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State v. Cloutier: Implied Invitees, Pretext and Plain View Under the Fourth Amendment

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STATE v. CLOUTIER: IMPLIED INVITEES, PRETEXT AND PLAIN VIEW UNDER THE FOURTH AMENDMENT

I. INTRODUCTION

Law enforcement officers often have occasion to follow the path to the front door of a residence in order to speak to its occupant. Upon answering the door, the occupant may hear a complaint about his barking dog, a query as to whether he witnessed the burglary next door, or a plea seeking support for the police department's Christmas charity drive. Occasionally, a police officer follows the path to a person's door and unexpectedly observes incriminating evidence or activities. In such cases, the police officer's conduct generates the issue of whether his observation implicates the fourth amendment's prohibition against unreasonable searches. The Supreme Judicial Court, sitting as the Law Court, recently resolved that issue in *State v. Cloutier*[1] by articulating for the first time in Maine a legal standard for ascertaining the existence of "legitimate police business" as that term is used in applying the "implied invitee" doctrine to police entries onto private walkways.

This Note contends that the *Cloutier* standard consists of two components: an "objective justification" inquiry which establishes whether a police officer was engaged in some legitimate police activity, and a "good faith, lack of pretext" inquiry which determines whether the entry onto the walkway was a subterfuge or ploy for undertaking an otherwise unlawful search.[2] Significantly, the "good faith, lack of pretext" component invalidates an entry that would otherwise be legitimate under the objective justification inquiry.

Disagreeing that the *Cloutier* standard contains an objective justification inquiry, Justices Scolnik and Roberts joined in dissent to challenge the rationale and holding of the court.[3] Arguing that the court's articulated standard required *only* that a police officer possess "subjective good faith," the dissent insisted that such a standard was "abhorrent to the privacy values embodied in the constitution of a free society."[4] According to the dissent, a police officer's entry onto the walkway of a residence should be supported by an "objectively reasonable justification."[5]

This Note maintains that the *Cloutier* standard, despite the vigor-

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1. 544 A.2d 1277 (Me. 1988).

2. *See infra* notes 40-58 and accompanying text.

3. State v. Cloutier, 544 A.2d at 1281 (Scolnik, J., joined by Roberts, J., dissenting).

4. *Id.* at 1282.

5. *Id.* at 1283.

ous protestations of the dissent,[6] does in fact include an objective justification component in addition to the "good faith" inquiry. The Note also argues that the standard comports with traditional fourth amendment analysis and values, and that it balances individual privacy interests and public safety values in a manner that is consistent with the general tenor of contemporary fourth amendment law.

II. THE COURT'S DECISION

On September 26, 1986, at about 8:00 in the evening, Ralph Sabins, a sergeant with the Town of Oakland Police Department, received a "barking dog" complaint while on patrol in the area of Rodney Cloutier's home.[7] Sergeant Sabins investigated by cruising through Cloutier's neighborhood and stopping at various places to listen for the dog. During one of the stops, he got out of the patrol car and proceeded on foot. He then noticed that a basement light was on in Cloutier's home, which was otherwise dark, and proceeded to walk up to the side door of the house to see if anyone was home.[8] Sergeant Sabins later testified that he was drawn to the house because of recent reports of burglaries in the area and because the light in the basement aroused his suspicion.[9]

Sergeant Sabins knocked on the side door of the house but did not receive a reply. He then walked down the steps from the side door and as he did so glanced into a basement window located at ground level immediately to his right. Without bending over or moving any objects to improve his observation, he saw several marijuana plants beneath a fluorescent light.[10] This observation provided the probable cause to support the issuance of a warrant to search the defendant's house. The search resulted in the seizure of an unauthorized cable television box situated in the basement and Cloutier was thereafter charged with theft of services.[11]

Cloutier subsequently moved to suppress the seized evidence at a pre-trial suppression hearing. The motion judge concluded that Sergeant Sabins did not suspect the presence of contraband on the premises when he approached the house and that, therefore, the officer's stated purpose for investigating a possible burglary was not a pretext, or ploy, for a "fishing expedition."[12] The judge found, however, that the available facts did not justify Sergeant Sabins's suspicion of a burglary in progress and that the officer thus had no legiti-

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6. *See infra* notes 31-39 and accompanying text.
7. State v. Cloutier, 544 A.2d 1277, 1278-79 (Me. 1988).
8. *Id.* at 1279.
9. *Id.* at 1279 n.2.
10. *Id.* at 1279.
11. *Id.* For the statute governing Cloutier's alleged theft of services, see ME. REV. STAT. ANN. tit. 17-A, § 357 (1983).
12. State v. Cloutier, 544 A.2d at 1279 n.2.

