

University of Michigan Journal of Law Reform

Volume 18

1985

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John M. Burkoff
University of Pittsburgh

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Recommended Citation

John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—or Professor Haddad's "Hard Choices"*, 18 U. MICH. J. L. REFORM 695 (1985).

Available at: <https://repository.law.umich.edu/mjlr/vol18/iss3/4>

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REJOINDER: TRUTH, JUSTICE, AND THE AMERICAN WAY—OR PROFESSOR HADDAD'S "HARD CHOICES"

John M. Burkoff*

I frankly think that Professor Haddad's response to my article on pretext searches is first-rate. It is articulate; it is thoughtful and scholarly; it sharpens the issues and the analysis in this area; and, for the most part, I think his criticisms of various portions of my own work present my positions fairly and honestly. On the other hand, I think that Professor Haddad is dead wrong.

Where do we disagree? Haddad's response is carefully thought out and the argumentation is intricate. Hence, it should come as no surprise that we disagree on a great many points, too many for an itemized response in this brief rejoinder. But I think it is safe to say that we disagree fundamentally on three things: (1) what message can be fairly drawn from the Supreme Court's "pretext decisions"; (2) whether a subjective approach to pretext analysis is desirable; and (3) whether any other approach—particularly Haddad's own "hard-choice" approach—is a more desirable solution to the pretext problem.

I. SUPREME COURT "PRETEXT DECISIONS"

A key argument in my *University of Michigan Journal of Law Reform* article was, as Haddad notes, that Supreme Court decisional law on the subject of pretext searches reveals a decided ambiguity.¹ The gist of my argument was that although the Court sloughed off a concern about deterring pretext searches in *United States v. Villamonte-Marquez*,² it retained this concern in other decisions.³ Hence, the argument continued, reason ex-

* Professor of Law, University of Pittsburgh. A.B., 1970; J.D., 1973, University of Michigan; L.L.M., 1976, Harvard University.

1. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 524-25, 544-50 (1984).

2. 462 U.S. 579, 584 n.3 (1983).

3. Burkoff, *supra* note 1, at 544-48.

ists to believe that the Court's implicit rejection of the pretext search doctrine in *Villamonte-Marquez* was unintended.⁴

Haddad's response to this point is that none of the Supreme Court decisions dealing with the pretext search issue adopted a subjective approach to the analysis of pretexts. Rather, as Haddad views the cases, "the Supreme Court has consistently taken into account the possibility of pretextual fourth amendment activity in determining whether to expand a particular fourth amendment limitation upon police conduct This is the hard-choice approach."⁵ Accordingly, Haddad maintains, the Supreme Court's implicit rejection in *Villamonte-Marquez* of a case-by-case (subjective or objective) approach to the pretext issue does not indicate a lack of concern on the part of the Court about the issue of pretexts. Rather, the Court simply likes Haddad's pretext approach better than mine—or Professor LaFave's.⁶

Now, I can live with rejection by the Supreme Court. In some of the circles in which I travel, such rejection might be construed as a badge of honor. But I honestly do not believe I have been so honored by the Court—at least not to this date. I think that Haddad is mistaken when he argues that the Court has "consistently" used a "hard-choice" approach to deal with pretext problems.⁷ Some Supreme Court decisions, which cannot fairly be viewed as "hard-choice" cases, imply clearly the existence of a congruent subjective approach to pretexts. The best example of such a case is *South Dakota v. Opperman*.⁸

4. *Id.* at 550.

5. Haddad, *Pretextual Fourth Admendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639, 673 (1985).

6. Haddad categorized both LaFave's and my approach to this subject as variants on a case-by-case analysis. Haddad, *supra* note 5, at 649-51.

I cannot speak for LaFave, but as for myself, Haddad anticipates my reaction to this categorization when he acknowledges that "[o]f course, the Court could still reexamine various fourth amendment doctrines while simultaneously retaining an individual motivation approach." *Id.* at 688. See *infra* text accompanying notes 25-27. Cf. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 79, 116 (1982):

The analytical framework that has been outlined is straightforward. Initially, a court should determine whether a search is objectively constitutional or unconstitutional. If the search is objectively unconstitutional, a court need proceed no further. If, however, the search is objectively constitutional, the court must next determine (if the issue is raised) whether the search was a 'bad faith' search.

