colonists also perceived the general rummaging of customs officers as part of an unbalanced distribution of power between the people and the branches of government. Fear of the overreaching power in general warrants led to the adoption of the broad protections found in the fourth amendment.

The evils that the fourth amendment sought to prevent represent more than a mere historical oddity. The colonial tradition of police abuse continues to flourish, notwithstanding the protections of the fourth amendment. Typically, the abuse takes the form of racial or

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26 See R. ISAAC, THE TRANSFORMATION OF VIRGINIA 105 (1982) (noting local tensions arising from development of a colonial network of gentry families resembling the European model); K. LOCKRIDGE, A NEW ENGLAND TOWN: THE FIRST HUNDRED YEARS 79-90 (1970) (arguing that less plentiful land and increasing social stratification created tensions in the colonies); G. WOOD, supra note 6, at 598-99 (arguing that many colonists feared their representatives failed to represent the peoples' interests). English manorial lords could more easily vote in Parliament for a new tax that their tenants would be forced to pay. In the colonies, however, an elected representative was sometimes sent to legislative assemblies with specific instructions, and he might be removed for not following them. See R. GROSS, THE MINUTEMEN AND THEIR WORLD 162-63 (1976) (rather than petitioning the legislature, inhabitants of Concord instructed newly elected representative to oppose new taxes).

27 See B. BAILYN, supra note 15, at 211.

28 See T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969). The fourth amendment was modeled on a similar provision in the Constitution of Massachusetts. See Harris v. United States, 331 U.S. 145, 157-58 (1947) (Frankfurter, J., dissenting), overruled on other grounds, Chimel v. California, 395 U.S. 752, 768 (1969). Of the eight states that adopted a bill of rights in their original constitutions, see G. WOOD, supra note 6, at 271 & n.21, the Massachusetts constitution provided the most protection. See Harris, 331 U.S. at 158-61.

29 See B. BAILYN, supra note 15, at 60.

29 See generally P. CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY (1969) (examining cases of police abuse and means of redress); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 12 (1969) ("A startlingly high proportion of official discretionary action pertaining to administration of justice is illegal or of doubtful legality.").

30 See Meyer, POLICE SHOOTINGS AT MINORITIES: THE CASE OF LOS ANGELES, 452 ANALS 98, 102 (L. Sherman ed. 1980) (stating that more than twice as many black suspects are shot by police officers than are white or Hispanic suspects, although explanation for statistics are unclear); Smith & Visher, STREET LEVEL JUSTICE: SITUATIONAL DETERMINANTS OF POLICE ARREST DECISIONS, 29 SOC. PROBS. 167, 170 (1981) (reporting that 48.4% of suspects are non-white and non-white suspects arrested exceed white suspects arrested).
political harassment, excessive violence, as well as police fabrication of the grounds for an arrest or search. While this type of conduct may not be the norm, its existence hardly comes as a surprise. And yet police violence rarely becomes a political issue because of the difficulty in opposing the forces of "law and order." Thus, the abuses that the fourth amendment was designed to prevent exist now as they did two centuries ago; the historical purposes of the fourth amendment have relevance beyond mere academic interest.

B. The Substantive Law of the Fourth Amendment

Two basic levels of analysis characterize fourth amendment questions: whether there was probable cause, and whether there was reasonable suspicion. The general rule requires a warrant based on probable cause as a prerequisite to any lawful search. In certain limited circumstances however, a warrantless search based on probable cause is permissible. These exceptions are for exigent circumstances, automobile searches, plain view, and arrests of persons.

31 See F.B.I. Papers Show Wide Surveillance of Reagan Critics, N.Y. Times, Jan. 28, 1988, at A1, col. 3 (reporting that citizens opposed to Reagan’s Central America policies were subjects of extensive surveillance by the F.B.I.); Lewis, Test For the Attorney General, N.Y. Times, Jan. 5, 1989, at A23, col.1 (noting that the attorney general had to respond to series of reports of abuses within F.B.I.).


35 See infra note 66.

36 See Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting) (“[T]he Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom.”).


38 See Carroll v. United States, 267 U.S. 132, 151 (1925). Although the original rationale for excusing the warrant requirement in automobile searches was the mobility of the car, recent cases have departed from this. See California v. Carney, 471 U.S. 386, 391-92 (1985) (automobile exception available because of mobility and diminished expectation of privacy from "pervasive regulation"); Chambers, 399 U.S. at 48-50 (permitting warrantless search of car seized despite officers' opportunity to seek a warrant).

The second level of analysis focuses on intrusions based on less than probable cause, but which nonetheless are deemed reasonable and therefore permissible under the fourth amendment. Permissible intrusions based on less than probable cause include the stop and frisk of \textit{Terry v. Ohio}, \textit{border stops and check point searches}, \textit{searches at schools and other governmental areas}, \textit{searches incident to arrest}, \textit{inventory searches}, \textit{consent searches}, and \textit{private searches}.

The fourth amendment establishes standards restricting the government's authority to intrude on personal privacy. Several areas of

view" may be seized, though its discovery must be "inadvertent"). Recent cases have expanded the exception by permitting the police to circumvent the inadvertence requirement first articulated in \textit{Coolidge}. See, e.g., Dow Chem. Co. v. United States, 476 U.S. 227, 234 (1986) (allowing E.P.A. use of airplanes to make plain view observations). There remain some limits to the reach of the exception. See Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (finding it impermissible for police officer without warrant to move stereo equipment to see serial number of turntable that officer suspected was stolen).


Originally, courts treated all searches without warrants as unreasonable. This approach views the warrant requirement clause simply as the definition of the reasonableness clause. Current law treats the two clauses of the fourth amendment separately, with a general reasonableness requirement and, in certain circumstances, a warrant requirement.

392 U.S. 1, 21-22 (1968) (stating that in order to justify a particular intrusion, a police officer must be able to identify "specific and articulate facts . . . available to the officer at the moment of the seizure or search "[that would] warrant a man of reasonable caution in the belief" that the action taken was appropriate . . . .") (citation omitted).


\textit{See, e.g., Schneckloth v. Bustamonte}, 412 U.S. 218, 222 (1973) (reaffirming the Court's position that a search authorized by consent is wholly valid).


\textit{See McCullough v. Maryland}, 17 U.S. (4 Wheat.) 316, 405 (1819) (government may not exceed "enumerated powers"); \textit{N. LASSON, supra} note 7, at 120-23 (discussing the requirements for a search and seizure as prescribed by the fourth
fourth amendment law, however, contain notions that the power to search or stop may be used only for the limited purpose which justified the initial grant of power.\textsuperscript{50} Perhaps the clearest example of the limiting nature of the fourth amendment is in the specificity requirement for warrants. The warrant requirement interposes a neutral judicial magistrate between the state and the individual. The magistrate determines whether there is probable cause. If probable cause exists, the warrant issued must contain a specific description of the items to be seized.\textsuperscript{51} The police officer executing the warrant has no discretion regarding which items may or may not be seized.\textsuperscript{52} The particularity requirement thus confines the grant of the search power to those items for which there was an initial justification.

Even in the limited circumstances meriting suspension of the warrant requirement, the law restricts the police officer’s freedom to intrude on personal liberty. For example, the exigent circumstances exception to the warrant requirement permits the police to conduct a warrantless search when the delay in obtaining a warrant would cause the loss or destruction of evidence or harm to another person.\textsuperscript{53} Yet once the circumstances creating the emergency no longer exist, the police are once again subject to the warrant requirement.\textsuperscript{54} In \textit{Mincey v. Arizona},\textsuperscript{55} the Supreme Court held unconstitutional a warrantless search conducted four days after a shootout because exigent circumstances no longer existed that would have permitted a search conducted immediately after the shootout.\textsuperscript{56} Again, circumstances justifying the original grant of power limit the power to intrude.

In \textit{Chimel v. California},\textsuperscript{57} the Supreme Court confronted manipulative police conduct that was in some ways pretextual. The police searched Chimel’s home without a search warrant, on the theory of a

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\textsuperscript{50} For example, in a pretext search the power to intrude is being used for purposes unrelated to the initial grant of power. Some scholars and courts find no objections founded in the fourth amendment when the execution of that power is limited to what would otherwise be permitted in the execution of a non-pretextual use of that power. See infra text accompanying notes 67-70.

\textsuperscript{51} See Berger v. New York, 388 U.S. 41, 55-56 (1967); Stanford v. Texas, 379 U.S. 476, 481 (1965). The specificity requirement originates in the particularity requirement of the fourth amendment, see supra note 1 (text of fourth amendment), which in turn springs from the colonial opposition to the use of general warrants. See supra text accompanying notes 14-27.


\textsuperscript{55} 437 U.S. 385 (1978).

\textsuperscript{56} See id. at 392-93.