mate law enforcement reason to justify his presence on Cloutier's walkway.[13] He concluded, therefore, that the observation constituted an unlawful search under the fourth amendment and granted the suppression motion.[14]

In a tightly reasoned decision, the Law Court determined that the motion judge had incorrectly concluded that Sergeant Sabins had no legitimate law enforcement reason for being on the defendant's walkway.[15] In reaching that conclusion, the Law Court first noted that an observation can constitute a search under the fourth amendment.[16] The court explained, however, that Sergeant Sabin's observations could only constitute a search if Cloutier entertained a reasonable expectation of privacy with respect to the "activities" in his basement.[17] Relying on *Katz v. United States*,[18] the court stated that a reasonable expectation of privacy exists if a person has manifested a subjective expectation of privacy with respect to a place or object that society is willing to recognize as reasonable.[19]

The court continued its analysis by noting that fourth amendment protections extend to the "curtilage," or the land immediately surrounding and associated with the home, as well as the home itself.[20] But as to these protected areas the Law Court explained that " '[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.' "[21] The court then explained that the walkway used by Sergeant Sabins was only a semi-private area because it was the normal route of access for anyone visiting the premises. Thus, there was a reasonable expectation that various members of society might use the walkway "in the course of attending to personal or business pursuits with persons residing in the home, including police officers on police business."[22] The court then stated as a legal principle that

> [t]he right to come upon a walkway or entranceway or porch of a residence is not absolute. Rather, the owner impliedly invites to intrude upon his or her property only those with a legitimate social or business purpose . . . As to someone present on the property under the implied invitation, the property owner has no reasonable

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13. *Id.* at 1279 & n.2.

14. *Id.* at 1279.

15. *Id.* at 1280. The court noted that the motion judge's legal conclusion, since it was based on uncontroverted facts, was independently reviewable on appeal. *Id.*

16. *Id.* at 1279 (citing State v. Wentworth, 480 A.2d 751, 757 (Me. 1984)).

17. *Id.*

18. 389 U.S. 347 (1967).

19. State v. Cloutier, 544 A.2d at 1279 (citing Katz v. United States, 389 U.S. at 351, and State v. Bridges, 513 A.2d 1365, 1367 (Me. 1986)).

20. *Id.* (citing Oliver v. United States, 466 U.S. 170, 180 (1984), and State v. Pease, 520 A.2d 698, 699 (Me. 1987)).

21. *Id.* (quoting Katz v. United States, 389 U.S. at 351).

22. *Id.* at 1279-80 (citing State v. Rand, 430 A.2d 808, 818 (Me. 1981)).

expectation of privacy from observations made by that invitee.[23]

Thus, the critical question distilled by the court was whether Sergeant Sabins entered the walkway as an "implied invitee."[24] In answering this question, the court stated that "police officers may avail themselves of the implied invitation to the same extent as other persons."[25] The court then articulated a legal standard for ascertaining the existence of legitimate police business when applying the implied invitation doctrine:

> To come within the implied invitation, a police officer must be on some police business. That does not necessarily mean that the officer has to have probable cause or even an objectively reasonable suspicion that criminal activity is afoot. The police business may be administrative as well as investigative, and it may be action based on a suspicion that turns out to be without substantial basis, provided the suspicion is held in good faith rather than as a pretext for an arbitrary search.[26]

After applying its newly articulated legal standard, the court concluded that Sergeant Sabins was sufficiently engaged in legitimate police business so as to be an implied invitee.[27] The court reasoned

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23. *Id.* at 1280.

24. The concept of implied invitation is derived from the common law of trespass. *See generally* Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182 (1953). In Oliver v. United States, 466 U.S. 170 (1984), the United States Supreme Court stated that "[t]he common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful." *Id.* at 183. In *Cloutier*, the Law Court acknowledged that in some contexts, particularly in cases involving open fields, " 'general rights of property protected by the common law of trespass have little or no relevance to applicability of the Fourth Amendment.' " State v. Cloutier, 544 A.2d at 1280 n.3 (quoting Oliver v. United States, 466 U.S. 170, 183-84 (1984)). But it noted that fourth amendment cases that involve the curtilage have long been informed by the common law. *Id.* (citing Oliver v. United States, 466 U.S. at 180). The Law Court in *Cloutier* found authority for its use of the implied invitee doctrine by looking to its ealier decision in the case of State v. Rand, 430 A.2d 808 (Me. 1981), which upheld police entry onto the driveway of a multiple dwelling unit for the purpose of conducting a criminal investigation. The *Rand* court in turn cited the following cases as authority for applying the concept of implied invitation: State v. Crider, 341 A.2d 1 (Me. 1975) (police may lawfully enter common hallways of multiple dwellings in performance of criminal investigation); State v. Corbett, 15 Or. App. 470, 516 P.2d 487 (1979) (police entry onto private driveway for purpose of criminal investigation was a legitimate societal function); State v. Daugherty, 94 Wash. 2d 263, 616 P.2d 649 (1980) (police entry onto private driveway was unreasonable and thus constituted a search under the fourth amendment). *See* State v. Rand, 430 A.2d 808, 818 (Me. 1981) (citing *Crider*, *Corbett*, and *Daugherty*).