7. I am not arguing that Haddad is wrong on this point with respect to all of the cases he discusses, just that he is wrong with respect to some of them. I agree that there are some relatively recent decisions that can fairly be categorized as "hard-choice" cases in Haddad's analytical grid. I am thinking particularly here of *Steagald v. United States*, 451 U.S. 204 (1981). See Haddad, *supra* note 5, at 664-65.

8. 428 U.S. 364 (1976).

In *Opperman*, the Supreme Court legitimized suspicionless automobile inventory searches, but only after noting that the inventory search in question was not "a pretext concealing an investigatory motive."⁹ (Nit-pickers, please note: that is the Supreme Court bringing up "motive," not me.) I am far from alone in taking the radical position of reading the *Opperman* case as meaning just what it says. A great many, if not the overwhelming majority of, lower courts reaching the issue have read *Opperman* as mandating that automobile inventory searches are unconstitutional when undertaken with an investigatory motive.¹⁰ Haddad's response to this point is simply to argue that "[s]uch an approach might be consistent with the quoted sentence [from *Opperman*], but it is not a course that the sentence commands."¹¹ Haddad elsewhere acknowledges, however, that a "hard-choice" rather than a subjective test reading of *Opperman* "undermine[s] somewhat the three purposes of inventory searches that the Supreme Court recognized as legitimate."¹² Strike the word "somewhat" and Haddad and I are in agreement.

Moreover, consider a case not discussed by Professor Haddad. In *Michigan v. Clifford*,¹³ decided after I wrote my *University of Michigan Journal of Law Reform* article, the Supreme Court held that an individual can in some circumstances retain a privacy interest in fire-damaged premises sufficient to require fire officials to obtain a warrant prior to entry subsequent to extinguishing the fire. Whether the fire officials, however, need a criminal search warrant or an (easier-to-get) administrative warrant turns on—*mirabile dictu*—the officials' motive. As Justice Powell held for a plurality of the Court:

If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. . . .

If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant [is

9. *Id.* at 376.

10. *See, e.g.,* Commonwealth v. Landamus, 333 Pa. Super. 382, 390, 482 A.2d 619, 623 (1984) (finding automobile inventory search unconstitutional under *Opperman* as "police had a motive to search for evidence when they seized the car"). *See also* Burkoff, *supra* note 6, at 79 n.40. Haddad recognizes that this subjective approach is "popular with many reviewing courts." Haddad, *supra* note 5, at 1. *See also id.* at 649, 693.

11. Haddad, *supra* note 5, at 663.

12. *Id.* (footnote omitted).

13. 104 S. Ct. 641 (1984).

required]

The object of the search is important even if exigent circumstances exist.¹⁴

Haddad has learned to predict my hypothesized responses to his criticisms rather well;¹⁵ so let me give his hypothesized responses to mine a crack. "John," he will patiently tell me, "*Clifford* is simply not a pretext case—you've screwed up again!" "Jim," I patiently respond, "the point is only that the Supreme Court has made clear that an arson investigator who attempts to justify a search with an administrative warrant where his motive was really to search for criminal evidence—a search justified only with a criminal search warrant—has acted unconstitutionally." Equally significant, the Court explicitly eschewed a "hard-choice" analysis in *Clifford*. Rather, case-by-case analysis of fire investigators' motivation was clearly and purposefully anticipated, despite the fact that Justice Powell recognized that "[i]n many cases, there will be no bright line separating the firefighters' investigation into the cause of a fire from a search for evidence of arson."¹⁶ In *Clifford*, as in *Opperman*, the Court deemed evidence of an investigatory motive sufficient to render the type of administrative search in question unconstitutional—and, I might add, for a very good reason: because the criminal search that was in fact undertaken was not undertaken for the administrative reasons that purported to justify it.

