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NOTES

CRIMINAL LAW — PRETEXTUAL ARRESTS AND ALTERNATIVES TO THE OBJECTIVE TEST

INTRODUCTION

Under the fourth amendment, every citizen has the right to be free from unreasonable searches and seizures. This right is jeopardized when law enforcement officers use a pretextual arrest as an excuse for carrying out a search that is otherwise illegal. For the purpose of this note, a pretextual arrest will be defined as a legal arrest carried out for an illegal purpose. A “classic example occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal activity.” A pretextual arrest presents a unique threat to those rights guaranteed by the fourth amendment because, as one judge observed, pretextual arrests transform a common traffic ticket into a “one-time pass” to violate the fourth amendment requirement of probable cause.

Traditionally, courts have responded to pretextual arrests by invoking the exclusionary rule. The exclusionary rule is designed to allow judges to suppress evidence from arrests that violate the

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

2. See Burkoff, Pretext Searches, 19 SEARCH AND SEIZURE L. REP. no.4 at 25 (1982); United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988) (“A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place . . . for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop.”).

3. Guzman, 864 F.2d at 1515.

4. United States v. Causey, 834 F.2d 1179, 1186 (5th Cir. 1987) (Higginbotham, J., concurring). See also United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989) (A pretextual arrest “serves as a means to circumvent the warrant requirement of the Fourth Amendment.”).
In order to determine if a given arrest is unconstitutional, the courts currently use an objective test that examines only the conduct of the arresting officers. If the officers' actions, viewed without regard for their subjective intent, are found to be unreasonable, the exclusionary rule may be applied to block admission of the evidence. Motive is not a factor in the objective test, for, as one court put it, "an objectively reasonable seizure does not violate the Constitution despite the officer's bad intent."

The objective test provides an effective method of identifying non-pretextual arrests that violate the fourth amendment. The test, however, fails to identify pretextual arrests because the test ignores the motives of the arresting officers, and, with pretextual arrests, it is the motives of the officers, not their conduct, which are illegal. The purpose of this note is to examine the weaknesses inherent in the objective test and to propose a modification of the test that addresses these weaknesses. This new test has two steps. The first preserves the current objective standard in order to address non-pretextual arrests. The second step involves a separate balancing test which weighs the benefits of admitting potentially important evidence against the costs to the integrity of the judicial system of tolerating improper law enforcement behavior.

Part I of this note traces the development of the objective test, showing how the Supreme Court originally used a subjective test in United States v. Lefkowitz and why this test was eventually replaced by the objective test in Scott v. United States. Part II focuses on a single case, United States v. Causey, which serves as an example of two different ways in which the objective test has been applied in the

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7. Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987).
8. The objective test upholds any arrest which has an objectively valid basis. By definition, a pretextual arrest is a valid arrest for an invalid reason. Therefore, by definition, all pretextual arrests will pass the objective test. See infra note 44 and accompanying text.
9. This second step is based on an alternative rationale for the exclusionary rule. The primary justification for the exclusionary rule is to deter police misconduct. Preserving the integrity of the judicial system is a secondary rationale. The first step of the proposed test is based on deterrence in order to discourage illegal conduct. The second step is based on the judicial integrity rationale and seeks to protect the legal system as a whole from the effects of police misconduct. See infra notes 177-191 and accompanying text.
12. 818 F.2d 354 (5th Cir.), rev'd, 834 F.2d 1179 (5th Cir. 1987) (en banc).
context of pretextual arrests. Part III analyzes alternative tests advanced by Professors Wayne LaFave and John Burkhoff. This note applies these alternative standards to the facts of Causey in order to measure their effectiveness in identifying pretextual arrests. Lastly, this note presents a new approach and explains why it offers an improved standard by which to test pretextual arrests.

I. DEVELOPMENT OF JUDICIAL STANDARDS FOR IDENTIFYING PRETEXTUAL ARRESTS

A. The Subjective Standard

Prior to 1978, courts generally used a subjective standard to identify pretextual arrests.13 This standard focused on police intent. A court using the subjective standard would examine the factual circumstances of a case and attempt to determine the arresting officers’ motives. If the court concluded that law enforcement officers acted with an illegal motive, the court would find the arrest pretextual and therefore illegal. The exclusionary rule would be invoked to suppress the evidence.14

The earliest example of the older subjective standard is United States v. Lefkowitz.15 While Lefkowitz did not involve a pretextual arrest as defined in this note, the Supreme Court did state that “[a]n arrest may not be used as a pretext to search for evidence,” and this statement has frequently been cited in pretextual arrest cases.16 A more detailed explanation of the Supreme Court’s pre-Scott position, however, appears in Abel v. United States.17 In Abel, the defendant claimed that the Federal Bureau of Investigation (FBI) had arranged for the Immigration Service to carry out an administrative arrest so

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15. 285 U.S. 452, 463-67 (1932). In Lefkowitz, law enforcement officers arrested the defendant under a valid warrant. The federal agents went beyond the scope of the issued warrant and carried out a general exploratory search for evidence. Id. at 458. The Court found that the search was done outside of the agents’ proper authority. Id. at 463-67. Courts have cited Lefkowitz as authority for excluding evidence obtained through a pretextual arrest. See, e.g., Blazak v. Eyman, 339 F. Supp. 40, 42-43 (D. Ariz. 1971).


that the FBI could search for evidence pertaining to a different matter. In dicta the Court stated:

The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.\(^{18}\)

In line with the Supreme Court's statements in *Lefkowitz* and *Abel*, lower courts adopted the subjective test.\(^{19}\) A specific example of the subjective test can be seen in a Ninth Circuit case, *Taglavore v. United States*.\(^{20}\)

In *Taglavore*, vice squad officers, suspecting a man of possessing marijuana,\(^{21}\) obtained warrants relating to two prior traffic violations. The officers waited until they believed that the defendant had drugs in his possession.\(^{22}\) Then, while serving the warrants, they saw the defendant put something into his mouth. The officers threw the defendant down, and one sat on his stomach while the other choked the defendant and pulled the remains of a marijuana cigarette out of his mouth.\(^{23}\)

The court held that the evidence was inadmissible. From the facts of the case, the court inferred that the police had "engaged in a deliberate scheme to evade the requirements of the Fourth Amendment."\(^{24}\) The court stated that "[w]here the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal."\(^{25}\) The court explained the reason behind its decision, saying: "Were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees. The courts must be vigilant to . . . prevent such a misuse of legal processes."\(^{26}\)

The subjective test, however, has been criticized for two reasons:

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\(^{18}\) *Abel*, 362 U.S. at 226.


\(^{20}\) 291 F.2d 262 (9th Cir. 1961).

\(^{21}\) *Id.* at 264.

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.* at 267.

\(^{25}\) *Id.* at 265.

\(^{26}\) *Id.* at 266.
first, motives are often difficult to ascertain, and second, the fourth amendment proscribes only unreasonable conduct, not unreasonable motives. Based largely on the latter reason, the Supreme Court abandoned the subjective approach in Scott v. United States.

B. The Objective Standard

In 1978, in Scott v. United States, the Supreme Court established the objective standard, which switched the primary focus from intent to conduct. While the Scott case did not involve a pretextual arrest, its holding has set the standard for determining when an arrest violates the fourth amendment.

In Scott, the Federal Bureau of Investigation obtained a warrant to tap the phone lines of suspected drug dealers. As required by the federal wiretapping statute, the warrant required the FBI “to minimize the interception of communications that are [not] otherwise subject to interception.” The agents were aware of the statute’s requirements, “but made no attempt to comply therewith,” and taped all the defendants’ telephone calls. The defendants moved to have the tapes excluded because the agents had knowingly violated the restrictions imposed by the warrant.