\textsuperscript{57} 395 U.S. 752 (1969).
search incident to arrest, after having arrested him pursuant to an arrest warrant.\textsuperscript{66} Noting that the fourth amendment "is designed to prevent, not simply to redress, unlawful police action,"\textsuperscript{59} the Court held that police may not manipulate\textsuperscript{68} the power to arrest in order to make use of the power to search incident to arrest.

Several fourth amendment doctrines thus limit searches to the extent justified by the initial intrusion.\textsuperscript{61} These doctrines followed from the colonial opposition to the abuse of the search power in the general writs of assistance. A pretext search is similar in that it is a use of power beyond its intended scope.\textsuperscript{62}

II. THE PRETEXT ISSUE

The following hypothetical case frames the issues raised in an analysis of pretextual searches:

Coach Chomsky, the notorious ruffian from the small town of Brownacre, was convicted below for armed robbery. The sole issue on appeal regards the police conduct in arresting Chomsky on the grounds of an old warrant for failure to appear in traffic court when he did not pay several parking tickets. Daniel and Larissa’s Radically Obscure Bookstore was robbed on December 23, 1986 while the owners were on vacation. The police received a tip through the local Crime Stoppers organization that Chomsky had robbed the bookstore. Although the Crime Stoppers believed the informant to be reliable, the police did not contend at the time of trial and do not argue on appeal that the tip provided probable cause. Detective Rocky Investigator, in a departure from routine

\textsuperscript{58} See id. at 753-54. Absent exigent circumstances, an arrest warrant is required to make an arrest at the home of an arrestee. See Payton v. New York, 445 U.S. 573, 590 (1980).

\textsuperscript{59} Chimel, 395 U.S. at 766 n.12.

\textsuperscript{60} The Court noted the potential for manipulative police tactics that would give "law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere." Id. at 767. Here, the police conduct was manipulative because the police chose not to seek a search warrant, though the fact that an arrest warrant was issued showed that there was an opportunity to obtain a search warrant.

\textsuperscript{61} Warrantless searches may sometimes be allowed despite the absence of circumstances that historically first justified the suspension of the warrant requirement. In Carroll v. United States, 267 U.S. 132 (1925), the Court first permitted the warrantless search of an automobile because of the inherent mobility of the automobile. See id. at 153. Since Carroll, the Court has allowed the warrantless search of an automobile even when the police had immobilized the car. See Chambers v. Maroney, 399 U.S. 42, 51-52 (1970); supra note 38.

\textsuperscript{62} See infra text accompanying notes 127-33.
police procedure, unearthed an outstanding traffic court warrant, which the traffic court verified as remaining valid. On cross-examination at the suppression hearing, Detective Investigator admitted that he knew that Chomsky worked as a basketball coach at a local private school. Yet Detective Investigator waited at the police station until about 6:00 p.m. before driving to Chomsky’s home, where he arrested Chomsky. The testimony is conflicting as to what then occurred. Detective Investigator testified that while arresting Chomsky in the living room, he saw a shotgun next to the television that matched the description of the gun used to shoot the lock on the door of the bookstore, and seized the gun. Chomsky testified, however, that the gun lay hidden between the mattress and boxspring of his bed on the second floor, and that Detective Investigator discovered the gun in a thorough search. Chomsky’s current girlfriend, Big Amy, testified to substantially the same facts as Chomsky. Further, on cross-examination, Detective Investigator conceded that his sole interest in enforcing the traffic warrant was his hope of discovering evidence in plain view. The trial court, per Judge Brown, made no finding of fact; instead, the judge ruled that the gun was constitutionally seized because the traffic warrant was valid, and that therefore Detective Investigator had legitimately entered the premises.63

Arguably, construing the fourth amendment to permit pretextual searches emasculates the personal rights safeguarded by the Constitution. On the other hand, it is plausible that if Detective Investigator was in the house constitutionally under the traffic court warrant, whatever evidence he found in plain view is constitutionally admissible against Chomsky. In recent years, the balance between the individual’s right to be free from unreasonable searches or seizures and the ability of the police to investigate those suspected of committing crimes has shifted toward the latter.64 Resolving the constitutionality of pretextual


arrests threatens to open the next great inroad into the protections of the fourth amendment. Perhaps because they fail to see this threat, courts and scholars addressing the pretext issue have not presented satisfactory solutions.

Initially, it is worth recognizing the three variables involved in an analysis of pretextual police conduct: the objective facts, the officer's subjective belief about the legal significance of the facts, and whether the officer relies on a fabricated or "legal" pretext. The objective facts are those actually arousing the officer's interest. The officer's subjective belief refers to whether the officer believed the objective facts provided the requisite probable cause or reasonable suspicion. Pretextual conduct generally occurs when the officer believes the facts did not provide such cause or suspicion. Otherwise, the officer would have no need to resort to the pretext. Finally, an officer may rely on either a fabricated or

The expectation of privacy standard for determining whether a search has occurred has also been weakened both internally and by the inroads of the risk analysis. Compare Katz v. United States, 389 U.S. 347, 351-53 (1967) (holding that unauthorized electronic recording of defendant's telephone calls to be a violation of fourth amendment rights despite the lack of a physical intrusion because an individual's expectation of privacy is protected) with California v. Ciraolo, 476 U.S. 207, 212-15 (1986) (search warrant obtained on basis of aerial observation of fenced-in marijuana plants did not violate defendant's reasonable expectation of privacy) and United States v. White, 401 U.S. 745, 752-53 (1971) (electronic surveillance of defendant's conversations with government informant does not violate defendant's expectation of privacy because "one contemplating illegal activities must realize that his companions may be reporting to the police"). As recently as this term, the Court narrowly upheld an aerial helicopter viewing from as close as 400 feet above a residential backyard. See Florida v. Riley, 109 S.Ct. 693 (1989). In United States v. Jacobsen, 466 U.S. 109, 119-22 (1984), the Court held that no legitimate expectation of privacy prevented a federal agent from examining and testing a damaged package which employees of a private freight carrier reported as containing white powder. Even the requirements for Terry stops, which deviate from the general warrant on probable cause rule, see supra note 42, have shown signs of withering. See Michigan v. Long, 463 U.S. 1032, 1047-52 (1984) (finding it reasonable to perform a protective search of a car even though the suspect was not in the car); Pennsylvania v. Mimms, 434 U.S. 106, 108-11 (1977) (per curiam) (permitting officer to order driver out of car in absence of particularized fear of dangerousness). Consistent with this recasting of constitutional protections is the erection of higher and more substantial barriers to civil suits arising from police misconduct. See Anderson v. Creighton, 107 S. Ct. 3034, 3039-40 (1987) (no liability when a reasonable officer could have believed that warrantless search was lawful).

Recent mandatory seat belt laws provide the most accessible vehicle; police officers will always be able to claim a stop was made because the occupants of a car were not wearing seat belts. See United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988) (instructing district court to apply reasonableness test to determine if stop allegedly for purpose of enforcing seat belt law was pretextual). In Causey, 834 F.2d 1179, Judge Higginbotham articulated the fear that "with the storage and retrieval capability of today's computers, warrants may function in a manner similar to the old general writs of assistance." Id. at 1186 (Higginbotham, J., specially concurring). As anyone who has been stopped for a traffic violation knows, police officers routinely run computer checks for such information. See, e.g., Warren v. City of Lincoln, 816 F.2d 1254, 1255 (8th Cir. 1987) (computer check led to pretextual arrest for traffic violation).
"legal" pretext. A fabricated pretext is a purely fictional basis for the police intrusion. A "legal" pretext, typically an outstanding traffic warrant, is a genuine basis for the intrusion. This Comment argues that all pretextual conduct is unconstitutional, regardless of whether the facts provided probable cause.

A. The Courts and Pretexts: Objective Tests and Recharacterizations

The broad discretion and nebulous standards governing trial courts in this area frustrate appellate review and permit the courts to avoid confronting the difficult constitutional issues. In some cases, courts determine that the pretext issue is simply not implicated. Other

66 See Rudovsky, The Criminal Justice System and the Role of the Police, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 244-47 (D. Kairys ed. 1982). Distrust of the factfinding process underlies these concerns since, typically, questionable police conduct becomes a swearing contest. Recent disclosures in cases in Philadelphia and Boston have revealed what may be a pattern of police fabricating the existence and reliability of informants whose information provides the basis for search warrants. See Gold, Dead Officer, Dropped Charges: A Scandal in Boston, N.Y. Times, March 20, 1989, at A12 (noting that although the "'whole system depends for its integrity on the honesty of the police officer,'" and despite the "ease with which a magistrate will grant a warrant," the information with which defense lawyers can question the process of obtaining warrants emerges only in rare instances (quoting Andrew Good, co-chairman of the Massachusetts Association of Criminal Defense Lawyers)); Rudovsky, Bar Testimony of Jailhouse Informants, Philadelphia Inquirer, March 18, 1989, at A9, col. 2 (in federal prosecution of Philadelphia narcotics squad, testimony emerged showing "that police officers in this elite narcotics unit systematically fabricated requests for hundreds of search warrants by falsely alleging that 'reliable informants' had told them that drugs or other contraband would be found at various locations. . . . [One officer] testified that in 15 years not one of his warrants was invalidated"). In some instances, however, allegations of police misconduct are supported with powerful evidence resulting from the "democratization" of video cameras. As a result, some police are now warned: "In this day and age, everybody and his brother has a mini-cam. Your actions are being recorded. Be careful. Play it cool." Hays, Home Videos Turn Lenses On the Police, N.Y. Times, Aug. 15, 1988, at B1, col. 2 (quoting Assistant Chief Thomas P. Walsh of Patrol Borough Manhattan South).