I do not want to belabor discussion of Supreme Court decisional precedent. I wholeheartedly agree with Professor Haddad

14. *Id.* at 647. Justice Stevens, concurring in the judgment, agreed with the plurality's assessment of the law on this point, noting that "[w]e are . . . unanimous in our opinion that after investigators have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be conducted only pursuant to a warrant, issued upon probable cause that a crime has been committed." *Id.* at 650.

15. See, e.g., Haddad, *supra* note 5, at 670-71.

16. 104 S. Ct. at 649 n.9. Justice Powell reasoned that lower courts could deal with this evidentiary problem by establishing some objective criteria to help determine the particular fire investigators' "primary object": "For example, once the cause of a fire in a single-family dwelling is determined, the administrative search should end and any broader investigation should be made pursuant to a criminal warrant." *Id.*

A similar answer—that objective criteria can be developed, and are often used already, to assess the existence of subjective pretext—is at least partly responsive to Haddad's criticism of my "sole" motive test for assessing the existence of pretextual activity. See Haddad, *supra* note 5, at 649, 674 n.158, 683-85. Nonetheless, Justice Powell's "primary object" test in *Clifford* may be, I confess, a more workable verbal formula than the one I proposed in 1982. See Burkoff, *supra* note 6, at 103-04. See also Haddad, *supra* note 5, at 684 (expressing a preference for Professor Brest's "significant role" test for motive used in another context).

that "for purposes of academic discussion, the most important thing is what the Supreme Court should do, not what it has done."¹⁷ But I do want to stress that the Supreme Court's decisions in this area, while none of them presents the resounding endorsement of a subjective pretext analysis that I would prefer, at the very least, serve to establish the Court's ambiguity—and ambivalence?—on this subject.¹⁸

II. DESIRABILITY OF SUBJECTIVE PRETEXT ANALYSIS

Supreme Court precedent aside, Haddad summarized his complaints about a subjective approach to pretexts as follows:

The individual motivation methodology punishes the prosecution where an officer has acted within the letter of the law to further the laudable goal of obtaining incriminating evidence. More importantly, an individual motivation methodology shifts the focus away from the most important issues: the existence and scope of fourth amendment limitations. Unlike the hard-choice approach, it tends to inhibit critical reassessment and deserved expansion of fourth amendment limitations.¹⁹

I could not disagree more with Haddad when he argues in this passage—and in other places in his response—that an officer acting pretextually is nonetheless acting within "the letter of the law."²⁰ Consider an officer making an investigatory search of a car under the purported legal authority of the non-investigatory inventory search rules. Haddad's position apparently is that the officer is acting lawfully, within "the letter of the law," because the Court in *Opperman* legitimized inventory searches, assuming that the scope of the search in question is limited in inten-

17. Haddad, *supra* note 5, at 680.

18. Haddad also acknowledges that the Supreme Court has, in *United States v. Ceccolini*, 435 U.S. 268, 276 n.4 (1978), adopted a subjective approach to assessing when the exclusionary rule should apply to police misconduct. See Haddad, *supra* note 5, at 667-68. He then proceeds to dismiss the precedential value of this case as it was decided in a "quite different context." *Id.* at 668. All I use it to establish in my analysis, however, is what Haddad elsewhere concedes, that *Ceccolini* "suggests that even Justice Rehnquist, [the author of the majority opinion], might agree . . . that sometimes a fourth amendment issue should turn upon what is in a police officer's mind." *Id.*

19. Haddad, *supra* note 5, at 681.

20. See *id.* at 645, 677, 681. As Haddad ultimately concedes, "to assert that . . . an improperly motivated officer acts within the boundaries of an established fourth amendment doctrine begs the question." *Id.* at 693.

sity to that associated with inventories.²¹ But that was not the “letter of the law” in *Opperman* at all, unless by that phrase Haddad means what a reader might garner from the West Publishing Company’s headnotes in a given case. As previously discussed, the *Opperman* Court legitimized only administrative inventory searches, clearly distinguishing criminal investigatory searches made with the pretense that they were inventories. How can anyone seriously argue that the Supreme Court’s intent—or its result—in *Opperman* was to legitimize investigatory searches made without probable cause as long as such searches could be disguised as inventories?