The Supreme Court, in a majority opinion by Justice Rehnquist, stated that the constitutionality of fourth amendment activity should be judged objectively. The Court noted that, “almost without excep-

We believe that it places an unfair burden on law enforcement authorities. Delving into the so-called ulterior motives of policemen penalizes officers who outwardly behave in a constitutionally appropriate way. . . . [A] defendant . . . may receive a windfall because the searching police officer harbored bad thoughts, despite the fact that those thoughts did not alter the external effects of the officer’s action.
Id. at 222, 463 A.2d at 327. The Bruzzese court also criticized the subjective test for being unpredictable, noting that motives are often difficult to identify and that each court may have different views of what constitutes the arresting officer’s “true” intentions. Id. at 221, 463 A.2d at 326.
30. Scott, 436 U.S. at 131.
31. Id.
32. Id. at 131-32.
33. Id. at 133. Forty percent of the calls were related to narcotics deals. Id. at 132.
34. Id.
tion," previous opinions dealing with fourth amendment violations were based on an "objective" standard. The Court observed that the courts of appeals had "generally followed these principles, first examining [the arrest] ... under a standard of objective reasonableness without regard to the underlying intent or motivation."35 Based on this interpretation of precedent, Justice Rehnquist concluded that the determination of violations of the fourth amendment "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time."36

The Court believed that the subjective test should be discarded because the intent of the arresting officers is constitutionally irrelevant. Justice Rehnquist explained that "[s]ubjective intent alone ... does not make otherwise lawful conduct illegal or unconstitutional;"37 he also wrote, "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."38 In Scott, therefore, the Court rejected the subjective test and ruled that the actions of law enforcement officers should be examined objectively because the motives of the police officers have no bearing on the constitutionality of their acts.39

Following Scott, the Supreme Court has continued to use an ob-

35. Scott, 436 U.S. at 137-38. This characterization of the holdings of Supreme Court and courts of appeals decisions is at best questionable. See Note, Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations, 63 B.U.L. REV. 223, 242-46 (1983); 1 W. LAFAVE, supra note 17, § 1.4(e), at 90-91; Burkhoff, supra note 17, at 74. Professor Burkhoff refers to the objective standard as "mere dicta." Id. Professor Burkhoff argues that the cases used by the Scott Court do not provide any support for Justice Rehnquist's statement. Id.


37. Id.

38. Id. at 138.

39. Lower courts have adhered to this rationale. See, e.g., Lester v. Chicago, 830 F.2d 706, 712 (7th Cir. 1987); United States v. Basey, 816 F.2d 980, 990-91 (5th Cir. 1987) ("As Scott plainly states, the unchallenged premises that the deputies had probable cause to and could lawfully arrest Basey ... render irrelevant any inquiry into the deputies' above-referenced alleged ulterior motivation."); People v. Anderson, 169 Ill. App. 3d 289, 297, 523 N.E.2d 1034, 1040 (1988) ("[T]he Supreme Court has repeatedly ruled that when officers do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and not subject to inquiry, and the results of their investigations are not to be suppressed."); cert. denied, 109 S. Ct. 1935 (1989); State v. Petty, 48 Wash. App. Ct. 615, 620, 740 P.2d 879, 882 (1987) ("[T]he constitutionality of the officer's action is not undermined by the officer's reasons for approaching the house. An officer's underlying intent or motivation is irrelevant to the judicial inquiry into the lawfulness of the officer's conduct.").
jective standard in ruling on the constitutionality of arrests. For example, in Maryland v. Macon, the defendant claimed that because an undercover officer purchased obscene materials with the intent to use them as evidence, the purchase was in fact a warrantless seizure. Citing Scott, the Supreme Court said that the proper test is an objective assessment of conduct, not "the officer's actual state of mind."

As a result, when called upon to decide the constitutionality of allegedly pretextual arrests, most lower courts have employed the Scott objective test. "Courts do not agree, however, on what objective elements are dispositive in determining whether a pretextual intrusion is unconstitutional." For example, the majority of courts follow the test strictly and ignore the arresting officer's motives. This note will refer to this approach as the "strict objective" standard. Other courts, however, overtly adopt the objective test, but actually use the objective facts of the arrest as a means of determining the subjective intent of the police. This alternate method, referred to in this note as

42. Id. at 470-71.
43. Id. at 470.
44. Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987); United States v. Nersesian, 824 F.2d 1294, 1316 (2d Cir.), cert. denied, 108 S. Ct. 357 (1987); United States v. Basey, 816 F.2d 980, 990-91 (5th Cir. 1987); United States v. Arza, 630 F.2d 836, 845 (1st Cir. 1980); State v. Malik, 221 N.J. Super. 114, 120, 534 A.2d 27, 29 (1987). In some instances, courts have ignored Scott and used the subjective test. In United States v. Keller, 499 F. Supp. 415 (N.D. Ill. 1980), an officer stopped a car for having only one license plate because, in the officer's words, "many times a traffic violation does lead to bigger things." Id. at 416. The Keller court, without citing Scott, rejected the contention "that ordinarily an arrest is judged by 'an objective standard rather than by inquiring into the officer's presumed motives.' " Id. at 417 (citation omitted). The Keller court refused to use the objective test because such a test would uphold all pretextual arrests. By definition, a pretextual arrest involves two different charges, the one the police are really interested in and the minor charge used as a pretext. If this minor charge is legal, a court using the objective test will find that the minor charge, no matter how trivial, satisfies the objective test.

The court stated that "the [objective test] . . . virtually eliminates the possibility of ever proving a pretextual arrest. If every arrest were judged by an objective standard and upheld if there was a valid basis for arrest, then there could never be a pretextual arrest." Id. The Keller court noted that an objective approach "rewards the officer for his subterfuge; his pretextual stop successfully uncovers other incriminating conduct or evidence and then the government is permitted to use that evidence." Id.
45. United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988).
47. United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988); United States v. Hardy, 855 F.2d 753, 756 n.4 (11th Cir. 1988), cert. denied, 109 S. Ct. 1137 (1989); United States v. Nersesian, 824 F.2d 1294, 1316-17, (2d Cir.), cert. denied, 108 S. Ct. 357 (1987);
the "modified objective" approach, appears in many ways to be the old subjective test applied within the restrictions of the language of the Scott decision. Regardless of the test used, if an arrest is determined to be unconstitutional, the exclusionary rule is invoked. The recent case of United States v. Causey demonstrates the two different ways the objective test has been applied.

II. UNITED STATES V. CAUSEY

The Fifth Circuit Court of Appeals issued two decisions in the Causey case. The first, Causey I, was a unanimous three judge panel decision. The second, Causey II, vacated Causey I following a re-hearing en banc. Causey I, without dissent, applied the modified objective standard. The Causey II majority used the strict objective standard.

The facts of Causey were undisputed. Baton Rouge police received a tip that Reginald Causey had been involved in a bank robbery. Causey fit a description given by a bank teller. Additionally, Causey had a record of prior bank robberies. The police realized that their informant's tip was insufficient to establish probable cause for an arrest, but they still wished to question Causey. The officers checked the city warrant book and found a seven-year-old default warrant for failing to appear on a misdemeanor theft charge. While the statute of limitations barring prosecution for the theft had passed, the statute of limitations on the default warrant for failing to appear had not. After a judge determined that the default warrant was still valid, the police arrested Causey, read him his Miranda rights, and took him to the station. There, they read him his rights again and questioned him.

According to Causey's testimony, the police informed him that, if he were brought up before a state court, he might face not only the


48. See, e.g., Johnson, 815 F.2d at 315 (5th Cir. 1987) (When analyzing a possible pretextual arrest, the appropriate inquiry is whether "a reasonable officer would not have made the arrest absent illegitimate motive.").