67 See, e.g., United States v. Young, 825 F.2d 60, 61 (5th Cir. 1987) (upholding inventory search as non-pretextual even though vehicle was not subsequently impounded), cert. denied, 108 S. Ct. 1483 (1988); United States v. Corral, 823 F.2d 1389, 1392 (10th Cir. 1987) (allowing evidence obtained from roadblock because roadblock was not pretextual), cert. denied, 108 S. Ct. 2820 (1988); United States v. Kimberlin, 805 F.2d 210, 229 (7th Cir. 1986) (upholding trial court's factual finding that search based on nontrivial misdemeanor was not pretextual), cert. denied, 107 S. Ct. 3270 (1987); United States v. Ecchegoyen, 799 F.2d 1271, 1278-79 (9th Cir. 1986) (upholding finding that warrantless search was justified by exigencies of fire hazard and not based on pretext even when police waited several hours to conduct search); United States v. Troise, 796 F.2d 310, 312 (9th Cir. 1986) (rejecting pretext claim for warrantless search of boat pursuant to Coast Guard license and safety inspection); United States v. O'Bryant, 775 F.2d 1528, 1534 (11th Cir. 1985) (holding search of abandoned briefcase not to be pretextual but a legitimate attempt to determine ownership); United States v. Diaz-Albertini, 772 F.2d 654, 658 (10th Cir. 1985) (upholding
courts avoid the issue by holding that the police had no basis for initiating the confrontation. Alternatively, trial courts may recognize the arrest or stop for the lesser offense as a pretext to arrest or stop for the greater offense, and hold that the requisite probable cause or reasonable suspicion was lacking. In relatively few cases do courts exclude evidence solely because it was obtained in a pretextual search.

In many cases, however, courts which could confront the pretext issue elect not to address the constitutional issues. These courts typically uphold the admission of evidence without exploring in any detail the constitutional basis for doing so. These decisions do, however, implicitly uphold the constitutionality of the police conduct. Often courts apply objective tests to police conduct and sidestep an inquiry into the subjective motive of the police officer. For example, in United States evidence obtained from roadblock because roadblock not pretextual), cert. denied, 108 S. Ct. 82 (1987); United States v. Rabenburg, 766 F.2d 355, 356-57 (8th Cir. 1985) (upholding inventory search of lost suitcase because it was made in a legitimate attempt to protect all parties from danger and from theft accusations); United States v. Franklin, 728 F.2d 994, 997 (8th Cir. 1984) (upholding arrest for minor traffic offense as not pretextual); United States v. Dowell, 724 F.2d 599, 602-03 (7th Cir.) (rejecting claim that exigent circumstances used to justify warrantless search of hotel room were pretextual), cert. denied, 466 U.S. 906 (1984).

See, e.g., Brown v. Texas, 443 U.S. 47, 51-53 (1979) (holding that defendant's walking in neighborhood frequented by drug users did not raise reasonable suspicion required for detainment by officer); Sibron v. New York, 392 U.S. 40, 64 (1968) (finding that officer lacked reasonable suspicion to stop and frisk defendant who had been observed talking to known narcotics addicts); United States v. Thompson, 712 F.2d 1356, 1358, 1361 (11th Cir. 1983) (holding that officer lacked reasonable suspicion when he approached a car and retained defendant's license because of asserted personal interest in the type of car).

See United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987) (holding that stop for traffic violation was in reality a stop to search for drugs because the officer testified that a stop would have been made whether or not there was a traffic violation and because the officer "decided to pursue and stop Miller's car before any alleged traffic violation occurred."); State v. Blair, 691 S.W.2d 259, 263-64 (Mo. 1985) (en banc) (fingerprinting of defendant for a parking violation in order to match prints with those found on murder weapon violated fourth amendment, so evidence must be suppressed), cert. dismissed, 480 U.S. 698 (1987). It is virtually impossible to estimate how prevalent such practices might be.

See, e.g., United States v. Bonitz, 826 F.2d 954, 957-58 (10th Cir. 1987) (reversing district court determination and suppressing evidence seized in warrantless search when, by allowing parties to remain in a house, police revealed the pretextual nature of claim that bomb in house threatened neighborhood); Miller, 821 F.2d at 549 (holding that stop of a car that was followed because it fit the drug courier profile and then stopped for a minor traffic violation was pretextual and invalid); United States v. Ladson, 774 F.2d 436, 439-40 (11th Cir. 1985) (rejecting as pretextual the government's claim of landlord's prerogative to enter a seized house, and thus upholding the exclusion of evidence obtained in a warrantless search).

See, e.g., United States v. Johnson, 815 F.2d 309, 316 (5th Cir. 1987) (upholding stop as not pretextual when reasonable officer would have stopped defendant for outstanding traffic warrant absent illegal motive), cert. denied, 108 S. Ct. 1032 (1988); Wilson v. Attaway, 757 F.2d 1227, 1236 (11th Cir. 1985) (upholding arrest even
a divided panel of the Third Circuit held that where a stop was objectively reasonable, that the police relied on a fabricated pretext did not taint the stop.\footnote{72}{811 F.2d 210 (3d Cir.), cert. denied, 108 S. Ct. 110 (1987).}

In \textit{United States v. Smith},\footnote{74}{799 F.2d 704 (11th Cir. 1986).} the district court found that the officer had not stopped the car for the alleged traffic violation, but nonetheless held the stop valid for suspicion of narcotics. The court relied on the fact that the car fit the drug courier profile.\footnote{76}{Id. at 706-07.} On appeal, the government abandoned the drug courier rationale and argued that the stop was valid on the grounds of the "weaving" that the officer observed.\footnote{78}{Id. at 707.} The Eleventh Circuit held that a search was unreasonable under an objective test, and articulated the standard as "whether a reasonable officer \textit{would} have made the seizure in the absence of illegitimate motivation."\footnote{77}{Id. at 708.} The court rejected the "\textit{could have}" standard urged by the government,\footnote{79}{See id. at 709-11.} and noted that "[i]f officers were permitted to conduct \textit{Terry}-stops based on what conceivably \textit{could} give rise to reasonable suspicion of minor violations, the necessary connection between a seizure's justification and its scope would inevitably unravel."\footnote{77}{Id. at 708.}

Courts disagree on the elements of the proper objective standard. In \textit{United States v. Cruz},\footnote{80}{581 F.2d 535 (5th Cir. 1978) (en banc).} an off-duty police officer pulled over a car, allegedly to issue a warning concerning an illegal U-turn.\footnote{81}{See Cruz, 581 F.2d at 539-40.} He discov-
ered the car held illegal aliens. The Fifth Circuit, sitting en banc, concluded that the alleged traffic violation simply masked the officer's subjective belief that the car was likely to hold illegal aliens. The court found the officer lacked probable cause to check for illegal aliens and overturned the stop. With little guidance regarding the standards applied, the court essentially recharacterized the stop as an illegal search for aliens without probable cause.

In United States v. Causey, the Fifth Circuit rejected the Cruz approach and upheld the police use of a valid traffic warrant to arrest and question a suspect in an armed robbery, although the officers lacked probable cause to arrest for the armed robbery. Rather than recharacterizing the arrest as an arrest for armed robbery, and therefore illegal in the absence of probable cause, the Fifth Circuit upheld the arrest because "the police who arrested Causey were empowered to do so by a valid warrant and . . . they took no action that they were not legally authorized to take." Unfortunately, the Fifth Circuit failed to support this conclusory assertion with legal analysis, and simply overlooked the critical constitutional issue.