Moreover, unlike Professor Haddad, I do not find the goals—or the actions—of law enforcement officers acting pretextually to obtain criminal evidence “laudable” in the slightest degree. The point here is as much a moral as a constitutional one: the end does not justify the means. Police officers are always looking for criminal evidence. Great! That is what they are supposed to do. Who would want it any other way? But the whole point of the fourth amendment—and the rest of the Bill of Rights—is that police officers must also have the concurrent goal of procuring evidence lawfully. Law enforcement officers cannot break down doors without probable cause, rummage through homes indiscriminately, or arrest anyone they want without sufficient justification at law—even if they are honestly looking for criminal evidence in the process. To be “laudable,” in my eyes, the police must follow the law, not just enforce it.

Now, to give Haddad his due, he recognized that his “hard-choice” analysis effectively “ignores” some pretexts, the existence of which can only be ascertained subjectively. But he offers two responses to this problem. First, he argues, a subjective approach to pretext analysis is equally problematic:

Of course, under my approach some officers will “get away” with pretextual fourth amendment activity even where no doubt exists that they exercised a fourth amendment power for the wrong reason. Yet, because of difficulty of proof, officers often will get away with pretextual searches under Professor Burkoff’s approach as well.²²

Second, Haddad argues that a subjective approach to pretexts

21. See *supra* text accompanying notes 8-12.

22. Haddad, *supra* note 5, at 692.

will only result in the suppression of evidence seized as a result of pretextual activity "motivated by a desire to obtain incriminating evidence,"²³ a perverse result because "[n]ormally we would expect praise for the officer who, while acting within the letter of the law, pursued this motive."²⁴

Neither of these responses, to my mind, is satisfactory. Under a subjective approach to pretexts, sometimes defense counsel will be unable to establish the truth, i.e., that the police officers in question acted pretextually. But that is the risk we run in any civil or criminal proceeding—that the process will not work, that the truth will not be established—and is hardly a reason for concluding that counsel should *ipso facto* not be entitled to make the effort.²⁵ More importantly, Haddad's first response assumes that I support *only* a subjective approach to pretext analysis and oppose the Supreme Court's concurrent use of the "hard choice" approach that Haddad contends could serve to diminish the incidence of pretextual activity. This is not my position at all. I wholeheartedly agree with Haddad that the "hard-choice" approach to pretext analysis can be useful. But I also believe that the "hard-choice" and subjective approaches can—and should—live together in peace.²⁶ Indeed, the fact that pretexts are difficult for defense counsel to establish except in exceptional cases should give the Supreme Court additional incentive to make "hard choices" as to the desirable scope of fourth amendment powers as a generic matter.²⁷

I have just as much trouble with Haddad's second response. I come to bury pretexts, not to "praise" them.²⁸ Haddad's argu-

23. *Id.* at 644.

24. *Id.* at 645.

25. "If justice requires [a] fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O.W. HOLMES, *THE COMMON LAW* 48 (1881). Haddad elsewhere concedes this point. Haddad, *supra* note 5, at 681-82. See also Burkoff, *supra* note 6, at 111-16 (applying this maxim to the issue of pretext searches).

26. See Burkoff, *supra* note 6.

27. Professor Haddad's response to this point is that he "believe[s] . . . that the availability of an individual motivation approach serves as a 'crutch.'" Haddad, *supra* note 5, at 688. See also *id.* at 681 ("an individual motivation methodology . . . tends to inhibit critical reassessment and deserved expansion of fourth amendment limitations"). I really do not think there is any—or at least enough—evidence that this is true. But even if it were, given the fact that we are debating what the Court should do, the answer to this criticism is prescriptive rather than descriptive: simply put, the availability of a subjective pretext approach *should not* prevent courts from also dealing with this problem generically. Moreover, if Haddad is arguing that the absence of large numbers of "hard-choice" decisions can be explained by the presence—the "crutch"—of the "individual motivation" analysis in pretext cases, then he has implicitly conceded the decisional precedent point discussed earlier. See *supra* text accompanying notes 1-18.