49. Note that the strict objective and modified objective tests are simply standards used to evaluate whether an arrest is unconstitutional. If found unconstitutional, the exclusionary rule may be applied. See United States v. Causey, 834 F.2d 1179, 1186-87 (5th Cir. 1987) (Rubin, J., dissenting).

50. 818 F.2d 354 (5th Cir.), rev'd, 834 F.2d 1179 (5th Cir. 1987) (en banc).
51. Id.
52. 834 F.2d 1179 (5th Cir. 1987).
53. Causey I, 818 F.2d at 355.
54. Id.
55. Id. at 356.
robbery charge, but also separate charges under the state Habitual Criminal Act. However, if he were to confess to the FBI and stand trial on federal robbery charges only, his sentence might potentially be shorter.\textsuperscript{56} Causey agreed to confess. The police called in the FBI who asked Causey whether the police had threatened or promised him anything. Causey answered that the police had not threatened him, and he confessed to the robbery.\textsuperscript{57} He was tried and convicted. Causey appealed, claiming the arrest was an illegal pretext because at trial the police testified that their only reason for arresting Causey was “to continue the investigation of the bank robbery.”\textsuperscript{58} A three-judge panel of the Fifth Circuit Court of Appeals reversed his conviction. On rehearing en banc, however, the Fifth Circuit Court of Appeals overruled and vacated the earlier panel decision.\textsuperscript{59}

A. \textit{Causey I}

In \textit{Causey I}, Judge Rubin, writing for a unanimous three judge panel, found that Causey’s arrest was a pretext and that evidence obtained as a result of it could be suppressed.\textsuperscript{60} Judge Rubin identified the issue before the court as whether a suspect’s confession is admissible when an officer arrests a suspect with a valid warrant, but with the intent of interrogating the suspect for a different crime.\textsuperscript{61}

Judge Rubin acknowledged that \textit{Scott} provided the proper standard for resolving questions of pretextual arrests.\textsuperscript{62} However, Judge Rubin found that the arrest in \textit{Causey} failed to pass the \textit{Scott} objective test because the arresting officers had no objectively valid reason to arrest Causey on the default warrant. Judge Rubin cited \textit{United States v. Basey}\textsuperscript{63} and \textit{United States v. Johnson},\textsuperscript{64} two cases in which the Fifth Circuit Court of Appeals had previously applied the \textit{Scott} test. Judge Rubin found that in both, the facts indicated that the arrests were objectively valid. For example, Judge Rubin was satisfied with the evidence that the police had acted in “good faith” in \textit{Basey}; he concluded that the law enforcement officers had acted within their “legitimate interests” in \textit{Johnson}.\textsuperscript{65} Therefore, according to Judge Rubin, the ar-

\begin{itemize}
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Id. at 357.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Causey II, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc).
  \item \textsuperscript{60} Causey I, 818 F.2d at 355.
  \item \textsuperscript{61} Id. at 358.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} 816 F.2d 980 (5th Cir. 1987).
  \item \textsuperscript{64} 815 F.2d 309 (5th Cir. 1987), cert. denied, 108 S. Ct. 1032 (1988).
  \item \textsuperscript{65} Causey I, 818 F.2d at 358. The \textit{Basey} court held that the defendant’s focus “on
rests in *Basey* and *Johnson* were not pretextual.

In contrast with *Basey* and *Johnson*, Judge Rubin found that the arrest in *Causey* must have been pretextual because there was no independent basis for the investigation absent the warrant which was issued for another charge. He noted that “the objective facts and circumstances would not have justified any officer in making the arrest.” Citing *Lefkowitz* and *Taglavore* as support, he concluded that, if the police “detain a suspect as a pretext to conduct a search for which probable cause is lacking . . . the subsequent search is unconstitutional.”

The prosecutor argued that cases such as *Lefkowitz* and *Taglavore* could be distinguished because these cases involved fourth amendment searches and not fifth amendment confessions as in *Causey*. Judge Rubin dismissed this argument as a “distinction without a difference.” Judge Rubin concluded that “[t]he degree of intrusiveness of an arrest made as a pretext to question is not less than the degree of intrusiveness of an arrest made as a pretext to search.”

Judge Rubin then examined two contradictory Fifth Circuit cases, *Amador-Gonzalez v. United States* and *United States v. Caval­lino*. In *Amador-Gonzalez*, a narcotics officer noticed the defendant acting suspiciously near a car belonging to known drug dealers. The officer followed the defendant and observed a few minor traffic violations. The police stopped the defendant, and a search uncovered her-

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66. 816 F.2d at 980, 990 (5th Cir. 1987).
67. Id. at 359.
70. *Causey I*, 818 F.2d at 359.
71. *Id.*
72. *Id.*
73. *Id.* at 360. *See* Wong Sun v. United States, 371 U.S. 471, 486 (1963) (holding that the exclusionary rule applies equally to evidence from confessions and physical evidence). *Id.* at 485-88.
74. 391 F.2d 308, 316 (5th Cir. 1968). *Amador-Gonzalez* has been relied on by other courts. *See*, e.g., *United States v. Arfa*, 630 F.2d 836, 845 n.12 (1st Cir. 1980); *United States v. Keller*, 499 F. Supp. 415, 416 (N.D. Ill. 1980).
75. 498 F.2d 1200 (5th Cir. 1974).
76. *Amador-Gonzalez*, 391 F.2d at 310.
oin. The defendant confessed to the charged drug offenses. The Amador-Gonzalez court concluded that the arrest was pretextual because the officer searched the car for drugs even though the arrest was technically for a traffic violation. Cavallino was factually similar, but reached an opposite result. In Cavallino, the police chief ordered two officers to follow a suspect and arrest him when he violated any traffic ordinance. The officers did so, and the defendant eventually confessed to an unrelated offense. The court stated that the motives of the officers were unimportant and upheld the constitutionality of the confession because the officers had an objectively valid reason for making the traffic arrest.

Judge Rubin expressed his concern that admitting evidence from pretextual searches would encourage violations of fourth amendment rights. He observed that Cavallino could be construed as suggesting that police can use any excuse to arrest a person:

Cavallino permits the police intentionally to conjure up some pretext to arrest a person and to use that arrest to conduct an interrogation that the fourth amendment would otherwise prohibit. The holding thus unintentionally encourages the development of police-state processes, whereby overzealous officers are permitted to exploit any possible violation of some misdemeanor statute in order to incarcerate citizens without regard for the individual’s freedom.

Judge Rubin found that Amador-Gonzalez furnished the correct standard because it prevented any use of evidence seized from a pretextual arrest. Concluding that Cavallino was an aberration, Judge Rubin determined that the decision of the Amador-Gonzalez court was more consistent with both Fifth Circuit and Supreme Court precedent.

Judge Rubin held that, in light of Amador-Gonzalez, the arrest of Reginald Causey was a pretext and that evidence obtained as a result of the arrest was subject to the exclusionary rule. The exclusionary rule, however, does not automatically require the suppression of all

77. Id. at 310-11.
78. Id. at 315.
79. 498 F.2d 1200, 1201-03 (5th Cir. 1974).
80. Id. at 1201-03.
81. Id.
82. United States v. Causey, 818 F.2d 354, 360 (5th Cir.), rev’d, 834 F.2d 1179 (5th Cir. 1987) (en banc).
83. Id. at 361.
84. Id. at 360-61.
illegal evidence. With confessions, the accepted procedure is to evaluate the evidence under the four point test of Brown v. Illinois to determine if the Miranda warnings attenuate the taint that results from the illegal arrest. Judge Rubin found that, in Causey, there were no intervening events that broke the causal chain from arrest to confession. Furthermore, he held that the law enforcement officers' actions were a deliberate attempt to circumvent constitutional protections and were "a 'flagrantly abusive' violation of Fourth Amendment rights." As a result, the confession was inadmissible. He concluded that "[t]he police deliberately set out to interrogate [Causey] by employing a method that violated his constitutional rights. The evidence thus obtained is as tainted as if it had been obtained by coercion, brutality, or any other unconstitutional lever."