25. State v. Cloutier, 544 A.2d at 1280. The court explained: " 'An officer is permitted the same license to intrude as a reasonably respectful citizen.' " *Id.* (quoting State v. Seagull, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981)).

26. *Id.*

27. *Id.* The court cited the following cases as authority for finding that Sergeant Sabins was engaged in legitimate police business as an implied invitee: State v. Rand,

that the officer's "burglary suspicion, based on recent reports of burglaries in the community and the fact that Cloutier's basement was the only illuminated room in the house, although tenuous, was held in good faith and was not pretextual."[28] The court held, therefore, that the observation was not a search under the fourth amendment since the police officer was "rightfully" on the premises and while there made a "plain view"[29] observation of the marijuana.[30]

Justice Scolnik, in a spirited dissent, challenged the court's holding.[31] Joined by Justice Roberts, the dissent agreed with the determination of the motion judge that there had not been a sufficient law enforcement reason to justify the officer's presence on Cloutier's walkway as an implied invitee.[32] The dissent contended that Cloutier's expectation of privacy was one that society considered reasonable.[33] According to the dissent, Cloutier's expectation of privacy

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430 A.2d at 819 (Me. 1981); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981); Causey v. State, 374 So. 2d 406 (Ala. Crim. App. 1979).

28. State v. Cloutier, 544 A.2d at 1280.

29. The Supreme Court first articulated the "plain view" doctrine in Coolidge v. New Hampshire, 403 U.S. 443 (1971) (holding that a warrantless police seizure within a defendant's driveway did not meet the requirements of the "plain view" exception because the search was not inadvertent).

30. State v. Cloutier, 544 A.2d at 1280-81. The court offered the following quote to support its holding:

> [I]f police utilize "normal means of access to and egress from the house" for some legitimate purpose, such as to make inquiries of the occupant or to introduce an undercover agent into the activities occurring there, it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.

Id. (quoting 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c), at 393-94 (2d ed. 1987)).

In applying the plain view exception, the *Cloutier* court rejected the state's argument that the case involved evidence in "open view." *Id.* at 1281 n.4. The court explained: "Under the 'open view' doctrine a police officer, *located in a place where he has an absolute right to be*, such as on a public sidewalk or street, may observe evidence by means of his natural senses without conducting a search implicating the fourth amendment." *Id.* at 1281 n.4 (emphasis added).

31. *Id.* at 1281 (Scolnik, J., dissenting).

32. *Id.*

33. *Id.* at 1281-82. Justice Scolnik quoted extensively and with approval the motion judge's reasoning as contained in the suppression order:

> I do not find the proposition that it is proper for any reason at any time for a police officer to be on somebody's premises, in their backyard, in their driveway, knocking on their door or looking in their windows, unless there's some reason. . . . [Sergeant Sabins] is the State of Maine, interfering in someone's home, and there's gotta be a reason for that to be done. . . . It just doesn't jibe to think that at 8:00 in the evening, with the neighbors' houses all lit up, being that close, that a burglar's [sic] gonna be in the cellar with the lights on. . . . And I'm satisfied that, without something more—some other reason because he is an officer of the State of Maine, that he had not the right to go on the premises.

Id. at 1282 (quoting motion judge).

was reasonable because the "suspicion" entertained by Sergeant Sabins leading to his entry into the walkway "[fell] short of the kind of legitimate police business that would allow law enforcement personnel to use residential walkways in the same manner as the general public."[34]

The dissent implicitly characterized the court's articulated legal standard as *solely* a search for the *subjective* good faith of the police officer.[35] According to Justice Scolnik, such a standard would allow a "police officer to act on every 'good faith' whim [to] enter on private residential property."[36] He insisted that the court's decision applied a standard that was

> abhorrent to the privacy values embodied in the constitution of a free society. The vision of police officers peering into private homes in the dark of night with so little justification for achieving their vantage point conjures up the practices of repressive societies that place little value on individual liberty and personal privacy.[37]