28. See *supra* text accompanying note 24.

ment is, apparently, that because the only pretexts that result in suppression under a subjective approach are pretexts aimed at the discovery of incriminating evidence, we should be less concerned about them.²⁹ I disagree completely. There is, to my mind, every reason to be concerned about pretexts—whatever their motivation.³⁰ Moreover, it is not necessarily true that only Haddad's arguably "praiseworthy" pretexts will lead to discovery of evidence. Haddad's lecherous police officer who stops a car strictly in order to meet the attractive driver³¹ may well discover that the secret behind the driver's attractive smile is cocaine (in plain view).

Furthermore, I believe Haddad misses an important point when he argues that use of a subjective pretext analysis will have only a misguided impact, i.e., it will apply only to deter those officers "who stop, detain, arrest, frisk, or search in the hope of obtaining criminal evidence" rather than those "who engage in such fourth amendment activity because of fluttering hearts, personal spite, or racial bigotry."³² The use of a subjective pretext analysis carries with it a simple and understandable, if not classic, general deterrent message: to search, you must act for the reasons that justify the search. Why should it matter what a searching officer's illegitimate reasons are, whether he or she is searching for evidence or searching for a soul mate? The general deterrent message remains the same, that police officers must have lawful reasons to engage in search and seizure activity.

Haddad says he "still believe[s] that it is strange to instruct police officers that they act improperly even when, for the purpose of obtaining incriminating evidence, they act within the boundaries of a recognized exception to the warrant requirement."³³ On this point, I am afraid that we just keep talking past one another. I do not believe it is strange at all to instruct police officers that they must not *pretend* to act within the boundaries of the law, even when their purpose is to obtain incriminating evidence rather than to stop attractive drivers.³⁴

29. Haddad, *supra* note 5, at 644-46, 691-92.

30. See *supra* text accompanying notes 21-24.

31. Haddad, *supra* note 5, at 644.

32. *Id.* at 645.

33. *Id.* at 691.

34. Given a general deterrence justification for the exclusionary rule, one might have thought that a police officer's improper motives would be the perfect target for deterrence. However, as Professor Yale Kamisar has critically commented about the Supreme Court's response to the deterrence point in this setting: "In recent years, the 'deterrence' rationale of the exclusionary rule and its concomitant 'interest-balancing' have come to

III. DESIRABILITY OF "HARD-CHOICE" PRETEXT ANALYSIS

I have already acknowledged that I have no objection to Haddad's "hard-choice" analysis *per se*.³⁵ My position is only that such an approach should not serve to replace, but rather should supplement, a subjective approach. The "hard-choice" approach is simply too inefficient with respect to deterrence of pretext searches and arrests to permit it to supplant the only analysis that insures that every time a defendant can demonstrate a pretext search or arrest, a court will deal with the pretextual activity under the law, and not simply ignore it.³⁶

Finally, in all candor, another, if not the principal, problem with considering adoption of the "hard-choice" analysis in the "real world" is that I believe the "real world" Supreme Court will all too rarely use it. Perhaps this point illustrates the real—and fundamental—difference between Professor Haddad and myself in our respective approaches to pretext problems. He trusts the Supreme Court to make consistently the "hard choices" and I am a decided skeptic.³⁷ In the last analysis, however, skeptical as I may be, I confess that I remain puzzled about one thing: why is there so much resistance to a pretext analysis that consists entirely of searching for—and applying—the truth?

center stage. But the 'deterrence' rationale seems to be a one-way street—a basis for narrowing the thrust of the exclusionary rule but never, apparently, for expanding it." Kamisar, *Introduction: Trends and Developments with Respect to That Amendment "Central to Enjoyment of Other Guarantees of The Bill of Rights,"* 17 U. MICH. J.L. REF. 409, 413 (1984).

35. See *supra* text accompanying notes 25-27.

36. See *supra* text accompanying notes 22-25.

37. See Burkoff, *When is a Search Not a "Search?" Fourth Amendment Doublethink*, 15 U. TOL. L. REV. 515 (1984).