B. Causey II: The Strict Objective Standard

The en banc circuit court in Causey II vacated the panel's decision in Causey I. The en banc court found that, objectively, the conduct of the police was not a violation of Causey's constitutional rights and that, after Scott, it was inappropriate to examine an arresting officer's intentions. Judge Gee noted that the reason for the rehearing en banc was to resolve a possible conflict between Scott and the Causey I court's holding "that conduct otherwise lawful in every respect on the part of the police is rendered unconstitutional by their irregular subjective intent alone." Judge Gee also criticized Causey I for adding a new requirement to the analysis for determining a confession's admissibility. Previously, the admission of confessions had been controlled by the constitutional voluntariness standard and the Supreme Court's Miranda requirements. In addition to these limitations, according to Judge Gee, the Causey I "panel added an additional requirement that the police who took the confessor lawfully into custody
must not have done so with improper motive."

Judge Gee's opinion stressed that the police conduct in the Causey case was lawful. It was only the intentions of the arresting officers that caused the panel court to declare the arrest illegal. Judge Gee took issue with the panel's use of authority, particularly Amador-Gonzalez. In a footnote, he pointed out that the opinion of the Amador-Gonzalez court, that Judge Rubin cited as support for his position in Causey I, was not endorsed by the full panel in Amador-Gonzalez. Additionally, according to Judge Gee, the Amador-Gonzalez majority qualified its decision saying:

The pretextual motivation did not vitiate the validity of the arrest. . . . Proof that a traffic arrest was only a pretext to search for evidence of another offense is significant legally only because it bears on the reasonableness of the search . . . the emphasis is on the objective relationship between the nature of the offense and the nature (circumstances) of the search, rather than on the motivational cause of the arrest.

Judge Gee concluded that, under Amador-Gonzalez, the focus of judicial inquiry is not on the motives of the officers but on the objective reasonableness of the search. Citing Scott, he stated:

Again and again, in precisely the present context, the Court has told us that where the police officers are objectively doing what they are legally authorized to do—as in arresting Causey . . . their investigations are not to be called in question on the basis of any subjective intent with which they acted.

Judge Gee held that Causey's confession was admissible, observing that Causey had been repeatedly read his Miranda rights and that this procedure indicated the objective reasonableness of the arresting officers' actions. Judge Gee concluded that, as long as the actions of the law enforcement officers were lawful, their motivations were of "no consequence."

93. Id.
94. Id. at 1181.
95. Id. at 1181-82.
96. In Causey I, 818 F.2d at 361, Judge Rubin stated that Amador-Gonzalez held "pretext arrests unconstitutional." Id. at 1182 n.6.
97. Id.
98. Id. (quoting Amador-Gonzalez, 391 F.2d 308, 315 (5th Cir. 1968) (emphasis added in Judge Gee's opinion)).
99. Id.
100. Id.
101. Id. at 1185.
Judge Higginbotham concurred in the use of the objective test, but emphasized two separate points. First, he pointed out that there was no evidence that the police had stored or “warehoused” the warrant for use in later arrests.102 Judge Higginbotham was concerned that, if this had been the case, old warrants would be used “to pocket a one-time pass to the strictures of the fourth amendment.”103 He warned that the court’s holding was not to be construed as tolerating storing of old warrants for this purpose.104

Second, Judge Higginbotham stressed that the warrant was validated by a magistrate. According to Judge Higginbotham, a warrant is presumed to be reasonable if it is issued by a neutral magistrate on sufficient probable cause.105 He noted that the fact that “the police may have been motivated to execute the warrant for reasons extrinsic to the offense ordinarily is irrelevant so long as there is probable cause for the arrest.”106 Because the judge issued the warrant on sufficient probable cause, the warrant was presumed to be within the “circle of objective reasonableness.”107 This presumption of reasonableness can only be overcome by objective evidence to the contrary, which Judge Higginbotham believed was lacking.108

Six judges joined in Judge Rubin’s dissent in Causey II. The dis-

102. Id.
103. Id. at 1186.
104. Id.
105. Id.
106. Id.
107. Id. The presence of a judge in the warrant process raises important questions. Arguably, if a judge issues a warrant, it is improper to apply the exclusionary rule to subsequent acts of law enforcement officers. The primary justification for excluding evidence is deterrence. See United States v. Calandra, 414 U.S. 338, 347 (1974). The deterrence rationale is predicated on the belief that suppressing evidence from illegal arrests will prevent police misconduct, not judicial misconduct. The Supreme Court has noted that it is inappropriate to apply the deterrence rationale to judicial acts. United States v. Leon, 468 U.S. 897, 916 (1984) (“[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges . . . . Most important[ly], we discern no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge.”); State v. Novembrino, 105 N.J. 95, 179, 519 A.2d 820, 868 (1987) (Garibaldi, J., concurring in part and dissenting in part) (“If a police officer acting in an objectively reasonable manner secures a warrant from a judge and in good faith believes he has complied with constitutional requirements, what more can we expect of him?”). As a result, it is illogical to use the exclusionary rule to deter law officers when they are acting under judicial direction (as in the case of a warrant) inasmuch as the primary justification for the exclusionary rule is to deter the police, not the judiciary. Stone v. Powell, 428 U.S. 465, 498 (1976) (Burger, C.J., concurring) (“Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.”).
108. Amador-Gonzalez, 834 F.2d at 1186.
sent expressed apprehension about the likely results of applying the objective test strictly:

By holding the arrest in Causey constitutional, the majority opinion establishes a new rule that makes the whole more than the sum of its parts: the police can take two bases for arrest, each constitutionally insufficient—an unreasonable and arbitrary execution of a warrant and a suspicion amounting to less than probable cause—and add them together as a basis for a constitutionally acceptable arrest.109

The dissent also feared that allowing the police to use pretextual tactics could result in routine abuse of constitutional rights.110 Any minor warrant would serve as an excuse for avoiding the fourth amendment restrictions on unreasonable searches and seizures.111 As Judge Rubin said: “Police who desire to arrest an individual without probable cause may merely leaf through the files or turn to the computer to determine whether they can . . . arrest a suspect.”112 The dissent concluded that “many millions will be exposed to pretextual arrest by virtue of the majority opinion” because of failure to pay parking tickets.113

The dissent claimed that the objective facts “mandate the conclusion that the arrest was but a means to take Causey into custody in order to question him about an offense other than the one for which he was arrested.”114 According to the dissent, the objective facts of the case demonstrated the existence of an improper motive for the arrest.115 In addition, the simple fact that the arresting officers deviated from standard departmental procedures indicated that they were not acting in good faith.116

The dissent acknowledged that the Scott objective standard was controlling,117 but applied the test in a different way from the majority. The dissent believed Causey’s arrest was illegal because the arresting officers lacked an objectively valid reason to arrest him in the first place.118 Because the facts indicated that the police could not have

109. Id. at 1188-89 (Rubin, J., dissenting).
110. Id. at 1189-90.
111. Id. at 1190.
112. Id. at 1189.
113. Id.
114. Id. at 1186.
115. Id. at 1187-88.
116. Id. at 1188.
117. Id. at 1187.
118. Id. at 1188.
had a legal motive to conduct the arrest, the dissent inferred that the police acted with an illegal motive.\textsuperscript{119} Citing the Eleventh Circuit Court of Appeals for support, the court reasoned that the \textit{Scott} test is “an examination of what a reasonable officer \textit{would} do. When, as here, a reasonable officer would not have made the seizure of the suspect’s person absent an invalid purpose, the arrest must be condemned as pretextual.”\textsuperscript{120} In essence, the dissent contended that the absence of a legitimate motive can be demonstrated objectively by examining the circumstances known to the arresting officers. If no persuasive reason for making the arrest is found, the courts may infer an invalid motive and find the arrest pretextual.\textsuperscript{121}