Justice Scolnik asserted that an "objectively reasonable justification" standard should be used to answer whether a police officer's entry onto a private walkway was within the implied invitation of the property owner.[38] The objectively reasonable justification standard contemplated by Justice Scolnik presumably would require a higher level of facts to support an officer's suspicion of criminal activity than that required by the court's articulated standard. Noting that the motion judge's decision was impliedly based on this higher standard, Justice Scolnik concluded that the judge's decision was legally correct.[39]

III. THE NATURE OF THE CLOUTIER STANDARD

For the first time in Maine, the *Cloutier* court articulated a legal standard for determining when a police officer may legitimately enter a private walkway for the purpose of speaking with the occupant of a home.[40] Notwithstanding the dissent's characterization, this Note argues that the *Cloutier* standard consists of two components. In addition to the "good faith, lack of pretext" inquiry, this Note contends that the standard also employs an "objective justifi-

34. *Id.*
35. *Id.* at 1282-83.
36. *Id.* at 1283.
37. *Id.* at 1282.
38. *Id.* at 1283.
39. *Id.*
40. In State v. Crider, 341 A.2d 1, 5 (Me. 1975), and State v. Rand, 430 A.2d 808, 819 (Me. 1981), the Law Court held respectively that police entry as implied invitees into common hallways and driveways of private multiple dwellings was lawful because the police were on legitimate police business. In those cases, however, the court did not fully define the term "legitimate police business."

cation" inquiry to evaluate the reasonableness of the police entry.

Before discussing the *nature* of the *Cloutier* standard, however, the *scope* of the standard merits consideration. *State v. Cloutier* does not apply to police entry onto all areas of the curtilage or to more private areas of property such as the interior of a residence. Significantly, the *Cloutier* standard solely addresses police entry onto those areas of the curtilage to which the resident has extended an "implied invitation" to members of the public. These areas are usually limited to walkways, driveways, and other established means of ingress onto private property. Furthermore, the scope of the *Cloutier* standard is circumscribed by those instances in which the purpose of the entry is to communicate to occupants about matters concerning legitimate police business.

In analyzing the nature of the court's articulated standard, the dissent characterized it as simply employing a subjective good faith standard for determining legitimate police business.[41] The dissent explained:

> The court essentially indicates that as long as a police officer's conduct is not pretextual, he can enter a residential driveway or walkway, proceed to the door, and observe from this vantage point items and activities in the home so long as he has a subjective "good faith" belief that he has a reason for being there.[42]

The *Cloutier* standard is arguably unconstitutional if, as the dissent asserted, it is solely a test for subjective good faith. Generally, in fourth amendment analysis courts are required to examine the objective facts which served as the basis for the questioned police conduct. For example, the Supreme Court has historically required that judicial officers, in issuing warrants, act as "neutral and detached magistrates" in order to determine the presence of probable cause.[43] The Court has also required judges, when examining challenged warrantless searches or arrests, to determine the "reasonableness" of the police justification for the search or arrest.[44] Even in judicial decisions which determine whether the exclusionary rule should apply to evidence gathered on the basis of defective warrants, the Supreme Court has held that an objective inquiry, in addition to a good faith inquiry, is required.[45] Therefore, the federal

41. State v. Cloutier, 544 A.2d at 1282 (Scolnik, J., dissenting).

42. *Id.* at 1282.

43. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948), *cited in* Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971).

44. The Supreme Court has explained that " 'good faith on the part of the arresting officer is not enough' " to determine the "reasonableness" of police conduct under the fourth amendment in cases involving warrantless searches or arrests. Beck v. Ohio, 379 U.S. 89, 97 (1964) (quoting Henry v. United States, 361 U.S. 98, 102 (1959)).

45. In United States v. Leon, 468 U.S. 897 (1984), for example, the Court held that evidence gathered on the basis of a defective warrant, but by an officer in good

Constitution arguably requires a judge to consider more than subjective good faith when determining whether a police officer has acted as an implied invitee.

The legal standard articulated by the court in *State v. Cloutier* does not, however, generate this constitutional difficulty. In contrast to the dissent's contentions, careful analysis of the court's decision demonstrates that the *Cloutier* standard contains more than a simple inquiry into subjective good faith; rather, it also contains an inquiry into objective facts. As discussed below, the court applied the "good faith, lack of pretext" inquiry only after objectively determining that the police officer's purpose and manner of entry justified the implied invitee classification.

The Law Court was exceedingly terse in its decision and did not expressly acknowledge its use of an objective justification inquiry. In several places, however, the opinion discloses that the court did engage in such an inquiry. The court began its objective justification inquiry by establishing a level of objective facts necessary to find a reasonable police presence on a private walkway. The court explained that " '[a]n officer is permitted the same license to intrude as a *reasonably* respectful citizen.' "[46] The court did not expand upon what would constitute a "reasonably respectful citizen," but presumably the frequency, timing and manner of entry onto a private walkway constitute relevant factors in determining whether a person was "reasonably respectful" so as to be an implied invitee.