In summary, the courts of appeals have not adopted clear or consistent approaches to the pretext issue. At times, courts recharacterize the search or seizure according to the subjective intent of the officer, as in Cruz. In other instances, courts simply ignore the subjective intent, and focus on the objective facts of the fourth amendment predicate, as in Hawkins or Causey, though the Third and Fifth Circuits do not follow the same objective standard. In still other instances, courts attempt to decide whether a reasonable officer would have taken the same action in the absence of an illegal motive, as the Eleventh Circuit did in

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82 See id. at 540.
83 See id. at 541-42. This case is particularly striking because the en banc court overturned as clearly erroneous the district court finding that the stop was for valid traffic purposes, a finding that the Fifth Circuit panel decision had upheld:

However credible the officer may have appeared to be when he testified, our experience as human beings, as lawyers, and judges, prevents our being gullible enough to think that an untrained, part-time deputy sheriff, while only technically on duty because he was en route to get a radio installed in his own pick-up truck, went out of his way to turn around, follow a motorist for a mile, and then stop him merely to proffer the advice, "You must have made a U-turn a mile or so back there, and I want to warn you that you must not do it again." We are left with the firm conviction that . . . [the officer] was hunting for illegal aliens. . . .

Id. at 541-42.
84 See id.
85 834 F.2d 1179 (5th Cir. 1987) (en banc), aff'd, 835 F.2d 1527 (5th Cir. 1988).
86 Id. at 1180-81.
Several possibilities explain why there are many approaches to the pretext problem. Most obvious is that the Supreme Court has not squarely faced the issue. In addition, the pretext issue raises questions that suggest there are limits on how police may fight crime. Finally, general confusion in the substantive law and its underlying policies lead to such a variety of analyses.

1. The Use Exclusion Rule

Exclusion of use of the evidence provides the leading solution to the pretext problem. The Court has described the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." This narrow view permits the police to use evidence obtained in violation of the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lacks standing to assert the fourth amendment rights of third parties, as the defendant against whom such evidence is to be used lack
amendment rights of others. This view of the exclusionary rule regards the fourth amendment as a narrow declaration of atomistic rights. Other commentators argue vigorously that the fourth amendment extends a broader right to be free from unlawful searches and seizures. The historical origins of the fourth amendment seem to support the latter view.

The fourth amendment and the use exclusion rule support not only deterrence of unconstitutional police activity, but also severe limitations on the introduction of evidence obtained in certain circumstances which the narrower exclusionary rule would not limit. For example, the rationale behind the Terry frisk is the protection of the police officer from possible confrontations with armed and dangerous suspects. The broad use exclusion test thus would prohibit the use of any evidence that is not a weapon. Under this approach, a police officer may stop someone on the street and frisk that person. If the officer uncovers a weapon, she may disarm the person. However, if the officer finds drugs, the drugs may not be used as evidence.

A broad use exclusion rule benefits the police by allowing them to protect themselves. Those who object to the frisk for weapons do so not only because they question the danger faced by police officers in several situations, but also, and more importantly, because they perceive a great potential for abuse. The latter concern is especially pressing in the pretext area. Typically, the abusive frisk for weapons occurs when the police officer confronts someone whom the officer suspects of carrying drugs; lacking probable cause for a search, the police officer may frisk the suspect even in the absence of any genuine subjective fear. The Court already has held that an improper motive alone will not make unconstitutional conduct that is otherwise constitutional. The evidentiary difficulties of determining subjective intent, however, argue against adjudication of fourth amendment doctrine on such a basis.

92 See, e.g., Amsterdam, supra note 14, at 432 (criticizing the Court for solely focusing upon an "atomistic" view of the fourth amendment, thereby not recognizing its role in keeping citizens "collectively secure" against unreasonable searches and seizures); Schock & Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 MINN. L. REV. 251, 302-07 (1974) (arguing that Justice Day's fourth amendment interpretation in Weeks v. United States, 232 U.S. 383, 391-92 (1914), compels the conclusion of a personal constitutional right to exclusion).
93 See supra text accompanying notes 14-27.
94 See Terry v. Ohio, 392 U.S. 1, 23 (1968).
95 See Amsterdam, supra note 14, at 437 (noting that frisks may become a motive "to stop and question persons whom the officer [otherwise] would not stop at all").
96 See, e.g., id. at 436 (noting that the stop-and-frisk power "may be—and, indeed, very frequently is—abused by its employment as an investigative tool").
Investigative searches made absent an objective threat to the officer are fundamentally unsound. The constitutional basis for the search arises from the heavy weight of the state's interest in protecting its police officers when balanced against the relatively small intrusion on personal privacy. The balance of the competing interests of personal privacy and police safety, however, does not favor searches when made without a threat to the police officer's safety. On the other hand, to permit the police to conduct searches only when there is a certain high level of danger may not be the proper solution. It sends the wrong message to police officers who constantly confront situations that may become dangerous without warning. It is impractical to expect judicial fiat to define what elements of a police-suspect confrontation threaten the officer's safety and justify a limited frisk for weapons. Permitting the use of evidence found in a weapons frisk, even if a higher level of danger were required, presents an additional concern by encouraging perjury at trial. The use exclusion rule would balance the state's interest in police safety against individual fourth amendment rights by permitting the search but removing the incentive for abusive investigatory searches.

A strong argument also can be made that the fourth amendment strictly limits a search for weapons to weapons alone. By limiting the admissible evidence of such a search to weapons, the use exclusion rule more closely comports with the particularity requirement of the fourth amendment. The particularity requirement applies to a search pursuant to a warrant; in the case of a warrantless search, there is no check on the police. Imposition of greater protections, therefore, would not be unreasonable when the police can initiate a search without judicial supervision. A strict limit on what items a warrantless search may

88 See Terry, 392 U.S. at 24-26. The problem of abusive frisks and searches is also enhanced by the apparent inability or unwillingness of the Court to establish general rules. The Court's focus on fact-oriented decision making undermines the development of guidelines for the necessarily novel situations presented by the facts of each confrontation and search. See, e.g., Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyerign, 48 Ind. L.J. 329, 334 (1973) (finding the "fact style decision making" of the Court to be "an abysmal failure"); see also Comment, When Bright Lines Break Down: Limiting New York v. Belton, 136 U. PA. L. Rev. 281, 313 (1987) (criticizing the breakdown of the bright line permitting a search of an automobile when arrestees were occupants at time of arrest).

89 Cf. United States v. Hawkins, 811 F.2d 210, 215 (3d Cir.) (although recognizing the possibility that not excluding evidence from a pretextual stop might encourage police officers to fabricate causes for a stop, the court held that the "exclusionary rule was designed to deter unconstitutional conduct, not perjury"), cert. denied, 108 S. Ct. 110 (1987).

100 The particularity requirement of the fourth amendment is set out supra text accompanying note 49-52.
produce would serve as a constraint on the abuses that the warrant and particularity requirements were intended to prevent. In order to regulate police conduct and safeguard individual rights against police abuse, courts should limit the incentives motivating warrantless searches to reasons reflecting those for which a limited search is constitutionally permissible.\textsuperscript{101}

Despite its strengths, the use exclusion rule has serious weaknesses. One shortcoming is its failure to stop the search. Although it may exclude the evidence,\textsuperscript{102} it does not stop searches initiated for reasons other than to secure evidence admissible in criminal prosecutions. Other purposes may include simple harassment, or even a police officer's curiosity or desire to talk to the suspect. Clearly, the fourth amendment was intended to prevent the constitutional wrong that is the search itself.\textsuperscript{103}

2. Bad Faith and Subjective Intent Tests

Initially, it is necessary to distinguish between the tests of subjective intent and of good or bad faith. The subjective intent of the police officer is limited to what the officer sought by initiating the confrontation. Thus the subjective intent test is unconcerned with whether the police officer believed her actions to be constitutional. The good or bad faith test addresses the police officer's belief concerning the legality of the search. Whereas the subjective intent test focuses on the officer's intention as it relates to conduct, the good or bad faith dichotomy concentrates on the officer's judgment about the legality of the conduct. Under these two distinct tests, a police officer who believes that her conduct is constitutional can deliberately seek to exploit probable cause for a minor offense, in the hope of either uncovering evidence of a crime or questioning a suspect.

Professor Burkoff argues that "it is the facts upon which the officer acts that determine the constitutionality of a search."\textsuperscript{104} Therefore,

\textsuperscript{101} See Amsterdam, supra note 14, at 439 ([A] "flexible administration of the exclusionary rule is desperately needed to keep police power within the confines of their justifications.").


\textsuperscript{103} See supra text accompanying notes 57-62.

\textsuperscript{104} Burkoff, Bad Faith Searches, 57 N.Y.U. L. Rev. 70, 102 (1982) [hereinafter Burkoff, Bad Faith Searches] (emphasis omitted). In Burkoff, The Pretext Search Doctrine: Now You See It, Now You Don't, 17 U. Mich. J.L. Rev. 523, 549 (1984), Burkoff primarily attempts to distinguish as dicta Supreme Court decisions suggesting that the subjective intent of officers are to be disregarded and an objective analysis is the proper approach. Burkoff's more penetrating analysis comes in the Bad Faith Searches article.
an inquiry into the officer’s state of mind, in order to determine both
intent and good or bad faith, is necessary to ascertain on what facts the
officer relied. Burkoff posits four possible categories of police con-
duct,105 and argues that the police rely on insufficient facts in two pos-
sible situations: when the actual facts are not as the officer perceived
them, or when the facts existed but were overlooked by the officer.106 In
both situations, Burkoff concludes that the search violates the fourth
amendment. This conclusion is widely accepted.