The dissent also noted the unusual circumstances of the arrest. According to Judge Rubin, the Supreme Court has upheld searches as long as there is no evidence of “bad faith” on the part of the arresting officers.\textsuperscript{122} The dissent stated that bad faith can be demonstrated if the officers depart from standard procedures in conducting the arrest.\textsuperscript{123} “When standard practices, not themselves unlawful, are followed, the police are acting in a fashion that is reasonable, objectively viewed, even if they have an ulterior motive. Here the police were clearly \textit{not} following standard procedures. And they were not acting in good faith—objective or subjective.”\textsuperscript{124} In the dissent’s view, “[t]heir deviation from their usual practice without just cause made their conduct arbitrary.”\textsuperscript{125}

\section*{III. Analysis of Alternate Approaches}

The majority of courts apply the strict objective test for three reasons. First, the strict objective test is based solely on an analysis of conduct and is therefore more consistent with the Supreme Court’s language in \textit{Scott}..\textsuperscript{126} Second, the strict objective test is easier to apply than the subjective test because it avoids “a costly and time-consuming

\begin{itemize}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.} at 1187 (citing United States v. Smith, 799 F.2d 704, 709-11 (11th Cir. 1986)). Judge Rubin also quoted the \textit{Johnson} court: “If a reasonable officer would not have made the arrest absent illegitimate motive, then the resulting search or inventory...is unlawful.” \textit{Id.} (quoting \textit{Johnson}, 815 F.2d at 315).
\item \textsuperscript{121} \textit{Causey II}, 834 F.2d at 1186-89.
\item \textsuperscript{122} \textit{Id.} at 1187 (citing South Dakota v. Opperman, 428 U.S. 364, 376 (1976); Cady v. Dombrowski, 413 U.S. 433, 447 (1973)).
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.} The dissent concluded that “the police activity would not have been undertaken but for the” improper motive, and therefore was illegal. \textit{Id.}
\item \textsuperscript{126} \textit{Scott}, 436 U.S. at 137-38.
\end{itemize}
expedition into the state of mind of the law enforcement officers."

Lastly, Scott makes it clear that the alternative motive-based tests are theoretically indefensible. For example, the exclusionary rule is invoked when an arrest is found to be unconstitutional. An arrest is unconstitutional only if the arresting officer violates some constitutional requirement. According to Scott, bad motives do not violate the fourth amendment. Bad motives, therefore, do not make an arrest unconstitutional. As Justice Rehnquist observed in Scott, the fact that the officer lacks the proper motivation “does not invalidate the action taken.” The theoretical weakness of subjective tests is that they examine motives, and, after Scott, motives do not determine the validity of an arrest. Therefore, the subjective test is focused on a factor that is not relevant to the question before the court. As one court explained: “An officer’s underlying intent or motivation is irrelevant to the judicial inquiry.”

The objective approach, however, also has several weaknesses. As the Causey I court pointed out, a strict application of the objective test allows law enforcement officers to use any trivial excuse, such as a traffic violation, as a means of arresting and interrogating a suspect for a crime for which probable cause does not exist. As one judge ex-

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127. State v. Bruzzese, 94 N.J. 210, 221-22, 463 A.2d 320, 326-27 (1983). The Bruzzese court observed that intent-based standards require the courts to engage in expensive and unnecessary examination of the psychology of individual officers. Id. In addition, the court noted that individuals may have several motives for a given action, further hindering the application of any subjective test. Id. Lastly, the court stated that the precedential value of such decisions would be limited because each case would be as unique as the intentions of the arresting officers themselves. Id. See United States v. Arra, 630 F.2d 836, 846 (1st Cir. 1980) (“[T]he difficulty of applying a subjective standard would be monumental.”).


129. Id. at 136. See also State v. Petty, 48 Wash. App. 615, 620, 740 P.2d 879, 882 (1987) (“[T]he constitutionality of the officer’s action is not undermined by the officer’s reasons.”).

130. See People v. Anderson, 169 Ill. App. 3d 289, 297, 523 N.E.2d 1034, 1040 (1988) (“[T]he Supreme Court has repeatedly ruled that when police officers do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and not subject to inquiry, and the results of their investigations are not to be suppressed.”) (citing United States v. Causey, 834 F.2d 1179 (5th Cir. 1987), cert. denied, 109 S. Ct. 1935 (1989)). See also United States v. Basey, 816 F.2d 980, 991 (5th Cir. 1987) (“As Scott plainly states, the unchallenged premises that the deputies had probable cause to and could lawfully arrest [the suspect] ... render irrelevant any inquiry into the deputies’ ... alleged ulterior motivation.”); Lester v. Chicago, 830 F.2d 706, 712 (7th Cir. 1987).


pressed it, the objective standard "converts an arrest warrant for any offense, no matter how minor or unrelated, into a skeleton key for every suspect's home."\textsuperscript{134} In addition, the strict objective test "virtually eliminates the possibility of ever proving a pretextual arrest."\textsuperscript{135} To prove that an arrest is a pretext under the strict objective test, it is necessary to demonstrate that there is absolutely no valid basis for the arrest. Yet, with a pretextual arrest, there will always be at least one valid reason. A pretextual arrest is, by definition, made up of two different charges: the serious charge for which the officers lack probable cause and the trivial, but valid, charge being used as a pretext. Because the objective test will uphold an arrest if there is one legitimate charge and a pretextual arrest always has one legitimate charge, the objective test will uphold all arrests.\textsuperscript{136}

To avoid the problems associated with the strict objective test, some judges use a modified approach similar to Judge Rubin's \textit{Causey I} standard.\textsuperscript{137} This approach limits judges to evaluating objective evidence only, but also allows them to use such evidence to infer motive. Using the language of the objective test, this approach examines motives like the subjective test. But, it falls prey to the same weaknesses as the subjective approach because, as \textit{Scott} made clear, motives are not relevant to the question of whether an arrest is acceptable under the fourth amendment.\textsuperscript{138} The modified objective test also punishes police officers who stay within the letter of the law. With the modified approach, an officer who conscientiously obeys the law can find the evidence from his arrests suppressed if a court decides that he acted with bad motive.\textsuperscript{139} Lastly, as with the old subjective test, the modified objective test requires the court to engage in the unreliable process

\textsuperscript{134} Bruzzese, 94 N.J. at 252, 463 A.2d at 343 (1983) (Pollock, J., dissenting).
\textsuperscript{136} \textit{Id.} at 417. As the court stated in Keller:
If every arrest were judged by an objective standard and upheld if there was a valid basis for the arrest, then there could never be a pretextual arrest. The concept assumes that there is a basis for the arrest, but that the arrest is made for the purpose of conducting a search for which there would not otherwise be a justification.
\textsuperscript{137} United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988); State v. Nersessian, 824 F.2d 1294, 1316-17 (2d Cir.), \textit{cert. denied}, 108 S. Ct. 357 (1987); United States v. Johnson, 815 F.2d 309, 315 (5th Cir. 1982).
\textsuperscript{138} \textit{Scott}, 436 U.S. at 136-38. For a discussion of \textit{Scott}, see \textit{supra} notes 29-39 and accompanying text.
\textsuperscript{139} Bruzzese, 94 N.J. at 222, 463 A.2d at 326-27 ("Delving into the . . . motives of policemen penalizes officers who outwardly behave in a constitutionally appropriate way.").
of examining the thoughts of the arresting officers.¹⁴⁰

Concerned with the deficiencies of the subjective and objective approaches, Professors Wayne LaFave and John Burkhoff have advanced their own alternatives. Section A of Part III discusses these alternatives. Section B of Part III proposes a new standard suggested by a New Jersey case. This new approach has two steps. The first step is an application of the strict objective standard.¹⁴¹ The second step balances the cost of suppressing valuable evidence against the cost to the judicial system of tolerating police misconduct.¹⁴²