The court, however, did not simply measure the legality of the police officer's conduct on the basis of whether he had acted as a reasonably respectful citizen. The court continued its objective justification inquiry by requiring that the officer be on legitimate police business.[47] The court did not require that the police business be based on probable cause,[48] reasonable suspicion,[49] or even a suspi-

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faith, may be lawfully used at trial. *Id.* at 913. Even in *Leon*, however, where the issue was not one involving the constitutionality of the search, for clearly it was an unlawful search, but rather the lesser issue of the application of the exclusionary rule to the evidence, the Court employed both a "good faith" *and* an objective inquiry. *Id.* at 922-23. The Court explained that "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." *Id.* In short, a judge must "perform his 'neutral and detached function and not serve merely as a rubber stamp for the police.' " *Id.* at 914 (quoting Aguilar v. Texas, 378 U.S. 108, 111 (1964)).

46. State v. Cloutier, 544 A.2d at 1280 (emphasis added) (quoting State v. Seagull, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981)). *See also* State v. Rand, 430 A.2d 808, 818-19 (Me. 1981).

47. State v. Cloutier, 544 A.2d at 1280.

48. The Law Court in *State v. Rand* defined probable cause as "facts and circumstances sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been or was being committed." State v. Rand, 430 A.2d at 820

cion founded on a "substantial basis."[50] Nevertheless, the court implicitly required that the police business justifying entry onto the walkway possess some objective basis in order to be classified as legitimate.[51]

The use of an objective justification inquiry is also evidenced by the court's detailed recital of the facts in *Cloutier*. The court carefully considered the facts and circumstances which caused Sergeant Sabins to enter the walkway before concluding that he was on legitimate police business as an implied invitee. If the court's decision had been based solely on Sergeant Sabins's lack of pretext, it could have simply relied on the factual finding of the motion judge that the officer conducted the search without pretext.[52] Instead, the court carefully recited the salient facts of the case, and specifically noted in its holding that the officer's suspicion was based on recent reports of burglaries in the community and on the fact that Cloutier's basement was the only illuminated room in the house.[53]

Finally, the Law Court's use of particular authorities in *State v. Cloutier* also supports the view that the standard employs an objective inquiry.[54] The cases cited by the court examined the legitimacy of police entry onto private walkways or driveways by determining, implicitly or explicitly, that the police had acted justifiably. For example, in *State v. Rand*[55] the Law Court implicitly found that police entry onto a private driveway was justified because a car parked in the driveway matched the description of a vehicle involved in a robbery.[56] In *Causey v. State*,[57] an Alabama decision, the court explic-

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(citing Brinegar v. United States, 338 U.S. 160, 175-76 (1949)).

49. In *State v. Rand*, the Law Court defined reasonable suspicion, which is required for police to make temporary detentions of automobiles or persons lawfully, as a situation in which a police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant suspicion of criminal conduct." State v. Rand, 430 A.2d at 819. Justice Scolnik did not argue in dissent for application of the reasonable suspicion standard; rather, he argued for adoption of an "objectively reasonable justification" standard. State v. Cloutier, 544 A.2d at 1283 (Scolnik, J., dissenting).

50. State v. Cloutier, 544 A.2d at 1280.

51. The court did not expressly state that there must be "some" objective basis, but if the court believed that police should not have to base their entry on "some" basis, then it would have said that the police entry may be based on a suspicion that turns out to be without *any* basis, not one "without substantial basis." State v. Cloutier, 544 A.2d at 1280.

52. State v. Cloutier, 544 A.2d at 1279 n.2.

53. *Id.* at 1280.

54. The court cited the following cases as authority for finding that Sergeant Sabins was engaged in legitimate police business as an implied invitee: State v. Rand, 430 A.2d 808 (Me. 1981); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981); Causey v. State, 374 So. 2d 406 (Ala. Crim. App. 1979).

55. State v. Rand, 430 A.2d 808 (1981).

56. *Id.* at 819.

57. 374 So. 2d 406 (Ala. Crim. App. 1979).

itly held that "[t]here was nothing illegal, nothing improper, *nothing unreasonable* about [the officer's] conduct as to [the entry onto the driveway]."[58] The Law Court, in relying on these cases for authority, presumably was aware of the reasonableness inquiry implicitly employed by the court itself in *Rand* and by the courts in the other states from which it found authority.

The above discussion establishes that *State v. Cloutier* requires more than subjective good faith to justify a police officer's entry onto a private walkway as an implied invitee. Indeed, the legal standard articulated by the court employs a two-pronged inquiry which examines whether the police officer was motivated by good faith as well as whether his conduct was objectively justified. The question remains whether this two-pronged standard comports with the requirements of the fourth amendment.