Burkoff next argues that the fourth amendment permits a search
conducted by a police officer who relies on facts that she mistakenly
believes do not provide legal grounds for the search.107 It is difficult to
understand what Burkoff means here. He claims that the constitution-
ality of police conduct should be judged on the basis of facts actually
relied on by the officer; however, he condones a search conducted by an
officer who believes the facts to be insufficient, yet conducts the
search.108 This analysis is flawed because a police officer who conducts
a search despite a mistaken belief that there is an insufficient basis for
the search, has the same state of mind as an officer who correctly be-
lieves the facts are insufficient to justify a search. The situations differ
only in that after the searches, courts reach different conclusions.
Burkoff states that in this situation, “there is no improper police con-
duct warranting deterrence . . . . We certainly do not have any interest
in deterring law enforcement officers from doing that which is perfectly
lawful . . . .”109

Burkoff’s notion of deterrence is misguided. General deterrence110

105 See Burkoff, Bad Faith Searches, supra note 104, at 85.
106 See id. at 86-87. These two situations would fall into Burkoff’s insufficient
factual basis category.
107 See id. at 92-93.
108 See id. at 93. It is unclear what Burkoff means by “rely”; in what way does
the police officer rely on facts she believes to be insufficient? How can the officer be-
lieve her conduct to be unconstitutional and yet act in good faith? How is this at all
different from what Burkoff labels the “bad faith” search: the police officer who con-
ducts a search while aware of facts that she believes to be insufficient and on which she
does not rely. The distinction is to be found in how a court rules in a suppression
motion after the search. Yet, the meaning of that ruling to the officer about to conduct
the search, in terms of the deterrence rationale of the exclusionary rule, seems fleeting
at best. For examples of the uncertainty of the significance of the distinction, see the
Ct. 110 (1987), supra note 73, and United States v. Causey, 834 F.2d 1179 (5th Cir.
1987) (en banc), aff’d 835 F.2d 1527 (5th Cir. 1988), supra text accompanying notes
85-86.
109 Burkoff, Bad Faith Searches, supra note 104, at 93.
110 General deterrence is to be distinguished from specific deterrence, in which the
goal of the legal system is to prevent an unjust result from what is deemed after the fact
to be improper conduct. Specific deterrence also has a general deterrent effect because
the police will see that in the future, should they conduct a similar unconstitutional
must take place prior to the conduct that is to be deterred. Thus, the fourth amendment must apply at the search itself or not at all. Under Burkoff's approach, the fourth amendment provides no guidance to the officer when she must decide whether to conduct the search. Indeed, the result is the opposite of deterrence: the police officer is encouraged to conduct a search with the hope that a court later will hold the search constitutional. This notion of deterrence, that a police officer should not lose a conviction when she believed there was no probable cause but acted on facts that in fact provided probable cause, is not deterrence at all.

Much of the confusion stems from *Scott v. United States*, in which the Supreme Court held that, by itself, the fact that an officer believes that her conduct is unconstitutional is insufficient to render unconstitutional otherwise reasonable conduct. This result has a certain superficial appeal. It seems pointless to overlook evidence discovered in bad faith when that bad faith had no impact on the objective conduct of the police officer. For example, returning to the hypothetical at the beginning of Part II, it would make no difference that Detective Investigator acted in bad faith. Perhaps Investigator was merely following orders, although he believed the orders to involve unconstitutional conduct. If Investigator had refused to follow orders, some other detective, Detective Moses, who believed that the orders from his superiors were constitutional, might have made the arrest. If Moses' conduct would have been identical to Investigator's, then it should make no difference that Investigator mistakenly believed his conduct was improper. A strong counter-argument can be made, however, that if police officers can conduct searches that they mistakenly believe are unconstitutional, then the police will lose incentive to prevent searches that they correctly believe would be unconstitutional. The focus on conduct alone abandons the deterrence rationale.

Burkoff's third classification, the latent bad intent category, posits a police officer who plans to conduct an unconstitutional search, but who then uncovers and subsequently relies upon constitutional grounds search, the evidence will be ignored. General deterrence, by contrast, is exclusively prospective. General deterrence permits a court to declare that evidence obtained in a certain manner is unconstitutional and will not be permitted in the future, even while admitting it against the defendant in the case before the court.


See id. at 138. In *Scott*, the defense claimed that government agents with a legal wiretap had in bad faith failed to minimize their intrusion as required. See id. at 132. In approving the analysis of the lower court, the Court seemed to imply that bad faith alone, where the officers had in fact minimized the intrusion as much as was possible, did not invalidate the intrusion. See id. at 142. The discussion of subjective motivation was, therefore, dictum.
for the search. This search is constitutional. By contrast, Burkoff’s fourth category, the bad faith category, posits an officer who observes grounds giving rise to a constitutional search but ignores them.

On a practical level, if Burkoff’s analysis was correct, it would be easily circumvented. The police officer would testify about every fact that she observed. When asked what facts she relied on, she would simply respond that she relied on the facts she believed sufficient grounds for the search, rather than those she thought insufficient to justify a lawful search. As long as a set of facts drawn from all observed facts provides sufficient constitutional grounds, the court will allow the search. Any reliance on the wrong facts would be a mere mistake of law.

On the theoretical level, the most significant difficulties with Burkoff’s approach lie in his rigid classifications of human motivation. Burkoff assumes that people act with clear and discernible motives, but this is simply not the case. In United States v. Hawkins, police officers saw a car pull up in front of a house suspected to be a location for drug trafficking. People moved back and forth from the car to the house. Apparently believing they lacked sufficient grounds for either a stop or arrest, the police officers fabricated traffic violations that they claimed motivated the subsequent stop. Burkoff’s analysis reads Hawkins as a mistake of law case and a bad faith case at the same time. The police in bad faith fabricated a traffic violation because

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113 Burkoff, in a separate article, acknowledges this point. See Burkoff, The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine, 58 OR. L. REV. 151, 180 n.107 (1979) (“Many commentators argue that it is often impossible to overcome law enforcement officers’ averments of good faith.”) (citing Foote, Tort Remedies for Police Violations of Individual Rights, 39 MINN. L. REV. 493 (1955); Theis, “Good Faith” as a Defense to Suits for Police Deprivations of Individual Rights, 59 MINN. L. REV. 991 (1975)).


115 See id. at 212-15.

116 There are two possible readings of Hawkins. One might read Hawkins as approving a post facto justification of the search based on the facts that were available to the police officers, but on which they did not rely. This approach compromises the impartiality of the judiciary, which effectively becomes an arm of the prosecution. The message to the police is that they should conduct searches, even when they do not believe that they have constitutional grounds, in the hope that the prosecutor or the reviewing court will find a way to uphold the search. If this is the correct reading, Hawkins fundamentally misapppreends the deterrence rationale. On the other hand, one might read Hawkins as a mistake of law case. Although the police thought the drug activity did not provide probable cause, in fact there was probable cause based on the drug activity and in fact the police acted on this basis, and not on the fabricated traffic stop. While this reading might not present the same misappprehension of deterrence and the exclusionary rule, a court is in the anomalous position of disbelieving the officers’ asserted basis for the stop in order to uphold the stop. The impartiality of the judiciary is again in question. See Burkoff, Bad Faith Searches, supra note 104, at 123-24 (sug-
they knew that the driving of the car provided no basis for a stop. Burkoff’s analysis would require suppression. Yet, Burkoff might also claim the drug activity provided probable cause, and although the police mistakenly believed it did not, those were the facts relied upon for the stop. To uphold the search, Burkoff is placed in the curious position of rejecting the police officers’ asserted explanation of their subjective intent for one that he believes to be more fitting.

Burkoff also avoids the hard case, the situation in which the police officer actually has valid grounds for a search, relies on those grounds to initiate the search, but still hopes to discover evidence of some crime for which the search was not granted. In this way, Burkoff avoids cases such as United States v. Causey. His analysis would place such police conduct into the latent bad intent or bad faith categories, depending on the facts on which the officer relied. If the officer based her search on the failure to appear warrant, the search was constitutional. On the other hand, if the officer’s “sole reason for engaging in the search [was] the improper reason that first brought her” to the case, then the search was unconstitutional. Burkoff’s analysis breaks down because the police officers’ conduct in Causey fits into both categories: they acted on the warrant, but their sole reason for doing so was improper. Burkoff’s oversimplified notions of human motivation cannot incorporate these facts, which are typical of those found in pretext cases.