A. Two Academic Alternatives to the Strict Objective Standard

1. Wayne LaFave: The “Standard Procedures” Test

Under Professor Wayne LaFave’s test, if a given arrest is contrary to standard police practice, then the arrest is objectively arbitrary and unconstitutional.¹⁴³ The basis of Professor LaFave’s test is the notion that the fourth amendment is primarily concerned with unreasonable searches and seizures.¹⁴⁴ A search is unreasonable if it is arbitrary. If the actions of the law enforcement officers are contrary to normal procedure, the arrest is arbitrary and a violation of the fourth amendment.¹⁴⁵

This test has the virtue of being easy to apply. Under the LaFave approach, a judge only has to decide what constitutes normal law enforcement practices and then determine whether the arresting officers deviated from it. For example, in Causey, as well as in Taglavore¹⁴⁶ and Cavallino,¹⁴⁷ police from one department, contrary to normal procedure, executed warrants normally entrusted to an entirely different

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¹⁴⁰. Id. For a discussion of Bruzzese, see infra notes 167-82 and accompanying text.
¹⁴¹. For a discussion of the proposed test, see infra notes 167-99.
¹⁴². For a discussion of the second step to the proposed test, see infra notes 183-99.
¹⁴³. 1 W. LAFAVE, supra note 17, at 90-97.
¹⁴⁴. Judge Rubin cited Professor LaFave’s test in Causey I, 818 F.2d at 358, and in Causey II, 834 F.2d 1187-88. LaFave has been cited in several cases. See, e.g., United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988); United States v. Arra, 630 F.2d 836, 845 n.12 (1st Cir. 1980).
¹⁴⁵. 1 W. LAFAVE, supra note 17, § 1.4(e), at 96. Professor LaFave recommends the “more widespread application of the requirement utilized by the Supreme Court in South Dakota v. Opperman, namely, that the fourth amendment activity ‘was carried out in accordance with standard procedures in the local police department.’” Id. (citing South Dakota v. Opperman, 428 U.S. 364, 374-75 (1976)).
¹⁴⁶. 291 F.2d 262 (9th Cir. 1961). For a discussion of Taglavore, see supra notes 20-26 and accompanying text.
¹⁴⁷. 498 F.2d 1200 (5th Cir. 1974). For a discussion of Cavallino, see supra notes 79-81 and accompanying text.
department. Because this behavior was a deviation from the norm, courts applying the LaFave standard would find these arrests invalid. LaFave also argues that his approach encourages police departments to define their departmental regulations carefully and responsibly.

Several courts and commentators, however, have criticized the LaFave test. For example, in *State v. Bruzzese*, the New Jersey Supreme Court rejected the LaFave test because the court believed that it discourages police initiative. In addition, academic sources have criticized the test on theoretical grounds. One criticism is that LaFave's use of police regulations to determine the validity of an arrest is applying a non-constitutional test to solve a constitutional problem. The constitutional question raised by the fourth amendment is whether an arrest is arbitrary or unreasonable, not whether it is within police regulations. The LaFave standard is based on an analysis of "normal police procedure," and police procedure is not, in itself, relevant to the question of the constitutional validity of an arrest.

Additionally, there are difficulties in Professor LaFave's assump-

148. *Taglavore*, 291 F.2d at 264. In *Taglavore*, the arresting officers were from the vice squad yet the warrant was of the type normally written by traffic officers. *Id.*


The only evidence that causes the Court alarm in this regard was the fact that a Federal Narcotics Agent was with the arresting officer, and they were looking for a similar car. *It always creates suspicion in the Court's mind when a Federal Agent is with a City Officer in making an arrest for a traffic violation.* . . .

*Id.*

150. 1 W. LAFAVE, *supra* note 17, § 1.4(e), at 90-97. Note that Professor LaFave's approach is essentially objective. It is based on an examination of the conduct of the arresting officers, not their intent. Professor LaFave is generally supportive of the Scott objective approach and is critical of those courts that still seek to invoke the subjective standard.


152. *Id.* at 228, 463 A.2d at 330. The *Bruzzese* court stated:

We do not endorse the rule that a search shall be deemed unreasonable merely because a police officer deviates from his department's standard operating procedure. This theory is espoused by Professor LaFave, in his *Search and Seizure* treatise . . . The adoption of such a rule would discourage police officers from thinking and from exercising initiative . . . It is impossible for a police department to envision and to develop standard operating procedures for all such situations . . . To hold that a policeman's conduct is unreasonable because it deviates from standard procedure would penalize the best officers and discourage imaginative police . . . work. *Id.* *See* Burkoff, *supra* note 17, at 108-09.


154. *Id.*
tion that all deviations from departmental regulations are prima facie evidence of a pretextual arrest. There are many reasons to deviate from any standard set of rules, and not all are illegal.\textsuperscript{155} For example, the police may deviate from the rules in a specific arrest because it is physically safer to do so. If the normal procedure is to approach the suspect's front door, but the suspect in a particular case is known to shoot at officers, it may be reasonable to try a different method. The fact that police deviate from their normal routine does not mean that such deviation is improper and certainly does not mean that the deviation violates the fourth amendment. As a result, the LaFave approach is overinclusive.

At the same time, the LaFave approach is underinclusive. Police observance of standard procedures does not alone guarantee protection of a suspect's rights. Law enforcement actions may be within the normal scope of police authority yet still result in a violation of a suspect's constitutional rights. For example, in certain circumstances, it may be normal police procedure to carry out a body search of a suspect. This procedure, while within the authority of the arresting officers, can violate the fourth amendment if carried out in an arbitrary or improper manner.

Applying the LaFave standard to the facts of \textit{Causey} would probably result in the exclusion of the confession.\textsuperscript{156} Judge Rubin's dissent in \textit{Causey II} observed that the actions of the arresting officers were "absolutely without precedent in the Baton Rouge police force."\textsuperscript{157} Because the officers' conduct was outside of normal police procedure, the LaFave test would identify it as invalid and would trigger the exclusionary rule.

2. John Burkhoff: The Limited Subjective Approach

Professor Burkhoff proposes a limited subjective standard.\textsuperscript{158} The Burkhoff test, like the subjective test and the newer modified objective test, involves investigating the motives of law enforcement officers. If it appears that the arresting officer acted with dual motives, one motive legally sufficient and the other pretextual and illegal, Professor Burkhoff would admit the evidence because the legally sufficient motive, by itself, adequately justifies the arrest.\textsuperscript{159} Professor Burkhoff

\begin{footnotes}
\footnotetext{155}{Burkhoff, \textit{supra} note 17, at 108. See \textit{Bruzzese}, 94 N.J. at 228, 363 N.E.2d at 370.}
\footnotetext{156}{818 F.2d at 358 n.13.}
\footnotetext{157}{\textit{Causey II}, 834 F.2d at 1187.}
\footnotetext{158}{See Burkhoff, \textit{supra} note 17, at 81, 115.}
\footnotetext{159}{Id. at 98-101.}
\end{footnotes}
suggests that in these circumstances the bad motive is "latent" and not acted upon.\textsuperscript{160} According to Professor Burkhoff, a bad motive, not acted on, is "constitutionally irrelevant."\textsuperscript{161} For Professor Burkhoff, an arrest violates the fourth amendment only if the officer is acting \textit{solely} on an improper motive.\textsuperscript{162}

Commentators have identified several difficulties with the Burkhoff approach. One major weakness is the practical problem of determining the "true" motivation of the police.\textsuperscript{163} In \textit{State v. Bruz­zese}, the New Jersey Supreme Court noted:

Since motives are seldom apparent or vocalized, there is little reliable evidence of them. Even where motives are evident, the analysis may still pose problems. Complex creatures that they are, humans usually have several motives. A judge cannot and should not be required to weigh the motives to determine which one guided the officer's behavior. . . . A further weakness of the subjective approach is that it is neither reliable nor predictable. Appellate courts with views of human psychology different from those of the trial court would no doubt be tempted to second-guess the latter's assessment of the searching policeman's "true" intentions.\textsuperscript{164}

Additionally, the Burkhoff test may encourage dishonesty. For example, under the Burkhoff approach, if the arresting officers have at least one valid motive for making an arrest, any illegitimate motives are assumed to be latent, and evidence from their search is admissible. Application of the Burkhoff test may encourage the arresting officers to invent "valid" motives for their actions, perhaps after the fact.\textsuperscript{165} In addition, the Burkhoff test contradicts the \textit{Scott} Court's conclusion that the thoughts of arresting officers do not determine the constitutionality of their conduct.\textsuperscript{166}

\begin{footnotesize}
\begin{enumerate}
\item[160.] Id.
\item[161.] Id. at 99.
\item[162.] Id. at 100-03. \textit{See Anderson}, 169 Ill. App. 3d at 297, 523 N.E.2d at 1040.
\item[163.] \textit{Bruz­zese}, 94 N.J. at 221, 463 A.2d at 326.
\item[164.] Id.
\item[165.] \textit{See United States v. Arra}, 630 F.2d 836, 845 n.12 (1st Cir. 1980). The \textit{Arra} court noted "the difficulty of administering a standard which turns upon motivation." \textit{Id.} The \textit{Arra} court cited \textit{Amsterdam, Perspectives on the Fourth Amendment}, 58 MINN. L. REV. 349, 437 (1974), and stated that "motivation is a self-generating phenomenon. As law enforcement personnel learn that a particular motivation is improper because it will render an otherwise valid search invalid, they may not have difficulty convincing themselves that their conduct was prompted not by the improper reason but by the proper one. . . ." \textit{Arra}, 630 F.2d at 845 n.12.
\item[166.] \textit{Scott}, 436 U.S. at 132-36. \textit{See United States v. Basey}, 816 F.2d 980, 991 (5th Cir. 1987); \textit{United States v. Arra}, 630 F.2d 836, 845 n.12 (1st Cir. 1980). Professor Burkhoff's interpretation of \textit{Scott} is different from that of other authorities. Burkhoff does
\end{enumerate}
\end{footnotesize}
There is another practical difficulty with Professor Burkhoff’s method. For an arrest to be a pretext there must be two different charges—the minor pretext charge and the more serious one. The very nature of a pretextual arrest ensures that there is at least one legitimate, though pretextual, reason for the arrest. Professor Burkhoff’s method accepts an arrest if there is one valid reason supporting it. Because pretextual arrests invariably involve one valid charge, the Burkhoff approach will uphold most pretextual arrests.

Applying the Burkhoff test to the facts of Causey would likely result in admission of the defendant’s confession. The default warrant was valid, and the arresting officers could simply point to it as the valid reason for their actions. Even if the court were to determine that the officers also entertained improper motives, these would be classified as “latent” under the Burkhoff analysis.

Because of the weaknesses in Professor Burkhoff’s standard, as well as the weaknesses noted previously in Professor LaFave’s method and in the subjective and objective tests, a different approach is needed.

3. The Proposed Two-Step Standard

A New Jersey case suggests another variation on the strict objective test that opens the possibility of reconciling the concerns of advocates of both the subjective and objective approaches. In State v. Bruzzese, police arrested a burglary suspect on an old unrelated warrant. During the arrest, police seized evidence implicating the suspect in the burglary. The trial court suppressed the evidence.

not believe Scott advocates a purely objective test for all fourth amendment situations. He believes that the Scott Court admitted the evidence because, although the police had an improper motive, it was not acted on. He reads the Court’s finding that the wiretaps were objectively reasonable as an implicit determination that the police’s illegal intentions had no effect on the eventual actions. Burkhoff, supra note 17, at 83-84.

168. Id. at 213-14, 463 A.2d at 322. The defendant was a suspect because the police were aware that he had been in the area of the crime and had made comments to his friends that he wanted to “get even” with his former employer for firing him. Id. Local police ran a check on his criminal record and found an old arrest warrant. Id. Interestingly, at trial it was determined that the police were unsure of the warrant’s purpose. The court noted that at no point during the entire case was anyone sure for what charge the defendant was actually arrested. Id. at 245, 463 A.2d at 339. Four policemen used the warrant to make an arrest and carry out a search. The defendant alleged that, although the “seizure was objectively reasonable, it was unconstitutional because the . . . arrest warrant served as a mere pretext for the search of the defendant’s home.” Id. at 219, 463 A.2d at 325. The trial court held that the arrest was a pretext and suppressed the evidence. Id.
169. Id. at 215-16, 463 A.2d at 322-23.
The appellate division affirmed170 and, using a subjective test, concluded that the arrest was a pretext.171

The New Jersey Supreme Court reversed the appellate court citing the Scott objective test.172 Judge Garibaldi commented:

We hold that the proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent. We emphasize that the Fourth Amendment proscribes unreasonable actions, not improper thoughts. In determining whether a police officer's actions are constitutional, we do not rely on the officer’s own subjective appraisal, but on an objective evaluation by a neutral judicial authority.173

The Bruzzese court criticized the subjective standard,174 but also acknowledged that the objective test has potential for abuse. The court applied two limitations to the objective test to reduce this potential. The first, and more important for the Bruzzese court, is that the officer's conduct must be reasonable. "The requirement of reasonableness is not one without teeth."175 The Bruzzese court referred only briefly to its second limitation on the objective test. While emphasizing the reasonableness requirement, the court cited an earlier decision that held that, if a search is objectively valid, "the existence of other defects that do not . . . impugn the integrity of the judicial process

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170. Id. The appellate division used a subjective test observing that "the intent of the police officers may be determinative of the validity of their arrests." Bruzzese, 187 N.J. Super. at 443, 455 A.2d at 497.


172. Id. at 216-23, 463 A.2d at 323-27.

173. Id. at 219-20, 463 A.2d at 325. The dissent argued that Scott, which involved only wiretaps, may not apply to actual invasions of the home. The dissent voiced the concern that the objective test, if applied woodenly, results in injustice and observed that the test "converts an arrest warrant for any offense, no matter how minor or unrelated, into a skeleton key for every suspect's home." Id. at 252, 463 A.2d at 343.

174. Id. at 221, 463 A.2d at 326. The Bruzzese court criticized the subjective standard for being costly and impractical. The court stated that "[w]ere the Court to adopt the defendant's subjective rule, practically every search-and-seizure case would require the court to engage in a costly and time-consuming expedition into the state of mind" of the law enforcement officers. Id. The court also observed that motives are "seldom apparent or vocalized" and that there is usually little practical evidence of them. Id. The Bruzzese court also decided that the result of the establishment of a subjective test would be that "each case would be as unique as the individual officer's thoughts. In short, the law would become as unfathomable as the policeman's motives themselves." Id. at 222, 463 A.2d at 326-27.

175. Id. at 226, 463 A.2d at 329.
should not be relied on to invalidate the search.'"\textsuperscript{176} This second limitation on the objective test is based not on the need to deter police misconduct, but on the need to protect the integrity of the judicial system.

The primary justification for the exclusionary rule is deterrence.\textsuperscript{177} To a point, the deterrence rationale works well with the objective test.\textsuperscript{178} If the arresting officers act in a way that is obviously unreasonable, the objective test will identify that arrest as a violation of the fourth amendment, and the exclusionary rule will suppress the evidence.