IV. THE CONSTITUTIONALITY OF THE CLOUTIER STANDARD

The dissent argued that the fourth amendment requires a higher level of objective facts than that which satisfies the objective justification inquiry required by the *Cloutier* standard. This Note maintains, however, that the relatively low level of objective facts required by *Cloutier*, a "some basis" level, is a more appropriate standard than the "substantial basis" requirement implicitly advocated by the dissent.[59]

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58. *Id.* at 413.

59. The facts and circumstances which justified the police entry in *Cloutier* are quite low compared to numerous cases in other jurisdictions which involved police entry onto private walkways or driveways. These cases, however, do generally support the conclusion that the police conduct in *Cloutier*, though based on a very low level of objective facts, is consistent with the requirements of the fourth amendment. *See, e.g.*, United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977) (police officers investigating theft of television sets went to defendant's home to interview him); United States v. Hersh, 464 F.2d 228 (9th Cir. 1972) (police went to interview defendant at home after receiving report from third party of suspected drug lab); United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971) (police entered defendant's walkway while investigating auto theft); Davis v. United States, 327 F.2d 301 (9th Cir. 1964) (police observe evidence at defendant's home while interviewing defendant concerning an ongoing police investigation); Gross v. State, 8 Ark. App. 241, 650 S.W.2d 603 (Ark. Ct. App. 1983) (police officer entered driveway of multiple dwelling to investigate a report that a stolen vehicle was in the driveway); People v. Bradley, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) (police investigating informant's tip went into fenced-in backyard at night); People v. McGahey, 179 Colo. 401, 500 P.2d 977 (1972) (police observed marijuana plants in house from defendant's driveway after receiving a tip from a third party); Gilreath v. State, 247 Ga. 814, 279 S.E.2d 650 (1981) (police observed corpse in home through window after receiving report from third party that something might be wrong at the defendant's house), *cert. denied*, 456 U.S. 984 (1982); State v. Dickerson, 313 N.W.2d 526 (Iowa 1981) (police investigating burglary went to home to interview suspect); Cloar v. Commonwealth, 679 S.W.2d 827 (Ky. Ct. App. 1984) (officer entered driveway of defendant's home to talk with occupant about a stolen chain saw); State v. Sanders, 374 So. 2d 1186 (La. 1979) (acting on informa-

The Supreme Court has traditionally interpreted the scope of fourth amendment protections by balancing competing interests: the individual's right to privacy versus society's need for effective law enforcement.[60] In recent years, the Supreme Court has generally given greater weight to the interests of public safety and law enforcement. For example, in cases approving police conduct involving automobile searches,[61] "open view" observations,[62] and the gathering

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tion from informant, police undercover agent went to defendant's home to buy drugs); State v. Rand, 430 A.2d 808 (Me. 1981) (police entered driveway of multiple dwelling on investigation of burglary of store earlier in the evening); State v. Crea, 305 Minn. 342, 233 N.W.2d 736 (1975) (police went to home to interview defendant concerning a burglary); State v. Gott, 456 S.W.2d 38 (Mo. 1970) (police, informed of drug sales, went to interview defendant at home); State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979) (police went to defendant's home to interview him concerning an anonymous "tip" that house was "full of marijuana"); State v. White, 18 Or. App. 352, 525 P.2d 188 (1974) (after receiving anonymous tip, undercover agent went to home to purchase drugs); State v. Lee, 633 P.2d 48 (Utah 1981) (police, after observing suspicious behavior of defendant in public locations, followed defendant to interview him at home), *cert. denied*, 454 U.S. 1057 (1981); State v. Drumhiller, 36 Wash. App. 592, 675 P.2d 631 (1984) (police went to home after receiving burglary report from neighbors); State v. Seagull, 95 Wash. 2d 898, 632 P.2d 44 (1981) (officer, while "canvassing" neighborhood to inquire about an abandoned car, went to defendant's home).