3. Principled Approach

In recognition of the difficulties inherent in allowing the police to conduct pretextual searches, some commentators seek to limit the power of the police to engage in activity that is likely to present the opportunity for pretextual abuses. Rather than focusing on the specific facts of a given case, this more restrictive approach seeks to evaluate the need for the police power invoked, the individual interests, and also the possibility of pretexts. After balancing these competing interests, the court

gestating that objective analysis makes the court an accomplice in constitutional violations). 818 F.2d 354 (5th Cir.), rev’d, 834 F.2d 1179 (5th Cir. 1987) (en banc), aff’d, 835 F.2d 1527 (5th Cir. 1988). For the facts of this case, see supra text accompanying notes 85-86.

118 See Burkoff, Bad Faith Searches, supra note 104, at 98-104.

119 Id. at 100.

determines whether the police power should be upheld. This analysis limits the police "authority to make stops so that this investigative technique may be used only for certain serious offenses, excluding narcotics and gambling offenses and others as to which [pretext] activity is most likely."\textsuperscript{121}

This approach aims to make the "hard choice," and thus produces a principled approach to police power. It avoids the difficulties of determining subjective motive, as well as the administrative difficulties of a case by case method.\textsuperscript{122} The hard choice scheme also establishes clear guidelines for the police. Professor Haddad asserts that this approach shifts attention to "the most important issues: the existence and scope of fourth amendment limitations."\textsuperscript{123} The hypothetical that began Part II illustrates some of the strengths and weaknesses of this approach. The hard choice approach asks whether a police officer should be permitted to investigate an armed robbery by means of enforcing a traffic court warrant. Framing the issue in this manner shifts the focus to critical broad issues of police power in society. Attention is also given to the possibility of police exploiting the power to arrest on old traffic warrants. Thus, following the hard choice approach, the police may enforce warrants for minor regulatory offenses, but only when they have made reasonable efforts to enforce the warrant before the suspect came under suspicion for the major offense.

The principled approach also presents significant difficulties. It assumes that pretextual conduct is unconstitutional in some situations without articulating any reasons why that is so.\textsuperscript{124} Even with the assumption that some searches violate the fourth amendment, the principled approach generalizes, and thus abandons, individual defendants who have been subjected to pretext searches. The inquiry into the likelihood of abuse in certain categories of police-citizen confrontations necessarily neglects specific situations in which the police officers have in fact acted in a pretextual manner. Thus, the hard choice approach might deem proper a pat-down search by a police officer who stops a suspect based on reasonable suspicion, but not when the suspect's cloth-

\textsuperscript{121} 3 W. LAFAVE, SEARCH AND SEIZURE § 9.4(f), at 140 (1978). LaFave seems to address only Terry pat-downs used to search for drugs. Certainly this is an area of great abuse, due to the lenient discretion afforded police, yet it is not the only area that poses such difficulties.

\textsuperscript{122} See Haddad, Pretexual Fourth Amendment, supra note 120, at 681.

\textsuperscript{123} Id.

\textsuperscript{124} LaFave states only that some commentators believe such conduct requires special treatment. See W. LAFAVE, supra note 121, § 9.4(f), at 137. LaFave later states, "assuming that the [pretext] problem is substantial enough to call for some Fourth Amendment remedy," the principled approach would be the most promising avenue. Id. § 9.4(f), at 140.
ing makes it impossible for the suspect to conceal a weapon. The generalizations of the so-called principled approach will lead to convictions of some individuals who are the victims of pretextual searches. For this reason alone, the hard choice approach is too harsh.

III. PRETEXTS AS AN ABUSE OF POWER

A. Particularity, Probable Cause, and Reasonable Suspicion: Pretexts as an Abuse of Power

Returning to the hypothetical that began Part II, one might ask whether Detective Investigator should use a relatively minor failure to appear warrant to uncover evidence that is in plain view of the armed robbery. If this use of minor warrants merits approval, there is no reason to deter it; if the result is unwanted, then the legal system should seek to deter it. In considering whether such a use of warrants is appropriate, one must ignore the guilt of Chomsky, the armed robber. The inquiry must focus on the moment Investigator discovered the failure to appear warrant; otherwise, a court's judgment becomes tainted with Chomsky's guilt. Allowing the police to use the minor warrant for what turns out to be a successful search overlooks that, absent both the failure to appear warrant and the subsequent discovery of evidence in Chomsky's home, the legal system considers the information about Chomsky insufficiently certain to justify the issuance of a search warrant. On the other hand, the legal system approves the warrant for the failure to appear; it is certain that Chomsky failed to appear in traffic court. The intrusion resulting from service of the failure to appear warrant would not be troubling if it were served independently of a desire to investigate the greater crime. This would be the case, for example, if a municipality decided to get tough on scofflaws with unpaid traffic violations in order to fight a budget deficit. Use of traffic warrants for an investigation, however, is more troubling.

125 The obvious response under the principled approach would be to prohibit protective pat-downs when the suspect's clothing prevented the possibility of a concealed weapon. Such a fact-bound analysis is exactly what the principled approach seeks to avoid.

126 See Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (stating that in order to justify a particular intrusion, a police officer must be able to point to "facts available to [him] at the moment of the seizure or search "that would warrant a man of reasonable caution in the belief" that the action taken was appropriate . . . ." (citation omitted) (emphasis added)).

127 For present purposes, assume further that the statute of limitations on the underlying traffic offense has not run, as it had in United States v. Causey, 818 F.2d 354, 355 (5th Cir.), rev'd, 834 F.2d 1179 (5th Cir. 1987) (en banc), aff'd, 835 F.2d 1527 (5th Cir. 1988).
This intuitive difficulty with pretextual police conduct flows from a source deeper than the atomistic and regulatory views of the fourth amendment. The unease comes when one views the fourth amendment as an integral part of the Constitution's careful distribution of power between the state and the individual. The feeling that there is something unjust about using the traffic warrant for an investigation of armed robbery stems from the notion that the power delegated by the traffic court is being abused. It is analogous to the situation faced by the eighteenth century English and colonists when the power to search for evidence of a certain crime was used in a manner expanding the search beyond its legitimate scope. One senses the same type of moral outrage in several legal contexts: attorney ethics, instances of selective prosecution, cases of prosecutorial vindictiveness, and general due process or equal protection claims against the state. The moral outrage arises from the abuse of the legal process. Power is being used for reasons other than those for which it was granted.

Although the legal profession's ethical standards do not govern the police officers themselves, they do regulate prosecutors who seek to introduce the evidence obtained by the officers. Significant policy concerns justify the extension of these standards to police conduct as constitutional requirements. Whereas the prosecutor presents the evidence in an adversary proceeding in which the defendant is represented by counsel, the police do not face such obstacles designed to protect the defendant. The extension of the ethical rules for the production of evidence would further the deterrence of unreasonable searches.

It is generally accepted that the prosecutor, a representative of the state, must meet a higher ethical standard. Police are similarly agents of the state. Police conduct therefore should meet high standards.

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128 See supra text accompanying notes 8-20.
129 An analogous situation is the malicious prosecution of a suit. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-30, EC 7-10, EC 7-14, DR 2-109 (A)(1), DR 2-110 (B)(1), DR 7-102 (A)(1), DR 7-103 (1982).
130 The Supreme Court characterized the prosecutor's role as follows:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Commentators argue that unethically obtained evidence should be excluded. Arguably, "by admitting [unethically obtained] evidence, a court participates in the improper behavior and in effect condones it. This brings the court and the judicial system into disrepute." Established doctrine accepts the constitutionality of unethically obtained evidence. Yet, it is possible to argue exactly the opposite: that the conclusion that evidence was unethically obtained reflects the unconstitutionality of the search. Such a conclusion would be entirely consistent with the broad reading of the fourth amendment as one of several checks on the abuse of government power.

The notion that a delegated power should not be used for reasons other than those for which it was intended is not limited to the history of the fourth amendment. One can see the same concerns regarding fairness and the abuse of power in modern claims of selective prosecution. In the pretextual arrest for a minor offense, a defendant might claim that she is the victim of selective prosecution because such minor offenses are rarely prosecuted. Although generally a defendant has no right to have the prosecutor's decision to go forth with a case re-

131 See J. Rawls, A Theory of Justice 11-17 (1971) (defining justice as fairness). The need for a high level of police conduct can be seen in the pretext context in cases such as Causey, 818 F.2d at 356, in which a suspect arrested on a minor charge but confused or misled as to the grounds for the arrest may think that the police have more information—enough to satisfy probable cause requirements—than in fact they do. On the basis of that mistaken conclusion, a suspect may confess before consulting an attorney in the hope of facing a lesser charge or, perhaps, in the hope that the prosecution will move for a lesser sentence. Or, as was the case with Causey, such a suspect threatened with a state recidivist statute might plead guilty to a federal crime to avoid harsher state law penalties.