Reliance on the deterrence rationale as a justification for the objective test, however, sometimes prevents the objective test from protecting fourth amendment rights.\textsuperscript{179} For example, if the purpose of the objective test is to deter illegal conduct, the objective test has no application in cases involving pretextual arrests because, in pretextual arrests cases, the officers' conduct is itself legal.\textsuperscript{180} As one court noted, "Since evidence seized in violation of the Fourth Amendment is suppressed in order to deter unlawful actions by police officers, the exclusionary rule need not be applied when officers act in a lawful manner, even if they possess additional motives."\textsuperscript{181}

However, as the \textit{Bruzese} decision shows, deterrence is not the

\textsuperscript{176} Id. at 227, 463 A.2d at 329 (quoting State v. Guerra, 93 N.J. 146, 152, 459 A.2d 1159, 1162 (1983)).


\textsuperscript{178} It should be noted that some authorities question the effectiveness of the deterrence rationale. See United States v. Janis, 428 U.S. 433, 450-52 n.22 (1976) ("No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect.").

\textsuperscript{179} United States v. Leon, 468 U.S. 897, 918 (1984) ("We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.").

\textsuperscript{180} Id. at 919.

\textsuperscript{181} People v. Anderson, 169 Ill. App. 3d 289, 297, 523 N.E.2d 1034, 1040 (1988). See Leon, 468 U.S. 897, 916-18 (1984) ("[E]ven assuming that the rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.").
only rationale underlying the exclusionary rule. The Supreme Court observed in Dunaway v. New York that “there is another consideration—the imperative of judicial integrity”—which serves as an alternative justification for the exclusionary rule. In addition, in United States v. Payner, the Court said “[t]he Fourth Amendment exclusionary rule . . . is applied in part ‘to protect the integrity of the court, rather than to vindicate the constitutional rights of the defendant.’ ”

The original justification for the exclusionary rule probably was not deterrence. In Weeks v. United States, the case that introduced the exclusionary rule, the Supreme Court never referred to deterrence. On the contrary, the decision of the Supreme Court suggested that the Court was concerned with the effect of admitting the evidence on the reputation of the Court and the Constitution—“[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution.” Only since Wolf v. Colorado, thirty-five years later, has the notion of deterrence been advanced as a justification for the exclusionary rule. The deterrence rationale steadily gained acceptance until it became established as the primary reason for the exclusionary rule.

While it is true that “judicial integrity” is not currently used as an independent basis for excluding evidence, it can be used as a factor in balancing the costs and benefits of admitting evidence. It is submitted that in cases of pretextual arrests, the purpose of the fourth amendment is better served by applying the rationales of judicial integ-

185. Id. at 736 n.8. (quoting the dissent at 747).
188. Id. at 394. Note that in Lefkowitz, the first Supreme Court case to ban evidence from pretextual arrests, the Court did not mention deterrence but focused instead on the need to protect individual liberties. 285 U.S. 452, 464-67 (1932). See Schroeder, supra note 183, at 1371 n.70. See supra notes 16-17 for a discussion of Lefkowitz.
190. See Kamisar, supra note 177, at 598 n.210.
rity and deterrence together, rather than by relying on the deterrence rationale alone.

For example, courts criticize the objective test as unjust because law enforcement officers succeed in "a scheme to evade the fourth amendment." The judicial integrity rationale provides a basis for excluding such evidence, not because of improper motives, but because the result of admitting the evidence calls into question the integrity of the judiciary.

This note, therefore, proposes a two-step approach based on the strict objective test and the judicial integrity rationale. The first step would be the strict objective test. The strict objective test is simple to apply and effectively screens out any obviously illegal non-pretextual arrests. The second part of the proposed approach is to apply a separate balancing test based on the judicial integrity doctrine. The two factors to be balanced are the benefits to society from admitting the evidence and the costs to the integrity of the judicial system. Usually the benefits will include the fact that the evidence is very incriminating and will greatly assist the jury in the search for truth. This phenomenon may be especially true for voluntary confessions or perhaps physical evidence uncovered during a search. The costs, however, can be very important also. If the judicial system appears to condone cynically manipulative actions on the part of law officers, the integrity of the entire legal system is threatened. In State v. Novembrino, the court noted: "Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example ... If the Government becomes a lawbreaker, it breeds contempt for law. . ." This proposed test avoids the pitfalls associated with the modified objective approach because it does not depend on an analysis of police motives. The integrity of the judiciary is not directly threatened by

193. Balancing tests have been previously proposed for exclusionary rule questions. See United States v. Leon, 468 U.S. 897, 907 (1984) (exclusionary rule questions must be "resolved by weighing the costs and benefits of suppressing reliable evidence versus constitutional rights."); Burkhoff, supra note 153, at 268 (suggesting balancing "society's interest in seeing the officer make each arrest" against "the societal interest in preserving fourth amendment safeguards").
194. Elkins v. United States, 364 U.S. 206, 216 (1960) ("[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled discovery of competent and relevant evidence in a court of justice.").
196. Id. at 101, 519 A.2d at 823 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1938) (Brandeis, J., dissenting)).
improper police thoughts. The integrity of the courts is threatened by facially valid police actions that appear to be deliberate manipulations of the law. For the purposes of the second phase, it is not important whether the police do or do not entertain improper motives. What is important is that the actions of law enforcement officers cannot appear to be so egregiously manipulative that the courts would be considered tacit partners in unseemly conduct were the evidence admitted.

Applied to the facts of Causey, the first step of the proposed test would find the actions of the arresting officers objectively reasonable because the arrest was carried out under a valid warrant. The arrest, however, would probably not pass the second step for two reasons. First, the Baton Rouge police testified that they were uninterested in pursuing the minor charge. While this fact is unimportant to a strict objective analysis, it is very important to a judicial integrity analysis. If the courts permit law enforcement officers to use evidence from arrests which they have publicly admitted were pretexts, the integrity of and respect for the judicial system are endangered. The second reason that the Causey arrest fails the proposed standard is because the officers' actions were a blatant attempt to avoid the restrictions of the Constitution. The Causey I court considered the arrest to be as reprehensible as an act of "brutality." The Causey II dissent found that the actions of the police were "absolutely without precedent" in the jurisdiction. Whether or not the officers were thinking illegal thoughts, their actions, taken as a whole, shocked members of the court. The judicial sanction of actions of this type brings the courts into disrepute by association.

**CONCLUSION**

In United States v. Scott, the Supreme Court replaced the subjective test with an objective standard that permits evidence to be admitted from an arrest if the actions of the law enforcement officers are facially legal. Several courts have criticized the objective test because it allows law enforcement officers to use minor infractions of the laws as a means of violating the fourth amendment. The Causey I court attempted to apply Scott in a way that avoided this result. This modification of the objective test has not gathered support in the courts.

197. 818 F.2d at 362-63.
198. 834 F.2d at 1187.
199. See United States v. Trigg, 878 F.2d 1037, 1043 (7th Cir. 1989) (Ripple, J., concurring) (courts should suppress evidence from pretextual arrests that pass the objective test if "police action, taken as a totality, violates the fourth amendment").
because it is contrary to the principles of the *Scott* decision and because it requires courts to condemn law enforcement conduct that is legal on its face. The proposals advanced by academic commentators have likewise been rejected because they are either impractical to apply or fail to prevent police misconduct.

One solution to the unjust results of applying the objective test is to create a new standard based both on the need to deter improper law enforcement behavior and the need to preserve the reputation of the courts. This standard is not contrary to *Scott* but instead builds upon it. The proposed standard also does not require courts to engage in a vain search for the motives of arresting officers, but allows the courts to suppress evidence when the integrity of the judicial system is threatened by egregious misconduct. By including in the test criteria an analysis based upon judicial integrity, courts will simultaneously protect both the fourth amendment rights of suspects and society's interest in the legitimacy of its legal system.

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