In contrast to the above, the following cases involved the observations of incriminating evidence that occurred during what the courts determined *were* searches under the fourth amendment. The courts considered the observations made within the home or curtilage as searches in these cases because the observations were made incidental to lawful searches or arrests or, in the cases where the observations were held to have violated the individual's fourth amendment rights, as a result of unlawful intrusions onto a protected area. Washington v. Chrisman, 455 U.S. 1 (1982) (observation by a police officer into a dormitory room while accompanying an arrested student was lawful even in the absence of "exigent circumstances"); Michigan v. Tyler, 436 U.S. 499 (1978) (entry of police onto defendant's property to investigate arson after fire was extinguished was a search requiring warrant procedure governing administrative searches); Chimel v. California, 395 U.S. 752 (1969) (although the arrest of defendant was lawful, the search of entire house of the defendant without warrant was unreasonable because it went beyond the area immediately under the control of the defendant); McDonald v. United States, 335 U.S. 451 (1948) (observation into rented room through transom in hallway was a search requiring a warrant because there were no exigent circumstances); United States v. Lefkowitz, 285 U.S. 452 (1932) (police search and seizure of defendant's papers from desks and cabinets at time of valid arrest required search warrants because there were no exigent circumstances); Lorenzana v. Superior Court, 9 Cal. 3d. 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973) (officer's view into home through windows was an unlawful search because officer was in an area of property not opened to implied invitees; State v. Kaaheena, 59 Haw. 23, 575 P.2d 462 (1978) (officers's view through a window made possible by placing items on ground to improve the vantage point of police was a search because the view violated the defendant's reasonable expectation of privacy).

60. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 739 (1983) (" '[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests.' ") (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

61. *See, e.g.*, California v. Carney, 471 U.S. 386 (1985) (holding that warrantless

and examination of discarded trash,[63] the Court has clearly indicated its interest in promoting public safety values. Concomitantly, the Court has placed heavy burdens on defendants to prove that their expectations of privacy were justifiable or were violated.[64]

The relatively low level of facts satisfying *Cloutier's* objective justification inquiry is fully consistent with the public safety values furthered by recent Supreme Court cases. The *Cloutier* decision makes clear that if there is some objectively justifiable basis for suspecting that criminal activity is afoot, a police officer should feel free to investigate, even if that means entering upon a private walkway to test the validity of the suspicion. At the same time, fourth amendment privacy values are protected because the officer's suspicion may not be totally baseless: it must possess some basis in reality to satisfy the objective justification inquiry.

The good faith prong of the *Cloutier* standard is open to attack by cases holding that the applicability of the fourth amendment should not be measured by the subjective intent of the individual police officer.[65] This aspect of the *Cloutier* decision is perhaps the most

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search of motor home was not violative of defendant's fourth amendment interests).

62. *See, e.g.*, California v. Ciraolo, 476 U.S. 207 (1986) (holding that aerial observation of backyard did not violate defendant's reasonable expectation of privacy even though defendant had constructed high solid fence around the backyard); Oliver v. United States, 466 U.S. 170 (1984) (holding that open fields doctrine allows warrantless search of fields meant to be kept private by virtue of their remoteness, enclosure by fences, or "No Trespassing" signs).

63. California v. Greenwood, 108 S. Ct. 1625 (1988) (upholding warrantless seizure and examination of residential trash placed at curbside for routine pickup). The Court noted in *Greenwood* that it has generally held that "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *Id.* at 1629.

64. For example, in California v. Ciraolo, 476 U.S. 207 (1986), the Court found that the defendants did not have an objectively reasonable expectation of privacy in their backyard from police observations from an airplane even though the defendants had constructed a solid, high fence completely surrounding the yard. *Id.* at 213-14. Similarly, in California v. Greenwood, 108 S. Ct. 1625 (1988), the Court held that the defendants did not have a reasonable expectation of privacy in trash placed on the curb for routine pick-up even though the trash was contained in opaque plastic bags and the defendants expected only the trash collector to handle and dispose of the trash. *Id.* at 1628-29.

65. *See, e.g.*, Maryland v. Macon, 472 U.S. 463, 470-71 (1985) ("Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' . . . and not on the officer's actual state of mind at the time the challenged action was taken.") (1985) (quoting Scott v. Illinois, 436 U.S. 128, 136 (1978)); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (motivation of customs officials applicable to question of whether search of commercial ocean vessel was permissible under the fourth amendment); Scott v. United States, 436 U.S. 128 (1978) (judicially authorized wiretaps held constitutionally permissible where police conduct was objectively reasonable, regardless of subjective intent). *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4 (2d ed. 1987).

questionable and it places the decision within the boundaries of a lively legal and academic debate.[66] On one hand, the Law Court's adoption of a "good faith, lack of pretext" inquiry is consistent with a variety of Supreme Court cases that emphasize the presence or absence of pretext as a dispositive factor in fourth amendment analysis.[67] On the other hand, some recent Supreme Court cases hold that the subjective intent of the police officer is irrelevant for determining the scope of fourth amendment protections.[68] The Court, for example, has stated that whether a fourth amendment violation has occurred " 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the

66. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 516 (1971) (White, J., dissenting); Massachusetts v. Painten, 389 U.S. 560, 562 (1968) (White, J., dissenting); Texas v. Brown, 460 U.S. 730, 744 (1983) (White, J., concurring); 2 W. LAFAVE, *supra* note 61, § 6.7(c), (d); Burkoff, *Bad Faith Searches*, 57 N.Y.U.L. REV. 70 (1982); Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985).