132 See, e.g., Freedman, The Professional Responsibility of the Prosecuting Attorney, 55 Geo. L.J. 1030, 1034-35 (1967). Freedman argues that prosecution for reasons unrelated to the commission of the particular crime for which the defendant is being prosecuted is unethical and undesirable. Although the defendant in fact may be guilty of the crimes charged, there are few individuals who lead unblemished lives and to allow such searches would be "to justify making virtually every citizen the potential victim of arbitrary [prosecutorial] discretion." Id. Other commentators counter that preventing prosecution of those suspected of more serious offenses for minor offenses would tend to protect "gangsters and racketeers . . . who could always complain that they had committed a more serious offense than that with which they were charged." See Braun, Ethics in Criminal Cases: A Response, 55 Geo. L.J. 1048, 1056-7 (1967). This argument assumes that a large number of persons subjected to pretextual police conduct are guilty of the underlying major offense that led the police to enforce the minor crime. This contention ironically assumes that these defendants are guilty of the major offense despite the inability of the state to make out even a case for probable cause; little pause is given for the presumption of innocence.


134 It would not be necessary for the defendant to be prosecuted for the minor offense. Often a defendant arrested on grounds of a minor offense is prosecuted solely for the major offense, when the search uncovers evidence of the major offense.
viewed, when "the charge brought is unusual, either because other known violators have not been prosecuted or because the violated statute is rarely enforced, a defendant may seek to have the prosecutor's exercise of charging discretion closely examined." Selective prosecution claims attack not the merits of the prosecutor's case, but attack the prosecutor's motive in enforcing the law as impermissible under either the equal protection, due process, or other clauses of the Constitution. In Wayte v. United States, the Supreme Court noted that to make out a claim for selective prosecution the defendant must show that the government's decision to prosecute was "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification'... including the exercise of protected statutory and constitutional rights." The courts of appeals generally require that a defendant produce some evidence to support allegations of impermissible motive in selecting the defendant in order to make out a prima facie case.

Under an equal protection approach to selective prosecution claims, pretext cases are prosecutions of an impermissible class of

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136 See Kreimer, supra note 32, at 852-54 (discussing practice of releasing section 1983 claims in return for the prosecution dropping charges).
139 See, e.g., United States v. Bassford, 812 F.2d 16, 19 (1st Cir.) (to make out prima facie case defendant must show (1) others similarly situated were not prosecuted, and (2) government's discriminatory selection was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights), cert. denied, 481 U.S. 1022 (1987); United States v. Wilson, 806 F.2d 171, 176 (8th Cir. 1986) (requiring showing that government action based on impermissible motive), vacated, 815 F.2d 52 (8th Cir. 1987); United States v. Jennings, 724 F.2d 436, 445 (5th Cir.) (allegation of race selection without supporting facts insufficient to make out prima facie case), cert. denied, 467 U.S. 1227 (1984); Raheja v. Commissioner, 725 F.2d 64, 67 (7th Cir. 1984) (upholding random selection for audit by computer); Attorney General of United States v. Irish People, Inc., 684 F.2d 928, 932 (D.C. Cir. 1982) (requiring a colorable showing of illicit motive), cert. denied sub nom. Irish People, Inc. v. Smith, 459 U.S. 1172 (1983); Hatheway v. Secretary of Army, 641 F.2d 1376, 1381 (9th Cir.) (upholding decision to prosecute serviceman for homosexual sodomy when prosecution policy was not to prosecute heterosexual sodomy), cert. denied sub nom. Hatheway v. Marsh, 454 U.S. 864 (1981); United States v. Diggs, 613 F.2d 988, 1003 (D.C. Cir. 1979) (defendant must show selection deliberately based on unjustifiable standard), cert. denied, 446 U.S. 982 (1980).
140 See Yick Wo v. Hopkins, 118 U.S. 356 (1886) (stating that an ordinance which leaves to officials unfettered discretion to apply regulation discriminatorily violates equal protection). See generally Johnson, Race and the Decision to Detain a Suspect, 93 Yale L.J. 214, 215 (1983) (arguing that race is often used to "tip the scales from not-quite-probable cause to probable cause" and that this violates the fourteenth
people: those suspected, not convicted, of crimes and who have constructively asserted constitutional claims\textsuperscript{141} to be free from unreasonable searches. The constructive assertion argument is weakened because the government does not in fact prosecute all persons suspected of committing more serious crimes. The police do not always enforce traffic violations. The selective prosecution question is whether the police genuinely suspect the defendant of having committed a minor crime. The selective prosecution argument is that by failing previously to prosecute a suspect for a minor crime, the police have exhibited a lack of genuine suspicion. A later investigation of that same minor crime when the police suddenly suspect the defendant of a major crime suggests a pretextual selectivity of prosecution. This would invite an inquiry either into the subjective motive of the police or into objective indicia of what made the police aware of the minor offense. A court might consider when the police last attempted to investigate the minor offense,\textsuperscript{142} whether such an investigation varies from normal police practice, and so forth. Also, the court might seek to balance the state's interest in enforcing the minor offense and the major offense in determining whether the state acted impermissibly. Thus, a court might impose different presumptions concerning the selective prosecution claim. For example, when a felony suspect is also charged with a lesser included offense, there would be no presumption of selective prosecution. But when a former felony suspect is suddenly arrested for an unrelated minor misdemeanor that occurred years ago, or even a regulatory offense, the court might shift the burden of proof on the selective prosecution claim to the prosecutor.\textsuperscript{143}143

\textsuperscript{141} Usually the suspect is not presented with the opportunity to oppose the probable cause presentation before the indictment is issued. The situation, however, is analogous to those in which a defendant asserts a constitutional claim because one would expect the defendant, especially the defendant who moves for suppression of the evidence, to have made such claims at the probable cause hearing were it procedurally or factually possible.

\textsuperscript{142} Usually in the pretext search or seizure context, the minor offense has gone unenforced for some time, and the only intervening event explaining the renewed interest in the minor offense is the newfound suspicion concerning the major offense. The decision to prosecute closely parallels the vindictiveness claims asserted against prosecutors who seek greater sentences for defendants who have successfully asserted constitutional claims that require new trials. See, e.g., \textit{North Carolina v. Pearce}, 395 U.S. 711, 723-726 (1969) ("Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.").

\textsuperscript{143} This sliding scale of presumptions would avoid allowing the Al Capones of the world to escape prosecution by claiming selective prosecution because of the state's substantial interest in enforcing the tax laws.
A selective prosecution claim on due process grounds, on the other hand, is stronger. Due process requires that vindictiveness play no role in the prosecution of a defendant who has successfully sought the vindication of a constitutional right.\textsuperscript{144} As a practical matter, the standard of prosecutorial conduct is higher in the post-trial setting,\textsuperscript{145} after the initial conviction has been overturned, than in the pretrial context,\textsuperscript{146} typically plea bargaining. Conceptually, the standard is in fact identical: whether the prosecutor's conduct "pose[s] a realistic likelihood of 'vindictiveness.'"\textsuperscript{147} The likelihood of vindictiveness is slight in the give-and-take of plea negotiations, so long as the defendant is free to accept or reject the bargain.\textsuperscript{148} On the other hand, the Court has recognized the institutional pressures that might motivate a vindictive prosecution in the complete retrial setting.\textsuperscript{149}

The enforcement of a minor offense in a pretextual manner closely resembles the situation in which the likelihood of vindictiveness is great. Unlike plea bargaining, the defendant in this situation is not free to accept or refuse the prosecutor's deal. In many pretextual situations, the defendant is unaware until she is stopped that the police even suspect her of any illegality. This is especially true of the situation in which the police observe both alleged offenses within a few minutes and make an arrest without a warrant. Further, the pretextual enforcement resembles the post-trial situation because, in effect, the police officer has either unsuccessfully sought a warrant for the major offense or has determined that it would be futile to try establishing probable cause for the major offense. Thus, a pretextual search or seizure should be construed as a situation in which the constitutional right of the suspect poses a barrier to police efforts to investigate potential crime. To arrest the suspect for a minor crime in which the police were previously uninterested is to punish the suspect for having fourth amendment rights to

\textsuperscript{144} See, e.g., United States v. Goodwin, 457 U.S. 368, 372 (1982) ("To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978))); cf. North Carolina v. Pearce, 395 U.S. at 723-26 (vindictiveness can play no part in judge's sentencing after new trial when defendant had successfully attacked his first conviction).

\textsuperscript{145} See, e.g., Blackledge v. Perry, 417 U.S. 21, 27-28 (1974) (a prosecutor has a considerable stake in discouraging convicted misdemeanants from seeking a new trial, therefore she cannot substitute a new felony charge if defendant exercises her right at a trial de novo because a "realistic likelihood of 'vindictiveness'" exists which might deter the defendant).

\textsuperscript{146} See Bordenkircher, 434 U.S. at 362.

\textsuperscript{147} Blackledge, 417 U.S. at 27.

\textsuperscript{148} See Goodwin, 457 U.S. at 378.

\textsuperscript{149} See id. at 376-77.
protection from unreasonable government searches and seizures.\textsuperscript{150}

A constitutional analysis of such pretextual conduct must consider the police conduct from two perspectives: the use of the minor offense for which there is probable cause or reasonable suspicion, and also as a technique for investigating the major offense. For the conduct to be constitutional, the fourth amendment must approve of both facets of the police conduct: the use of the traffic warrant for traffic purposes and the use of a traffic warrant in the armed robbery investigation. If the fourth amendment prohibits either aspect of the police conduct, then the pretext is unconstitutional.

The use of a traffic warrant to investigate a major crime is unconstitutional because the power to intrude is restricted to the investigation of the minor offense. Just as the fourth amendment limits the power given police to search to the minimum extent necessary, the use of probable cause for minor offenses may not be abused for purposes unrelated to the offense.\textsuperscript{181} The historical purpose of the fourth amendment was to prevent the use of overreaching general warrants and to limit the scope of searches to what is reasonably necessary to discover evidence of the crime that justified the warrant.\textsuperscript{182} Any search outside of that limited scope, constitutionally embodied in the particularity clause,\textsuperscript{183} runs counter to the central historical purpose of the fourth amendment of seeking to restrain police abuses of the power to search.

It is a broad argument that any pretextual use of probable cause violates the particularity requirement of the fourth amendment because such a use would be an abuse of the search power. In State v. Blair,\textsuperscript{164} the police suspected Blair of murder, but did not have probable cause to
arrest her. The police arrested her ostensibly for a parking violation, and obtained copies of her palm prints which they matched against the prints taken from the gun used in the murder.155 The trial court rested its decision that the arrest was unlawful on a characterization of the arrest as one for the murder, and therefore without probable cause.156 An alternative ground for this decision could have been that the fingerprinting exceeded the scope of the traffic warrant. In Blair, the police conceded that under normal circumstances, the police obtain only one fingerprint, yet in this case the police had obtained a complete set of fingerprints.157 The court could have held that obtaining fingerprints from a suspect who is in custody for a crime for which the fingerprints have no relevance is an over-broad search violating the fourth amendment’s particularity requirement. Indeed, the potential abuse of the search power offers the best explanation for the particularity requirement.

The rationale underlying the particularity requirement would be entirely clear if the police had strip searched Blair under the authority of the traffic warrant. Such police conduct would be patently abusive of the protections of the fourth amendment.158 Yet one must question how far this particularity requirement extends. When an excessive search produces evidence that the police sought from the beginning, there are several methods for concluding that the fourth amendment has been violated. One can infer from the excessive scope of the search for evidence of the minor offense, evidence A, that the search was intended from the start to uncover evidence of the offense for which there was not probable cause, evidence B. The search for A is recharacterized as a search for B, and deemed unconstitutional. Alternatively, it is possible to conclude that because the search was excessive in scope, it violated the particularity requirement, and as the fruit of an abuse of the fourth amendment power to search, the evidence must be excluded. This evaluation of the police conduct closely parallels the historical fear of over-intrusive searches authorized by general warrants.

The particularity requirement presents two types of hard cases. One is the situation in which the police, hoping to locate B in the course of the search for A, conduct a search for A that is strictly limited in scope to searching for A. During that search, the police locate B. For

155 See id. at 260.
156 See id. at 261-62.
157 See id. at 262.
158 Cf. People v. Marsh, 20 N.Y.2d 98, 102, 228 N.E.2d 783, 786, 281 N.Y.S.2d 789, 793 (1967) (reversal of conviction based on evidence obtained in search of the defendant's person after he was arrested for an outstanding traffic warrant was "dictated by the constitutional prohibition against "unreasonable searches and seizures".")
example, if in the hypothetical beginning section II of this Comment, Detective Investigator had actually seen the gun next to the television, should the evidence have been excluded? Under the particularity analysis, there would appear to have been no violation because the search was, in fact, limited to what was reasonable. Yet the particularity requirement, narrowly read, can be an ineffective safeguard. A court should exclude the evidence for several reasons. Foremost, the police conducted the search for the wrong reasons. To conclude otherwise would be to overlook that the search was conducted to find evidence for which there was no probable cause. Even if the search itself is objectively indistinguishable from a non-pretextual search that turns up the evidence, the use of police power for such a purpose violates the intent behind the particularity requirement to prevent the use of government power for reasons other than those for which the power was granted. Further, the potential for abuses that preclude effective judicial review are enormous. To impose a narrow particularity requirement, one that would permit such a search, would effectively allow the police to conduct overly intrusive searches. In court, the police could commit perjury by testifying that they conducted a limited search, when in fact the search was overly intrusive. The possibility for abuse is so great that even the limited particularity requirement should exclude the evidence as a prophylactic measure.

One must consider also the application of the particularity requirement to situations in which there is no pretext. One only need alter the facts slightly. The police, unaware of B, search for A and conduct a search that is overly intrusive with respect to A. In the course of this search, the police uncover B. Thus, Detective Investigator may have been unaware that Chomsky was wanted for the armed robbery. Although one wonders why Investigator decided to enforce such a relatively unimportant offense, inquiry into the subjective motives of the police is irrelevant if the search is objectively unreasonable.

The fourth amendment analysis from the perspective of the major offense, B, brands the police conduct as unconstitutional. Again, it is useful to consider the fourth amendment probable cause and reasonableness requirements as attempts to balance the proper exercise of police power against individual privacy rights. Viewed thus, it is clear the

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159 This situation is indistinguishable from what Burkoff labels latent bad intent, see supra text accompanying note 118, where the police act solely on the facts that provide probable cause for A as an excuse for investigating B, the major offense. Whereas Burkoff concludes that such conduct is constitutional, the abuse of power analysis of the particularity requirement reaches the opposite result because the police in fact have used the power to search for evidence of A as an excuse to uncover evidence of B.
police have used minor offenses in order to collect evidence for a crime for which the Constitution has determined the police may not conduct a search. In a pretext search, the police deliberately set out to circumvent the fourth amendment requirements.

To allow law enforcement agencies to enforce minor warrants against persons suspected of crimes, but against whom the fourth amendment bars a search or seizure would be to create a fourth amendment without integrity. The fourth amendment purports to establish barriers limiting the occasions on which the police may interfere with individual privacy. The fourth amendment flatly prohibits a search based on grounds of less than probable cause; however, police conduct pretextual searches precisely because they harbor suspicions below the level of probable cause or reasonable suspicion of criminal activity. To permit pretextual police searches abandons the rationale underlying the fourth amendment.

The benefits of such an interpretation far outweigh the costs. As with any exclusionary rule, among the costs are the non-convictions of people who have violated criminal laws. On the other side of the equation, however, one must include the social value of maintaining the rule of law and the integrity of the judicial process. As Burkoff put the integrity question, "[i]t is difficult or impossible to distinguish as a normative matter the state's own lawlessness from that of the common criminal." State lawlessness is reprehensible because the state implicitly asserts a moral entitlement to its use of force. The fourth amendment guarantees protection for all persons, both those who have committed crimes and those who have not. That these constitutional guarantees extend to all citizens demonstrates that the fourth amendment has a political goal of restraining government power even when the state has a legitimate interest in enforcing the law.

CONCLUSION

This Comment has argued that the hypothetical pretextual arrest by Detective Investigator was unconstitutional. Indeed, all pretext searches are unconstitutional. Investigator may not have acted in bad faith; that is, he may have believed that his conduct was constitutional. He did, after all, verify the warrant. Yet Investigator sought to arrest Chomsky on the traffic warrant solely because of the lack of probable cause for the armed robbery offense. An objective analysis depends on the focus. If the center of the examination is artificially limited to the

enforcement of the warrant, clearly the warrant was valid. The review more consistent with the historical aims of the fourth amendment emphasizes both the abuse of the warrant for failure to appear and the circumvention of the probable cause standard for the bank robbery investigation.

Chomsky's conviction must be vacated, however, because the traffic warrant was selectively prosecuted in violation of his due process rights. Certainly the due process concern is not de minimis when the violation can lead to substantial deprivations of liberty. Further, the use of the traffic warrant for purposes unrelated to the warrant is the very abuse of power the fourth amendment was designed to prohibit. The enormous threat to fourth amendment protections, particularly in the context of the discretion afforded police by *Terry*, is likely to grow as the law slips further away from its historical purposes.