67. *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983); Steagald v. United States, 451 U.S. 204 (1981); Massachusetts v. Painten, 389 U.S. 560 (1968); Abel v. United States, 362 U.S. 217 (1960); Jones v. United States, 357 U.S. 493 (1958); United States v. Lefkowitz, 285 U.S 452 (1932). Perhaps the most important of these cases for purposes of this Note is Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which a plurality of the Supreme Court first explicitly articulated the "plain view doctrine." *Id.* at 464-73. A key, although controversial, element of the "plain view " test is whether the incriminating evidence was observed "inadvertently," that is, without pretext. *Id.* at 466. The policy basis underlying this requirement is to ensure that a plain view observation is undertaken only in circumstances that do not undercut the fundamental values of the fourth amendment. The plurality opinion in *Coolidge* stated the "plain view" doctrine is constitutional because it does not conflict with the historical purposes of the fourth amendment, that is, to prohibit searches not based on probable cause and to limit searches to specific objectives only. *Id.* at 467-68. More particularly, the *Coolidge* plurality stated that the "inadvertent" element of the "plain view" test constitutionally legitimizes the plain view doctrine because it ensures that "general, exploratory rummaging" will not be undertaken under the guise of the plain view doctrine. *Id.* at 467. In short, the inadvertent element prevents the arbitrary exercise of police power.

There is an energetic debate, however, concerning the meaning of *Coolidge* and the other cases cited above in regard to the importance of pretext as a criterion in finding fourth amendment violations. Professor Burkoff argues that the individual motivation of the police officer has always been a vital consideration of the Court and cites these cases and others as authority for his position. *See* Burkoff, *Bad Faith Searches*, 57 N.Y. U.L. REV. 70, 75-81 (1982); Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 544-48 (1984). Professor Haddad, on the other hand, argues that the Court has based its decisions not on the motivation of individual police officers, but instead on methods for reducing opportunities for police officers in general to engage in pretextual search or seizure activities, the so-called "hard-choice" approach. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 16 U. MICH. J.L. REF. 639, 651-53 (1985).

68. *See supra* notes 65-66 and accompanying text.

challenged action was taken.' "[69]

Regardless of whether good faith is proper in other fourth amendment contexts, this Note asserts that it is properly applicable in measuring the legitimacy of a police officer's entry onto private walkways as an implied invitee. Critics should not ignore the fact that the *Cloutier* standard encompasses more than good faith. In addition to being motivated by good faith, a police officer's conduct must be objectively justified to satisfy the court's articulated standard. Moreover, critics should also not ignore the narrow scope characterizing the *Cloutier* standard: it only governs police entry onto areas of the curtilage to which the resident has extended an "implied invitation" to members of the public, that is, walkways, driveways, and other established means of ingress onto private property. Because the scope of the *Cloutier* standard is narrowly circumscribed, and the good faith inquiry is coupled with an inquiry into whether police conduct is objectively justified, this Note concludes that the standard comports with fourth amendment requirements.

V. CONCLUSION

The *Cloutier* standard, then, consists of two inquiries: first, whether the police officer's entry is motivated by good faith and, second, whether it is objectively justified. The standard, with both its components, succeeds in striking a proper balance between society's right to protect itself from criminal conduct and the individ-

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69. Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (citation omitted) (quoting Scott v. United States, 436 U.S. 128, 136 (1978)).

In *Scott v. United States*, the Court agreed with the government that the motivation of a police officer may be a factor in deciding whether to apply the exclusionary rule, but that it is *not* a factor in determining whether there was, in the first instance, a violation of the fourth amendment. Scott v. United States, 436 U.S. at 136-37. The Court stated that

> almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. . . . We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.

Id. at 137-38 (citations omitted).

In *United States v. Villamonte-Marquez*, the Court rejected the argument of the respondent that the motivation of customs officials in stopping and boarding a commercial vessel in navigable waters should be a factor in determining whether the seizure was a violation of the fourth amendment. The Court stated that "[t]his line of reasoning was rejected in a similar situation in *Scott v. United States* . . . and we again reject it." United States v. Villamonte-Marquez, 462 U.S. at 584.

ual's right to be protected from unreasonable police intrusions. As noted in the introduction above, police officers often have occasion to follow the path to the front door of a residence in order to speak to the occupant. The legal standard articulated by the court in *State v. Cloutier* provides a permissible means of measuring the legitimacy of observations made by an officer on such occasions.

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